

(2001) 09 CAL CK 0059

Calcutta High Court

Case No: IT Ref. No. 128 of 1995 21 September 2001 A.Y. 1991-92

Commissioner of Income Tax

APPELLANT

Vs

SINGH ALLOYS and STEEL LTD.

RESPONDENT

Date of Decision: Sept. 21, 2001

Acts Referred:

- Income Tax Act, 1961 - Section 115J(2)

Citation: (2001) 172 CTR 144

Hon'ble Judges: Y.R. Meena, J; Arun Kumar Mitra, J

Bench: Full Bench

Judgement

@JUDGMENTTAG-ORDER

In the Calcutta High Court Y.R. Meena & Arun Kumar Mitra, JJ.

Order

By The Court

On an application u/s 256(1) of the Income Tax Act, 1961, Tribunal has referred the following question for the opinion of this court :

"Whether, on the facts and in the circumstances of the case and on a proper interpretation of section 115J(2) of the Act, the Tribunal was right in law in holding that the unabsorbed losses/allowances to the extent of Rs. 15,78,210 relating to the assessment years 1983-84, 1986-87, 1987-88 and 1990-91 were eligible to be set off against the income for the assessment years 1991-92 ?"

2. The assessment for the assessment year 1989-90 was made by invoking the provision of section 115J and the assessee's total income in accordance with that section was determined at Rs. 9,74,816, for the assessment year 1990-91 the income was also similarly determined at Rs. 6,73,920 under the same provision. The provision of section 115J were omitted with effect from 1-4-1991, i.e., from the

assessment year 1991-92 i.e., the relevant assessment year in the case in hand.

In the year under appeal while computing the assessment u/s 143(3) assessee claimed that an amount of Rs. 15,78,210 was available to it as unabsorbed investment allowance and unabsorbed business loss/depreciation for being set off against the income for assessment year 1991-92. The Income Tax Officer set off only Rs. 72,560 which represents unabsorbed investment allowance against the income of the assessee for assessment year 1991-92. According to him, in the assessment years 1989-90 and 1990-91 the entire unabsorbed business loss/depreciation and investment allowance had been adjusted, save and except the investment allowance of Rs. 72,560 which alone can be set off against the income of assessment year 1991-92. He, therefore, rejected the assessee's claim for set off of the unabsorbed loss and allowance amounting to Rs. 15,78,210.

In appeal before the Commissioner (Appeals), Commissioner (Appeals) confirmed the view taken by the assessing officer, though on different ground. In appeal before the Tribunal, the Tribunal has allowed the claim of the assessee. According to the Tribunal, sub-section (2) clarified that consequence of applying the deemed provision of sub-section (1) would not be that the assessee- company would also lose its right to have the aforesaid allowance and loss for that year determined and carried forward to the subsequent year. Tribunal also pointed out that there was an arithmetical mistake committed by the assessing officer, holding that the loss were set off in the earlier years.

3. None appeared for the assessee. We heard learned counsel for the revenue. Learned counsel for the revenue Mr. Dutt submits that once there is a non obstante clause in sub-section (1) of section 115J the income shall be determined as per sub-section (1) of section 115J.

4. Sub-section (1) of section 115J provides a fiction for taking the deemed income. That provides that though as per the provision of the Act in computing the income, income may come at nil. But in such cases, in case of companies referred in sub-section (1) while computing the income of the previous year, after 1-4-1988, and before the 1-4-1991, if the income computed as per the provision of the Act is less than 30 per cent of the book profits in such cases the 30 per cent of the book profit shall be taken as deemed income for the purpose of Income Tax.

Sub-section (2) further provides nothing contained in sub-section (1) shall affect the determination of amount in relation to the relevant previous year to be carried forward to the subsequent year or years under the provisions of sub-section (2) of section 32 or sub-section (3) of section 32A or clause 2(ii) of sub-section (1) of section 72 or section 73 or section 74 or sub-section (3) of section 74A, or sub-section (3) of section 801J.

The income shall be computed in respect of the deemed income and the deductions provided under the sections referred in sub-section (2) are to be taken into account

for the purpose of ascertaining the loss, if any, and that has to be allowed to carry forward to be set off in the subsequent year or years. That clearly shows that the legislature has intended though even the income may not be taxable under the provision of the Act but if the income is less than 30 per cent of the book profit if computed in accordance with the provisions of the Act, 30 per cent of the book profit be taken as a deemed income. But for that assessee should not suffer and that has been taken care of by allowing the loss which assessee suffered on account of not allowing the deductions for which the assessee is entitled under the Act. That has to be ascertained on allowing all these deductions and whatever the net loss comes on taxing the 30 per cent of book profit that has to be allowed to carry forward and be allowed to set off against the income of subsequent year or years.

5. In our considered opinion, there is no substance in the argument of Mr. Dutt that provision of sub-section (2) are contrary and does not prevail over sub-section (1) of section 115J. Under the scheme of section 115J it left no doubt or ambiguity under scheme behind section 115J whatever the loss assessee suffered on account of fixation of the deemed income, the assessee is permitted to carry forward that loss and that loss can be set off against the income of subsequent year or years.

In view of the aforesaid provisions, we find no infirmity in the order of the Tribunal.

In the result, we answer the question in affirmative i.e., in favour of the assessee and against the revenue.

The reference so made stands disposed of accordingly.