



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA No. 535/2009**

Date of decision : September 23, 2009

COMMISSIONER OF INCOME TAX ... Appellant.

Through: Ms. Suruchii Aggarwal, Advocate

VERSUS

M/S. C.J. INTERNATIONAL HOTELS LTD.Respondent

Through: Mr. Prakash Jain, Advocate.

CORAM:

HON'BLE MR. JUSTICE A. K. SIKRI

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

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ORDER

1. The issue and the question of law which is sought to be raised in this appeal is with regard to the applicability of the decision of the Supreme Court in



the case of *Apollo Tyres Ltd. v. CIT*, (2002) 9 SCC 1 (= 255 ITR 273). It

sought to be contended that even if the statutory Auditors of the assessee company have audited the accounts, yet, the said accounts can be re-opened in order to decide the issue of dis-entitlement of depreciation.

2. The relevant assessment year is 1998-1999. The original order of the Assessing Officer was in favour of the assessee and which was sought to be set aside in proceedings under Section 263 of the Income Tax Act, 1961. The order passed by the CIT under Section 263 was set aside by the Tribunal and a further appeal to this Court by the Department was dismissed in ITA 1092/2008 decided on 24th September, 2008. In the said judgment it has been held that audited accounts of an assessee company can only be re-opened on the grounds stated in the explanation to Section 115JA and not otherwise. The relevant portion of the judgment in ITA 1092/2008 reads as under:

“2. The Tribunal considered the decision of the Supreme Court in the case of *Apollo Tyres Ltd v. CIT*: (2002) 9 SCC 1 (= 255 ITR 273) and noted that once the accounts have been certified by the auditor to have been prepared in accordance with the provisions of Companies Act, then the Assessing Officer will not have any jurisdiction to go behind the net profit shown in the Profit and Loss Account except to the extent provided in the Explanation to Section 115J. The decision in *Apollo Tyres Ltd* (supra) was in respect of Section 115J. The Tribunal held that that decision would be applicable in the present case. Following the decision of the Supreme Court in *Apollo Tyres Ltd* (supra), the Tribunal concluded as under:-

“While the Assessing Officer would be well within his jurisdiction to compute depreciation under Section 32 on the rates provided in appendix-I to Income Tax Rules, 1962, for computing total income under other provisions of the act, he cannot disturb the book profit, which has been certified to be drawn in the Profit and Loss Account as per the Companies Act. Therefore, we are of the view that the order passed by the Assessing Officer was not erroneous, which is one of the pre-conditions for invoking



jurisdiction under Section 263 of the Act. Since it was not erroneous, it could not have been termed to be prejudicial to the interest of the revenue. In this view of the matter, we set aside the order of the learned CIT. In the result, ground No. 2 is allowed.”

3. The Supreme Court in *Apollo Tyres Ltd* (supra) had categorically held as under:-

“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.”

4. While the Tribunal proceeded on the basis that the present case fell under Section 115JB we find that the present case is actually one under Section 115JA. The Tribunal held that the decision of the Madras High Court in the case of CIT v. Covai Maruthi paper and Board (P) Ltd : 294 ITR 57 was applicable to the present case. For this purpose the Tribunal was of the view that the provisions of Section 115JA and those of Section 115JB were analogous. We find that this conclusion of the Tribunal was not necessary for the purposes of this appeal. As such, we are not expressing any opinion on the issue as to whether the provisions of section 115JA and 115JB are analogous or not. It was unnecessary for the Tribunal to have gone into this aspect because the decision in Covai Maruthi paper and Board (P) Ltd (supra) was one which was rendered in the context of Section 115JA and the present case also arose in the context of Section 115 JA. The Tribunal was under a mistaken impression that the present case was one which fell under Section 115JB and that is the reason why the observation was made that the provision of Section 115JA and Section 115JB were analogous. This conclusion was unnecessary. However, that does not change the ultimate result of the case. In as much as the decision in Covai Maruthi paper and Board (P) Ltd was directly applicable to the present case. The fact that the Tribunal applied the decision of the Supreme Court in the case of Apollo Tyres Ltd as well as Covai Maruthi paper and Board (P) Ltd. (supra) cannot therefore be faulted. The Tribunal concluded as under:-

“While the AO would be well within his jurisdiction to compute depreciation us 32 on the rates provided in appendix-I to I.T. Rules, 1962, for computing total income under other provisions of the act, he cannot disturb the book profit, which has been certified to be drawn in the Profit and Loss Account as per the companies act. Therefore, we are of the view that the order passed by the AO was not erroneous, which is one of the pre conditions for invoking jurisdiction u/s 263 of the act. Since it was not erroneous, it could not have been termed to be prejudicial to the



interest of the revenue. In this view of the matter, we set aside the order of the Id. CIT. In the result, ground no.2 is allowed.”

5. We agree with the views expressed by the Tribunal. Consequently, no substantial question of law arises for our consideration. The appeal is dismissed.”

It is therefore clear that the decision in *Apollo Tyres* case applies, and there is no scope for framing of any question of law on the applicability of the case of *Apollo Tyres*.

3. The Tribunal relying on the aforesaid judgment has further held that no other additions are possible and has rightly relied upon the decision of the Rajasthan High Court in the case of *CIT v. Shri Ram Singh*, dated 20.5.2008. Thus, the impugned order of the Tribunal calls for no interference on this aspect.

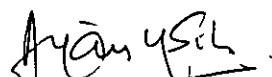
4. We may also additionally state that the Tribunal has rightly held that the Assessing Officer in the present case, could not have re-opened the Assessment Order in exercise of its power under Sections 147/148 because no new facts or materials were found to exist. The relevant portion of the impugned judgment, and which we accept, reads as under:

“Even otherwise, the information regarding depreciation was contained in the annual accounts of the assessee wherein it is specifically stated vide Note No. 4 to Accounts that rate of depreciation was enhanced in the hotel building as plant and machinery. It is also stated in the Significant Accounting Policies of the company in the annual accounts that depreciation on assets was provided on SLM basis as per provisions of the Companies Act except hotel building, depreciation on which was provided under WDV basis as per the Companies Act. In these circumstances, the reopening seems to be on a change of opinion which is not warranted in law in view of the full Bench decision of the jurisdictional High Court in the case of *Kelvinator of India Limited* 256 ITR 1. In these circumstances, we quash the order of the Assessing Officer which is



based on invalid assumption of jurisdiction under Section 147 of the Act as aforesaid.”

5. In view of the above, no question of law arises. The appeal is therefore dismissed.


A. K. SIKRI, J


VALMIKI J. MEHTA, J

September 23, 2009
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