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

+ **WRIT PETITION(CIVIL) NO. 448/2011**

ARCOTECH LTD. Petitioner
 Through Mr. Sandeep Sethi, Sr.
 Advocate with Mr. Siddharth Bhatnagar,
 Ms. Sonia Dube, Mr. S. Chakraborty &
 Ms. Kanchan Yadav, Advocates.

versus

DIRECTOR OF INCOME TAX (RECOVERY) & ORS.
 Respondents
 Through Mr. D.R. Jain & Mr. Sanjeev
 Sabharwal, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

% **ORDER**
01.11.2011

Arcotech Limited, earlier known as SKS Limited, has filed
 the present writ petition, inter alia, praying for following reliefs:-

- “(a) Issue a Writ of and/or in the nature of Mandamus directing the Respondents each of them to comply with order dated 18.11.2004 and 24.06.2009 passed by BIFR, inter alia, by granting following reliefs and concessions:
- i) Business losses be allowed to carry forward under Section 72 of Income Tax Act, 1961 for a period of 8 years from the cut off date i.e. 01.10.2004.
 - ii) No interest and/or penalty be levied.
 - iii) Condone the delay in filing of Income Tax Return for the AY 2005-06 under Section



139 read with the section 80 of the Income Tax Act, 1961.

- iv) The provisions of Section 115JB should not be applicable until such time net worth of the company exceeds Rs.63.71 Crores.

(b) In the alternative, issue a Writ of and/or in the nature of Mandamus directing the Respondents to consider and grant reliefs/exemptions and concessions as have been granted by them to other similarly placed sick industrial companies and in particulars the recommendations by the Income Tax Department dated 02.01.2010 after giving a notice and opportunity of hearing to the Petitioner Company, ignoring the letter dated 19.01.2010 and pass a reasoned order.

(c) Pass such further or other order or orders as may be deemed fit and proper in the facts and circumstances of the case.”

2. During the course of arguments, it is stated that the petitioner is not disputing the applicability and application of Section 115JB of the Income Tax Act, 1961 (Act, for short), but the petitioner claims that in case benefit under Section 72 is granted to the petitioner, then the said benefit should be available to the petitioner in terms of sub-section 3 to Section 115JB of the Act. The aforesaid statement made on behalf of the petitioner is taken on record.

3. By the impugned order dated 19th January, 2010, the relief



prayed for by the petitioner under Section 72 of the Act has been rejected for the following reasons:

“4. **Relief u/s. 72:-** Initially the company has asked for this relief in its correspondence. However, later on this section has been omitted from the request letter dated 17.07.2009. The company vide its letter dated 15.10.2009 has also given the details of brought forward business loss since AY 98-99 which can be carried forward till AY 2006-07. The Company's net worth became positive in Y 2005-06 as per SOP dated 24.06.2009. In this light also no relief has been considered u/s. 72 of the IT Act beyond its provisions.”

4. It is apparent from the said order that the Director of Income Tax (Recovery) has held that the petitioner had given up their request for relief under Section 72 as the said Section was omitted from the request letter dated 17th July, 2009. There is merit in the contention of the petitioner that the aforesaid authority has misunderstood the stand of the petitioner and the aforesaid letter. We have also examined the letter dated 17th July, 2009. The said letter refers to several sections of the Act and concessions are prayed for, but it is stated that similar reliefs and concessions, which have been granted to others, should be sanctioned and granted to the petitioner company. Moreover, the petitioner in their earlier letter dated 20th



November, 2008 had specifically mentioned and asked for relief and concession under Section 72 of the Act. In their subsequent correspondence dated 4th August, 2009 reference was made to relief and concession under Section 72 of the Act. The respondent authority had thereafter written a letter dated 10th August, 2009 asking for various details to examine and decide, whether claim for concessions or reliefs could be granted to the petitioner. In response to this letter, the petitioner had submitted details vide letter dated 15th October, 2009. It was stated in this letter that the scheme for rehabilitation was sanctioned by BIFR on 18th November, 2004 and the share capital of the company was de-rated to 20% and accordingly 80% of the share capital along with reserves and surpluses to the tune of Rs.41.69 crores were adjusted against accumulated losses. Further, the company had arranged for funds by selling for their assets and from sale of personal assets of the promoter and infusion of funds by the promoter to the extent of Rs.18.30 crores for relocating the machinery, construction of the factory building at the new plant site, de-commissioning of the plant and to augment the working capital. Along with this letter, the petitioner had enclosed projected cash flow statement, the then situation



of cash availability etc. It is the contention of the petitioner that the cash flow statement was enclosed with the sanctioned scheme. Learned counsel for the petitioner has drawn our attention to the projected profitability statement enclosed at page 74 of the paper book as per which till the year ending 31st March, 2009, it was projected that the petitioner company would not be liable to pay any taxes.

5. We have highlighted the said aspects as it is the contention of the petitioner that these aspects have not been considered and examined by the respondent authorities while recording the second reason for rejecting the request for relief under Section 72 of the Act as it is stated that the petitioner company's net worth became positive in the year 2005-06 as per the statement of profit dated 24th June, 2009. Another contention raised by the petitioner is that the entire business and operations of the petitioner company remained suspended between the period 1996-2006 as the matter was pending before BIFR and the petitioner company had been declared a sick company. Thus, the petitioner could not claim benefit of carried forward losses as the matter was sub-judiced.

6. Learned counsel appearing for the respondent authorities



has submitted that no direction was issued by the BIFR to grant concession or relief under Section 72 of the Act. In fact, no concession of this nature was envisaged in the draft scheme or stated in the sanction order. He has further submitted that once the petitioner company is earning profits since the assessment year 2005-06, no relief under Section 72 of the Act should be granted. It is further submitted that the company did not file any details to support their contention for relief or concession under Section 72 of the Act.

7. The draft scheme, as is placed on record, envisaged that the Central Government would consider waiver of income tax demand/interest and carry forward of business losses and depreciation and set off against future profit, if any, beyond nine years. The sanctioned scheme envisaged that the Central Government shall consider grant of usual tax and other reliefs and concessions to the petitioner company. Order dated 24th June, 2009 passed by the BIFR further records that the Bench had reiterated and directed the income tax authority and DGFT to implement the provisions of SS-04 with regard to relief and concessions as envisaged in paragraph E-IV(i) and (ii) on page 9 of SS-04. SS-04 refers to the sanctioned scheme and paragraph



E-IV(i) relates to the request to the Central Government consider grant of usual tax and other reliefs and concessions.

8. It may be clarified that we are not issuing any mandamus or direction to the respondent authorities to grant concession under Section 72 of the Act. What is required is that the respondent authorities must consider the request of the petitioner for grant of concession/relief under Section 72 of the Act in view of their contentions, the statement of profit and the cash flow statement. The respondent authorities while doing so should act objectively and fairly as is required and is expected from a statutory authority. As noticed above, the request has been wrongly rejected by recording that no prayer was made and the factual aspect has not been considered. We need not say any more on this aspect.

9. In view of the aforesaid discussion, we set aside the order passed by the respondent authority dated 19th January, 2010 to the extent relief to the petitioner under Section 72 of the Act has been denied. The said aspect will be reconsidered on the basis of details already submitted by the petitioner. Liberty is also granted to the petitioner to submit another representation within a period of fifteen days from today. It will be also open to the



authorities to call for further details or information, if it is felt that this is necessary. It is clarified that this Court has not expressed any opinion on the question whether or not relief/concession under Section 72 of the Act should be granted to the petitioner as it falls exclusively within the domain of the respondent authorities. The respondent authorities will pass an order expeditiously and preferably within a period of four months from today. While examining the question of concession/relief under Section 72, the question of delay in filing of return and in case benefit under Section 72 is granted to the petitioner, whether the said benefit will be also available to the petitioner assessee in terms of sub-section 3 to Section 115JB of the Act, will be examined.

10. The writ petition and all pending applications are disposed of.

DASTI.

SANJIV KHANNA, J.

R.V. EASWAR, J.

**NOVEMBER 01, 2011
VKR**