**SUPREME COURT OF INDIA**

Apollo Tyres Ltd.

Vs.

Commissioner of Income Tax,

C.A.No.6100 of 1998

(N. Santosh Hegde CJI. and D.M. Dharmadhikari JJ.)

02.05.2002

**JUDGMENT**

**Santosh Hegde, J.**

1. These appeals arise out of a common judgment delivered by a Division Bench of the Kerala High Court in ITR Nos.70/1994 and 43/1997.

2. Civil Appeal No.6100/1998 is preferred by the assessee company and Civil Appeal Nos. 2518-19/1999 are preferred by the C.I.T., Ernakulam.

3. Though a number of questions came up for consideration before the High Court, in these appeals, based on the arguments addressed before us, we are mainly concerned with the following three questions :

> (i) Can an Assessing Officer while assessing a company for income tax under Section 115-J of the Income Tax Act question the correctness of the profit and loss account prepared by the assessee company and certified by the statutory auditors of the company as having been prepared in accordance with the requirements of Parts II and III of Schedule VI to the Companies Act ?
>
> (ii) Whether the dividend income earned by the assessee company from its investment made in the units of Unit Trust of India, can be included in computing the profit of the eligible business under Section 32AB of the Income Tax Act ?
>
> (iii) Whether the business of buying and selling of units of Unit Trust of India by the assessee company amounts to a speculation business or not, for the purpose of allowing set off as to the loss suffered by the company in such a business ?

4. Brief facts necessary for the disposal of first of the above questions are as follows :

> The assessee company while determining its net profit for the relevant accounting year has provided for arrears of depreciation in its profit and loss account which

according to the Revenue is not in accordance with Part II and III of Schedule VI to the Companies Act, 1956 (the 'Companies Act'). Hence, the assessing officer while considering the case of the assessee company under Section 115-J of the IT Act recomputed the said profit and loss account of the company so as to exclude the provisions made for arrears of depreciation. The said action of the assessing officer in questioning the correctness of the accounts maintained by the company was challenged by the company before the Income Tax Appellate Tribunal ('the tribunal') which among other things held that the assessing officer has no authority to reopen the accounts of a company which is certified by the auditors of the company as having been maintained in accordance with the provisions of the Companies Act and which account has been accepted in the General Meeting of the Company as well as by the Registrar of Companies. This view of the tribunal was not accepted by the High Court which held that the assessing officer has the authority to examine whether the accounts of the company have been maintained in accordance with the requirement of sub-section (1A) of Section 115-J and in that process if he finds that the accounts of the company are not in accordance with the provisions of the Companies Act, he could make the necessary changes before proceeding to assess the company for tax under the Explanation to Section 115-J of the IT Act. The relevant part of Section 115-J of the IT Act reads as follows:-

"115-J. (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 [but before the 1st day of April, 1991] (hereinafter 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

(a) the amount of income-tax paid or payable, and the provision therefor; or

(b) the amounts carried to any reserves [(other than the reserves specified in section 80HHD [or sub-section (1) of section 33AC])], 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; or]

(g) the amount withdrawn from the reserve account under Section 80HHD, where it has been utilised for any purpose other than those referred to in sub-section (4) of that section; or

(h) the amount credited to the reserve account under Section 80HHD, to the extent that amount has not been utilised within the period specified in sub-section (4) of that section;
[(ha) the amount deemed to be the profits under sub-section (3) of section 33AC;]

[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

(i) the amount withdrawn from reserves [(other than the reserves specified in section 80HHD)] or provisions, if 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, 1988 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this Explanation; or ]

(i) 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

(ii) the amounts [as arrived at after increasing the net profit by the amounts referred to in clauses (a) to (f) and reducing the net profit by the amounts referred to in clauses (i) and

(ii)] attributable to the business, the profits from which are eligible for deduction under section 80HHC or section 80HHD; so, however, that such amounts are computed in the manner specified in sub-section (3) or sub-section (3A) of section 80HHC or sub- section (3) of section 80HHD, as the case may be; or]

[(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.

(2) Nothing contained in sub-section (1) shall affect the determination of the amounts 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 (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 80J.]"

5. For deciding this issue, it is necessary for us to examine the object of introducing Section 115-J in the IT Act which can be easily deduced from the Budget Speech of the then Hon. Finance Minister of India made in the Parliament while introducing the said Section which is as follows:

"It is only fair and proper that the prosperous should pay at least some tax. The phenomenon of so-called "zero-tax" highly profitable companies deserves attention. In 1983, a new section 80VVA was inserted in the Act so that all profitable companies pay some tax. This does not seem to have helped and is being withdrawn. I now propose to introduce a provision whereby every company will to have to pay a "minimum corporate tax" on the profits declared by it in its own accounts. Under this new provision, a company will pay tax on at least 30% of its book profit. In other words, a domestic widely held company will pay tax of at least 15% of its book profit. This measure will yield a revenue gain of approximately Rs.75 crores."

6. 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 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 115-J was introduced in the IT Act with a deeming provision which makes the company liable to pay tax on at least 30% of its book profits as shown in its own account. For the said purpose, Section 115-J makes the income reflected in the companies books of accounts as 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 III 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 IT 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 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. Inspite 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 re- scrutinise 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 115-J of the IT Act in support of the above contention is misplaced. Sub-section (1A) of Section 115-J 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 IT 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. Beyond that, 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 115-J of the Act, then it should be that income which is acceptable to the authorities under the Companies Act. There can not be two incomes one for the purpose of 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 115- J that "income of the company as accepted by the assessing officer". In the absence of the same and on the language of Section 115-J, it will have to held that view taken by the tribunal is correct and the High Court has erred in reversing the said view of the tribunal.

7. Therefore, we are of the opinion, the assessing officer while computing the income under Section 115-J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The assessing officer thereafter has the limited power of making increases and reductions as provided for in the Explanation to the said section. To put it differently, the assessing officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to Section 115-J.

8. The second question framed by us hereinabove arises for our consideration in the following factual background. The assessee company in its books of account had shown certain sums of money representing as "dividend" from units of the UTI and had included the said sums in the computation of its profit as an income from "eligible business". It also claims that out of such income from "eligible business" it had purchased certain new machineries for its factory because of which it claimed a deduction of 20% of the said income as provided in Section 32AB of the IT Act. This claim of the company has been allowed by the tribunal and confirmed by the High Court. The argument of the Revenue in this regard is that the income received by the assessee company from its investment in the UTI has been declared by the company itself as an "income from other sources" which head of income is different from income from "profits and gains of business or profession" and under Section 32AB, income from business alone is entitled for the benefit of that Section. The assessee contends that its income from sale and purchase of units of the UTI is part of its regular business and that it has held these units as stock-in-trade and has been doing the business of buying and selling the same. The assessee also contends that its income from this

business of investment in the units of the UTI and its business of manufacture and sale of tyres are pooled together in a common account of funds which is managed by one common Management. It is also the submission of the assessee that these two business, namely, the business of buying and selling units of the UTI and the manufacture and sale of tyres are so intertwined and interlaced that the same cannot be separated and treated independently, therefore, this income from the UTI being part of its business income, it is entitled to claim the benefit of Section 32AB.

9. A perusal of Section 32AB, as it stood at the relevant time, shows that if an assessee has a total income including the income chargeable to tax under the head "profits and gains of business or profession" and if the income from such business is derived from an "eligible business" and if the assessee has out of such income utilised any amount during the previous year for purchase of new plant or machinery then it is entitled to a set off of a sum equal to 20% of the profit of such eligible business as computed in the accounts of the assessee which account has been audited in accordance with sub-section (5) of Section 32AB.

10. The dispute in the present case is in regard to the question whether the assessee's investment in the UTI is business, and if so, is it a business which qualifies to be an "eligible business" under Section 32AB ? In regard to the first aspect, we must note that the tribunal as a question of fact based on material on record has come to the conclusion that the investment in the UTI by the assessee company is in the course of its business and its business of manufacture and sale of tyres and sale and purchase of units of the UTI are common in nature and both the businesses are intertwined and interlaced. This finding is accepted by the High Court also. We also find that this business of the assessee company of buying and selling of units is a business as contemplated under Section 32AB of the Act. The question then is: is it an eligible business under the said section ? The term "eligible business" is defined under sub-section (2) of Section 32AB. As per that definition, all business of an assessee company will be an eligible business unless it falls under the type of business enumerated in sub-clauses (a) and (b) of Section 32AB(2). It is nobody's case that this business of the assessee company is one of those businesses which fall under business enumerated in clauses (a) and (b) of sub-section (2) of Section 32AB. Therefore, there is no doubt that the business of the assessee company is an eligible business. The fact that it is shown under a different head of income would not deprive the company of its benefit under Section 32AB so long as it is held that the investment in the units of the UTI by the assessee company is in the course of its "eligible business". Therefore, in our opinion, the dividend income earned by the assessee company from its investment in the UTI should be included in computing the profits of eligible business under Section 32AB of the Act.

11. The last point for our consideration is: whether buying and selling of units by the assessee company can be treated as a speculative business ? For this purpose, the Revenue argues that the units purchased by the assessee company from the UTI are shares, therefore, as per Explanation to Section 73 of the Act, the said business of purchasing and selling of shares will have to be treated as a business of speculation. The Revenue in support of this argument, relies on Section 32(3) of the UTI Act which reads as follows:

"(3) Subject to the foregoing sub-sections, for the purposes of the Income-tax Act, 1961, --

(a) any distribution of income received by a unitholder from the Trust shall be deemed to be his income by way of dividends; and (b) the Trust shall be deemed to be a company."

12. Relying on the above provision of the UTI Act, the Revenue contends that if the UTI is a company and income from its units is dividend then ipso facto the units will have to be shares, therefore, the business of purchase and sale of units conducted by the assessee company will have to be deemed to be a business in shares which business, according to the Revenue, attracts Explanation to Section 73. On this basis, it is contended that the business of purchase and sale of units by the assessee company amounts to a business of speculation. Both the tribunal and the High Court have considered this argument as also the effect of Section 32(3) of the UTI Act and have come to the conclusion that the provision of the said Act is limited for the purpose of assessment of dividend income under the Act, and for deduction of tax at source. They have held that the legal fiction created by Section 32(3) of the UTI Act cannot be carried any further. We have examined the provisions of the UTI Act and we are of the opinion that even though the said Section creates a fiction to make the UTI as a deemed company and distribution of income received by the unit holder as a deemed dividend, by virtue of these deemed provisions, it cannot be said that it also makes the unit of the UTI a deemed share. In our opinion, a deeming provision of this nature as found in Section 32(3) should be applied for the purpose for which the said deeming provision is specifically enacted, which in the present case is confined only to deeming the UTI as a company and deeming the income from the units as a dividend. If as a matter of fact, the Legislature had contemplated making the units as also a deemed share then it would have stated so. In the absence of any such specific deeming in regard to the units as shares it would be erroneous to extend the provisions of Section 32(3) of the UTI Act to the units of UTI for the purpose of holding that the unit is a share. For these reasons, we are in agreement with the finding of the High Court on this point also.

13. For the reasons stated above, we allow C.A. No.6100/98 preferred by the assessee to the extent of our finding in the first point formulated by us but without costs.

14. Based on our finding in regard to point Nos.2 and 3 formulated by us hereinabove, C.A. Nos.2518-19/99 are dismissed with costs.