* **HIGH COURT OF DELHI : NEW DELHI**

\+ **ITA No.1674 of 2006**

Judgment reserved on: January 31, 2008

% Judgment delivered on: February 22, 2008

Commissioner of Income Tax
Delhi-II. ...Appellant

Through Mr. R.D. Jolly, Adv.

Versus

Jindal Drilling & Industries Ltd.
56, Hanuman Road,
New Delhi. ...Respondent

Through Mr. O.P. Sapra with
Mr.Sandeep Sapra, Advs.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE S.L. BHAYANA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MADAN B. LOKUR, J.

The Revenue is aggrieved by an order dated 1st February, 2006 passed by the Income Tax Appellate Tribunal, Delhi Bench 'F' in

ITA No. 4803/Del/2002 relevant for the Assessment Year 1989-90.

2. The case has rather a chequered history beginning with the assessment order dated 18th March, 1991 passed by the Assessing Officer under Section 143(3) of the Income Tax Act, 1961 (for short the Act).

3. It appears that the assessment order did not contain the computation of income under Section 115-J of the Act. The Assessee had computed a loss at Rs.46,65,746/- while determining the book profit for the purposes of Section 115-J of the Act but while arriving at this figure, the Assessee brought forward depreciation or loss that was wrongly calculated.

4. The Commissioner of Income Tax was of the view that the order passed by the Assessing Officer was prejudicial to the interest of the Revenue and accordingly issued a notice to the Assessee under Section 263 of the Act on 29th November, 1991 to show cause why the assessment be not set aside and the profit correctly computed under Section 115-J of the Act.

5. After hearing the Assessee, the Commissioner gave the following direction in her order passed under Section 263 of the Act on 15th January, 1992: -

> "On the facts of the case, as the assessment framed is erroneous, in so far as it is prejudicial to the interest of revenue, the same is cancelled on the limited issue with the direction that the assessing officer should computer profit under s. 115J as per provisions of the Act and before doing so, adequate opportunity should be allowed to the assessee. For this specific purpose, the assessment stands set-aside."

6. When the matter was then taken up by the Assessing Officer, the Assessee contended that for the purposes of Section 115-J of the Act the book profit has to be computed on charging depreciation as prescribed under Section 350 of the Companies Act, 1956. This contention was rejected by the Assessing Officer in his order dated 16th March, 1992.

7. Another issue that came up for consideration before the Assessing Officer, at the instance of the Assessee, was on the allowability of an expenditure of Rs.41,14,955/-. According to the Assessee, the claim for this expenditure was made in the subsequent assessment year, that is, 1990-91 but in the assessment order for that year, the Assessing Officer held that the expenditure could not be allowed in the assessment year 1990-91, since it related to an earlier year. In view of this, the Assessee contended that the expenditure of Rs.41,14,955/- be allowed to the Assessee in the assessment year 1989-

90 (the year under consideration).

8. The Assessing Officer rejected this contention of the Assessee on the ground that the order passed by the Commissioner under Section 263 of the Act on 15th January, 1992 was on the limited issue of computing the profit under Section 115-J of the Act and, therefore, it was not possible for him to look into the issue raised by the Assessee.

9. The consequence of the assessment order passed on 16th March, 1992 read with the assessment order for the assessment year 1990-91 was that the Assessee was not entitled to claim the expenditure of Rs.41,14,955/- in the assessment year 1990-91, nor could it claim that expenditure in the assessment year 1989-90.

10. Feeling aggrieved by this decision, the Assessee preferred an appeal which was heard and disposed of by the Commissioner of Income Tax (Appeals) [CIT(A)] by an order dated 31st January, 1995. The CIT (A) dismissed the appeal of the Assessee without considering the allowability of the expenditure claimed by way of a deduction for the assessment year 1989-90.

11. The Assessee then preferred a second appeal to the Income Tax Appellate Tribunal (for short the Tribunal) and by an order dated

27th December, 200, the Tribunal confirmed the finding that the expenditure of Rs.41,14,955/- related to the assessment year 1989-90 but on the question whether the Assessee was entitled to claim this in the re-computation of its total income pursuant to the order passed by the Commissioner under Section 263 of the Act, the Tribunal did not give any finding but remitted the matter back to the CIT (A) for dealing with the issue raised by the Assessee.

12. Pursuant to the order passed by the Tribunal on 27th December, 2000, the CIT (A) considered the issue of allowing the deduction to the Assessee for the assessment year 1989-90 and concluded that the order passed by the Commissioner under Section 263 of the Act did not disentitle the Assessee from agitating any fresh issue that arose as a result of certain developments that had taken place in the meanwhile. It was held that for re-computing the book profit for the purposes of Section 115-J of the Act, the Assessing Officer could have looked into the facts as they existed on that day and, therefore, the Assessing Officer was not right in refusing to entertain the claim of the Assessee which arose out of the order passed in respect of the Assessee for the assessment year 1990-91.

13. Against the order passed by the CIT (A) on 31st July, 2002,

the Revenue preferred an appeal before the Tribunal and that appeal was dismissed. It is under these circumstances that the Revenue is before us in appeal under Section 260A of the Act.

14. We find that apart from anything else, the Assessee is placed in a rather piquant situation. It is not entitled to a deduction for the expenditure of Rs.41,14,955/- for the assessment year 1990-91 on the ground that it is referable to an earlier assessment year but the contention of the Revenue is that it is not entitled to that deduction in the earlier year because that issue was not raised by the Assessee at the appropriate time. The Revenue forgets, in the process, that when the original assessment order was made on 18th March, 1991, this argument was not even open to the Assessee and, therefore, could not have been urged by it. It is only as a result of subsequent developments that the Assessee could raise such a contention. Moreover, we are also of the view that since the order passed under Section 263 of the Act by the Commissioner on 15th November, 1992 related to re-computation of the income, the Assessee was well within its rights to place all the material on the record of the Assessing Officer to enable him to re-compute the correct income in accordance with law.

15. That apart, we find that the Tribunal has referred to

Commissioner of Income Tax v. Geo Industries and Insecticides (I) Pvt. Ltd., [1998] 234 ITR 541. In this decision, it has been held by the Madras High Court, on a pragmatic understanding of the law, that where a claim is made by an assessee for considering an item for deduction during the course of the assessment proceedings, the Assessing Officer is duty bound to examine the claim on its merits.

16. In that case also, certain developments had taken place in the assessment proceedings for the subsequent year and taking that into consideration, the Madras High Court observed as follows: -

> "We are of the view that when the assessee made a claim for consideration of an item for deduction during the course of assessment proceedings, it is the duty of the Income-tax Officer to examine the claim on the merits of the claim. The present case is not a case where the assessee made a claim with reference to a matter which was concluded and has become final in the original assessment proceedings. But, on the other hand, it was found in the subsequent year's assessment proceedings that the liability of the assessee had accrued when the suit for injunction filed by the assessee was dismissed by the City Civil Court, Madras, and in view of the subsequent event that the deduction might relate to the present assessment year, the assessee made a claim for deduction of the damages and when such a claim was made, the Income-tax Officer was bound to examine the claim on the merits and it is not open to him to reject the claim even at the threshold and refuse to entertain the claim."

17. In our opinion, the law laid down in ***Geo Industries*** is fully

applicable to the facts of the present case.

18. Since, on the own showing of the Revenue, the Assessee was not entitled to claim the expenditure in the assessment year 1990-91 but only in an earlier assessment year, and that claim was made by the Assessee for the assessment year 1989-90, as a result of a direction given by the Commissioner under Section 263 of the Act to re-compute the income of the Assessee, no error was committed both by the CIT (A) and the Tribunal in concluding that the Assessing Officer ought to have taken these facts into consideration for the purposes of computing the correct income of the Assessee.

19. In our opinion, no substantial question of law arises. The appeal is dismissed.

MADAN B. LOKUR, J

FEBRUARY 22, 2008 **S.L. BHAYANA, J**
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