
(1997) 227 ITR 774 : (1997) 95 TAXMAN 554
Madhya Pradesh High Court (Indore Bench)
Case No: Miscellaneous Civil Case No. 138 of 1995

Commissioner of
Income Tax

APPELLANT

Vs

S.T.I. Biplus Tubing
(India) Ltd.

RESPONDENT

Date of Decision: July 10, 1996

Acts Referred:

- Companies Act, 1956 - Section 205(1)
- Income Tax Act, 1961 - Section 115J, 115J(1A), 256(2)

Citation: (1997) 227 ITR 774 : (1997) 95 TAXMAN 554

Hon'ble Judges: Subhash Balwant Sakrikar, J; Asha Ram Tiwari, J

Bench: Division Bench

Advocate: A.M. Mathur and Ashok Kumar Shrivastava, for the Appellant; P.M. Choudhary, for the Respondent

Judgement

S.B. Sakrikar, J.

The applicant/Commissioner of Income Tax, Bhopal, has filed this application u/s 256(2) of the Income Tax Act, 1961 (for short, "the Act"), seeking a direction to the Tribunal to state the case and refer the proposed question as extracted below arising out of the order of the Tribunal dated August 18, 1993, passed in I. T. A. No. 52/Ind. of 1993 for the assessment year 1990-91, after rejection of the application presented u/s 256(1) of the Act and registered as R. A. No. 268/Ind, of 1993 on July 26, 1994, for our opinion :

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in reducing unabsorbed depreciation of Rs. 1,34,20,719 in place of unabsorbed business loss of Rs. 3,64,769 for determining the book profit of the year ?"

The facts of the case, in brief, are that the non-applicant/assessee is a limited company. As per the profit and loss account, the assessee's profit amounted to Rs. 36,70,693. For

the purpose of working out the income u/s 115J of the Act, the Assessing Officer deducted business loss, set off of Rs. 3,64,769 as relating to the assessment year 1988-89 in accordance with the provisions of Section 205 of the Companies Act, 1956, and thus, computed the book profit at Rs. 33,05,924. The income for the purpose of Section 115J of the Act at the rate of 30 per cent, on this amount was worked out at Rs. 9,91,777. This was against only income u/s 115J as claimed by the assessee for the reason that its business loss including unabsorbed depreciation when set off against the current year's income, resulted in a negative figure. The assessee moved an application u/s 154 of the Act, which was rejected by the Assessing Officer on the ground that lesser of the business loss or unabsorbed depreciation was rightly held to be set off against the current year's profit. Aggrieved by the order of the Assessing Officer, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) who rejected the contention of the assessee and confirmed the order of the Assessing Officer. Aggrieved by the order of the Commissioner of Income Tax (Appeals), the assessee filed an appeal before the Income Tax Appellate Tribunal, Indore. The learned Tribunal, by its order dated August 18, 1993, allowed the appeal of the assessee holding that the expression "the amount of loss" appearing in Clause (b) of the first proviso to Section 205(1) of the Companies Act is to be construed to mean the loss including depreciation and unabsorbed depreciation and that the computation of loss must necessarily, therefore, include the amount of depreciation and unabsorbed depreciation. It was held that in the case at hand after set off of unabsorbed depreciation as per profit and loss account, the book profit of the assessee is a negative figure and, therefore, there is no income u/s 115J.

2. Aggrieved by the order of the Tribunal, the Department submitted an application u/s 256(1) of the Income Tax Act. The Tribunal declined to refer the case and rejected the application. Therefore, the applicant has filed this application u/s 256(2) of the Act.

3. We have heard Shri A. M. Mathur, learned senior counsel, with Shri Ashok Kumar Shrivastava, for the applicant/Department and Shri P. M. Choudhary, learned counsel, for the non-applicant/assessee.

4. The Tribunal, by its order dated July 26, 1994, declined to state the case and refer the question in the following terms :

" In our opinion, no question of law arises out of the finding of the Tribunal. The Tribunal based its conclusion on the basis of its order dated May 10, 1993, in I.T.A. No. 601/Ind. of 1992 in the case of Bright Automotive and Plastics Ltd. v. Deputy CIT, The Tribunal held in the above case of the assessee that after the set off of unabsorbed depreciation against the profit as per profit and loss account, the book profit was a negative figure and, therefore, there was no income u/s 115J. This finding of the Tribunal is a pure finding of fact and no question of law can be said to arise out of such a finding."

It is clear from the aforesaid portion that the Tribunal did not appreciate the facts and position of law in refusing the reference. The decision of the Tribunal is based on the

conclusion as recorded in its order dated May 10, 1993, in I. T. A. No. 601/Ind. of 1992. It is clear from the facts of the present case that the case mainly rests on the computation of income chargeable to tax u/s 115J of the Income Tax Act read with proviso (b) to Section 205(1) of the Companies Act, 1956. Section 115J of the Income Tax Act reads as follows :

" 115J. (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 (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.

(1A) 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 (1A), as increased by ...

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-- . . .

(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."

Section 115J of the Income Tax Act requires preparation of the profit and loss account by the company according to the provisions of the Companies Act, 1956. After arriving at the book profit in the manner as above, it has to make adjustments in accordance with the provisions mentioned in the Explanation (iv) of Section 115J(1A) of the Act. Thereafter, unabsorbed business loss or unabsorbed depreciation of the earlier years, whichever is less, is allowable as deduction from the profits for arriving at the book profit, thirty per cent. of which will be deemed as income chargeable to tax. The main controversy is whether while assessing the income chargeable to tax u/s 115J(1A) of the Act it shall include unabsorbed business loss and unabsorbed depreciation of the earlier year or either of the two, whichever is less.

5. In our considered opinion, in view of the aforesaid position, a referable question of law does arise in the case for issuance of a direction to the Tribunal to state the case and

refer the aforesaid proposed question of law.

6. This application is, therefore, allowed and the Tribunal is called upon to state the case and refer the aforesaid question as expeditiously as possible.

7. We leave the parties to bear their own costs of this application as incurred.

8. Counsel fee for each side is, however, fixed at Rs. 750 if certified. Transmit a copy of this order to the Tribunal immediately.