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

Reserved on : 1st October, 2012
% **Date of Decision** : 30th November, 2012

\+ W.P.(C) 3406/2000
\+ W.P.(C) 6310/2000
\+ W.P.(C) 6320/2000
\+ W.P.(C) 6308/2000

SUPER CASSETTES INDUSTRIES LTD ..... Petitioner
Through: Mr. Satyen Sethi with Mr. Arta Trana Panda, Advocates.

versus

DY.COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Sanjeev Rajpal, Sr. Standing Counsel.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.:

These are four writ petitions, two each by Super Cassettes Industries Ltd. and Tony Electronics Ltd., which later merged with the former company. Since the facts and the controversy are more or less similar in all the four writ petitions, and since they were also heard together, they are disposed of by a common judgment.

2. We may first take up the writ petitions filed by Super Cassettes Industries Ltd. The petitioner is a public limited company having its registered office at Greater Kailash, New Delhi and is engaged in the manufacture of

audio cassettes, audio equipment etc. WP(C) 3406 of 2000 pertains to the assessment year 1989-90, in respect of which the petitioner filed a return of income on 27.3.1991 declaring total income of ₹31.98 lakhs. The return was accompanied by the audited accounts and the tax audit report required to be filed in Form No.3CD under Section 44AB of the Income Tax Act ("Act", in short). The total income was arrived at on the basis of the book profit computed by the petitioner in accordance with Section 115J of the Act. The profit as per the profit and loss account, stated to be prepared in accordance with Part-II and Part-III of Schedule VI to the Companies Act, 1956 disclosed a profit of ₹1.06 crores. In accordance with Section 115J, 30% of the book profit was deemed to be the total income of the assessee. Accordingly, the petitioner declared ₹31.98 lakhs as its book profit. In preparing the profit and loss account and in arriving at a profit of ₹1.06 crores the petitioner calculated the depreciation on its assets at ₹2.50 crores. In the "notes to accounts" annexed to the annual accounts under Schedule 16, the petitioner included the following note :

> *"7. Depreciation has been provided on Diminishing Balance Method at the rates prescribed under section 32 of Income Tax Act, 1961, as applicable for the accounting year concerned and full years depreciation has been provided on addition and no depreciation has been provided on deletions, made during the year."*

In the computation of taxable income filed along with the return, the petitioner commenced the computation by taking the profit figure as per the profit and loss account and added back depreciation of ₹2,56,01,379/-; thereafter it deducted the admissible depreciation of ₹2,50,73,330/-. The figure of

admissible depreciation was arrived at by the petitioner after disallowing depreciation of ₹5,20,049/- from the figure of ₹2,56,01,379/-.

3. The assessing officer completed the assessment under Section 143(3) of the Act by order dated 27.3.1992. He took note of the fact that the petitioner had declared the total income on the basis of the book profit. He examined the depreciation claim made by the assessee and as was the practice in the earlier year, disallowed 50% of the depreciation on the building at N-108, Greater Kailash-II, New Delhi and the AC plant installed therein. The assessing officer also disallowed depreciation of ₹1,08,104/- claimed by the petitioner in respect of its building at Bombay, which was held under Power of Attorney basis, without legal ownership. Thus after examining the return filed by the petitioner and the various items claimed as deductions, including depreciation, the assessing officer first arrived at the taxable income as per the normal provision of the Act at ₹Nil after making various additions and disallowances and after allowing depreciation of ₹2,67,36,938/-.

4. Thereafter, the assessing officer proceeded to compute the book profit in accordance with Section 115J of the Act. He accepted the assessee's computation of the book profit at ₹1,06,63,302/- and determined the book profit at 30% thereof i.e. at ₹31,98,990/-. This figure was the same as declared by the petitioner as book profit. Since the figure of book profit was higher than the figure of taxable income arrived at under the normal provisions of the Act, the assessment was completed on the book profit and demand was raised accordingly.

5. On 3.3.2000, the respondent issued a notice to the petitioner under Section 148 of the Act on the ground that income chargeable to tax had escaped assessment within the meaning of Section 147 and called upon the petitioner to file a return of income. The petitioner, upon receiving notice, by letter dated 10.4.2000 written to the respondent stated that there was no mention in the notice as to the ground on which the assessment was sought to be reopened and further requested the respondent to treat the return filed originally as a return filed in response to the notice "under protest". The petitioner also requested that the amounts added back in the original assessment order which were not disputed by the petitioner in appeal may be added to the returned income. A request was also made for supply of the reasons recorded for issuing the notice under Section 148.

6. Accordingly, the reasons recorded for retaining the assessment were supplied to the petitioner. A copy of the reasons is annexed as Annexure 6 to the writ petition and the same is as follows :

> *"REASONS FOR TAKING ACTION UNDER SECTION 148 OF THE INCOME TAX ACT, 1961-IN THE CASE OF M/S SUPER CASSETTES INDUSTRIES LTD, A-289, OKHLA INDUSTRIAL AREA, PHASE-I, NEW DELHI-ASSESSMENT YEAR 1989-90*
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> *Return declaring net income at Rs.31.98 lacs was filed on 27th March, 1991. Alongwith the return of Income, audit report u/s 44-AB of I.T.Act, 1961 in form No.3-CD was also enclosed. As per the profit and loss account, profit was disclosed at Rs.69.90 lacs. Depreciation has been claimed as per Income-Tax Rules which amounted to Rs.2.50 crores and it was debited to the profit and loss account.*
>
> *2. In this year, under assessment, section 115J was applicable and the assessee was liable to pay minimum tax on*

30% of the book profit. In this case, the assessee has computed the book profit u/s 115J at Rs.1.06 crores and 30% of book profit was computed at Rs.31.98 lacs. Thus the assessee has declared 30% of book profit as net income which amounted to Rs.31.98 lacs. Thus the minimum tax payable by the company worked out to Rs.18.47 lacs. Assessment u/s 143(3) of I.T.Act was completed on 27.3.92 at income of Rs.31.98 lacs previous year for the relevant assessment year was the financial year.

3. U/s 115J, the book profit is to be worked out as under – "However assessee, being a company shall for the purpose of this section, prepare its profit & loss account for the relevant previous year in accordance provisions of Paras-II,III of Schedule-VI to the Companies Act."

4. Thus book profit is to be calculated after debiting depreciation as per Companies Act to the profit and loss account. But in this case the depreciation has been debited as per Income Tax Rules, 1962. Depreciation as per Companies Act comes to a very nominal amount whereas the depreciation as per Income Tax Act is a substantial amount. Under the Companies Act, depreciation is eligible on pro-rata basis and on actual use of machinery whereas under the Income Tax depreciation is admissible for the full year. During the year, addition to the fixed assets amounted to Rs.5.75 crores. Under the Income Act, depreciation was claimed for the entire year as admissible but under the Companies Act depreciation could be admissible only on actual period of use of machinery from the date of installation. Thus in this case, substantial higher depreciation as been claimed in order to reduce the book profit which resulted in under statement of book profit and thereby under statement of minimum tax as per Section 115J of the I.T.Act. Thus in this case there was clear cut under statement of income on account of non-furnishing and inaccurate furnishing of particulars of income. The deprecation admissible under Companies Act cannot be determined for want of relevant details but it will be less than 1 crore. Thus, there is atleast Rs.1.5 crore excess claim of depreciation in the profit and loss account. In view of the above, book profit was under stated by the aforesaid amount and tax

payable u/s 115J was also under-stated which resulted in under assessment.

5. The balance-sheet and profit and loss account are prepared under the Companies Act and the assessee was required to claim depreciation as per Companies Act also. But the assessee was claiming depreciation as per Income Tax Rules. From the Asstt. Year 1995-96 the assessee started claiming depreciation under Companies Act has Assessee has not changed this method of claiming depreciation under the Companies Act retrospectively.

6. The Annexure "D" of the return the computation of book profit and working of eligible tax u/s 115J was given which was totally incorrect. Thus in this case, the assessee has deliberately filed inaccurate particulars of income and claimed wrong depreciation to evade proper taxation. Thus, I have reason to believe that in this case there was under assessment of income on account of filing of inaccurate particulars of income by the assessee.

(S.RAMCHANDANI)

Dy. Commissioner of Income Tax,

Central Circle-25, New Delhi"

After supply of the reasons recorded to the petitioner, the respondent followed it up as by issue of notices of hearing under Section 142(1) and Section 143(2) calling upon the petitioner to furnished the details and information necessary to complete the reassessment. On receipt of the reasons recorded for reopening the assessment, the petitioner by letter dated 2.6.2000 filed its objections to the reopening of the assessment. It was contended that there was no escapement of income on account of any failure on the part of the petitioner to furnish full and true particulars of income. It was pointed out that the return filed originally was accompanied by the annual audited accounts as well as the tax audit report.

It was further stated in the objections that the assessing officer was wrong in his view that while drawing up the profit and loss account in accordance with the Companies Act, the petitioner had debited depreciation in accordance with the Income Tax Rules, 1962 even though the petitioner was required to debit and claim depreciation only in accordance with the Companies Act. Disputing the observations of the respondent in the reasons recorded, the petitioner contended as follows in the objections:

> *"8. It is submitted that section 205 of the Companies Act which provides for providing of depreciation before declaring dividend and under the aforesaid provision the companies are required not to distribute dividend without providing for depreciation. No rates of depreciation has been provided in the Schedule VI of Companies Act and Schedule XIV of the Companies Act only provide the rate of minimum depreciation to be provided before declaring dividend. From the aforesaid table it cannot be concluded, as now your are attempting to conclude, as a result of your change of opinion, that the rates of deprecation stated in the Schedule XIV are statutory rate of deprecation under Companies Act and no Balance Sheet even for the purposes of section 115J(1A) can be prepared providing depreciation at per the schedule of deprecation under the Income Tax Act. This assumption of yours is highly arbitrary and is based on no valid authority and in any case is based on a mere change of opinion.*
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> *9. Further, it is respectfully submitted that, the further observations in the reasons recoded that under the Companies Act, depreciation is eligible on pro-rata basis and on actual use of machinery whereas under the Income Tax Act, depreciation is admissible for the full year is also based on no valid justification. Here too, it is submitted that there is no justification or a valid basis for the aforesaid allegation. There is no justification to allege that under the Companies Act, deprecation is eligible on pro-rata basis and on actual use of machinery. There is absolutely no authority for the aforesaid allegation. Section 205*

of the Companies Act merely prohibits the distribution of dividend without providing for minimum depreciation and Schedule XV is not a table or Schedule which lays down the maximum rate of depreciation which to be provided by the Companies. It has then been stated that during the year, an addition to the fixed assets amounted to Rs.5.75 crores and as such, under the Income Tax Act, depreciation was claimed for the entire year as admissible but under the Companies Act, depreciation could be due only on actual period of use of machinery as per the date of installation. It is submitted hereto, there is no authority for so observing and it is a case of mere change of opinion and that too, without any basis."

7. After filing the objections to the re-assessment proceedings and to the notices issued under Section 142(1) and Section 143(2) of the Act, the petitioner filed the present writ petition before this Court. On 5.7.2000 an order was passed by this Court issuing notice and permitting the reassessment proceedings to continue without any final order being passed. The position today is that no final order has been passed pursuant to the notice of reassessment.

8. The contention of the petitioner is threefold :

(a) the original assessment was completed under Section 143(3) of the Act after a full examination of the return, and in particular the claim of depreciation;

(b) there is no allegation in the reasons recorded that income chargeable to tax had escaped assessment due to the failure of the petitioner to furnish full and true particulars; and

(c) in any case it is not open to the assessing officer to question the correctness of the profit and loss account. Once it has been certified to have been prepared

in accordance with parts II and III of Schedule VI of the Companies Act, 1956, it is not open to the respondent to call the same in question as held by the Supreme Court in ***Apollo Tyres Ltd. v. CIT*** (2002) 255 ITR 273 and ***Dynamic Orthopedics P. Ltd. vs. CIT*** (2010) 321 ITR 300. Reliance has also been placed on the judgments of this Court in ***Sun Investment Pvt. Ltd. Vs. Assistant Commissioner of Income Tax*** (2012) 344 ITR 1 and ***Properties Pvt Ltd Vs. DCIT (2011)*** 343 ITR 141 (Del.) as well as the judgment of the Bombay High ***Court in CIT Vs. Kotak Securities Ltd.*** (2012) 346 ITR 351 (Bom). It is further contended that in fact, the rates of depreciation provided in the Companies Act are the same as provided in the Income Tax Rules and therefore, it cannot be said that the profit and loss account was not prepared in the manner required by Parts II and III of Schedule VI to the Companies Act.

9. In the counter affidavit, it is stated by the respondent that the petitioner has admittedly claimed depreciation in accordance with the provisions of the Income Tax Rules by application of the written down value method and this has been admitted by the tax auditors in their report under Section 44AB. It is accordingly contended that the petitioner is wrong in saying that the profit and loss account was prepared in accordance with the Companies Act. It is further stated in the counter-affidavit that the petitioner was required to provide depreciation under Section 205 of the Companies Act and since it failed to do so it had suppressed material facts and in these circumstances the initiation of proceedings to reopen the assessment after the expiry of 4 years from the end of the relevant assessment year was permissible and in accordance with law. As regards the contention of the petitioner that there is no allegation in the reasons recorded that the assessee failed to furnish true and full particulars, it is stated

in the counter affidavit that the petitioner had claimed substantial by higher depreciation in order to reduce the book profit and thus there was clear-cut understatement of income on account of non-furnishing and wrong furnishing of particulars of income and it was so stated in para 4 of the reasons recorded. It is further submitted on behalf of the revenue that depreciation was claimed for the entire year as admissible, but under the Companies Act depreciation could be allowed only on the actual period of use of machinery from the date of instillation. These facts according to the respondent have been noted in para 4 of the reasons recorded and a specific allegation was also made in the said paragraph that the petitioner did not furnish the correct particulars of its income.

10. In WP(C) 6310/2000, which relates to the assessment year 1990-91 in the case of Super Cassettes Industries Ltd., the original assessment was completed under Section 143(3) of the Act by order dated 31.3.1993. In the assessment order the assessing officer computed the taxable income under the normal provisions of the Act at ₹3,22,66,588/- and the book profit under Section 115J was computed at ₹94,40,711/- 30% thereof being ₹28,32,210/-. Since the taxable income computed under the normal provisions of the Act was higher, the assessment was made accordingly and demand was raised. On 10.3.2000, the assessing officer issued notice under Section 148 of the Act, which was served upon petitioner on 16.3.2000. On 10.4.2000, the petitioner objected to the notice under Section 148 by a letter and sought the reasons for reopening the assessment, simultaneously, filing a return of income in response to the notice under protest. It has been stated before us that no reasons have

been given to the petitioner so far. This Court on 7.11.2000, issued Rule and made the interim order absolute.

11. We may now take up the writ petitions filed by Tony Electronics. WP(C) 6320 relates to the assessment year 1989-90 for which a return was filed by the petitioner on 9.10.1990 declaring total income of ₹Nil. It may be mentioned here that the petitioner company was incorporated as a private limited company on 7.7.1981 and was converted into a deemed public limited company on 8.2.1989 and ultimately merged with Super Cassettes Industries Ltd. on 1.4.1989. In the assessment made under Section 143(3) of the Act on 27.3.1992, the Assessing Officer examined the return in detail and determined the total income at ₹Nil. On 3.3.2000 a notice under Section 148 of the Act was issued which was served upon the petitioner on 16.3.2000. On 10.4.2000, the petitioner wrote a letter to the assessing officer objecting to the reassessment proceedings; a return was also filed in response to the notice, under protest. By the letter the petitioner also sought the reasons recorded for issuing the notice. The reasons we are informed, have so far not been provided to the petitioner. On 7.11.2000 this Court issued Rule DB and made the interim order absolute.

12. In WP(C) 6308/2000, the assessment year involved is 1990-1991. For this year the petitioner filed a return of income on 31.12.1990 declaring book profit of ₹15,68,157/- under Section 115J of the Act. The assessment was completed under Section 143(3) by order dated 31.3.1993 in which the taxable income under the normal provisions of the Act was computed at ₹Nil and book profit was computed at ₹15,68,157/-. Since the book profit was higher than the taxable income computed under the normal provisions, the assessment was completed on the book profit and the demand was raised accordingly. The

assessment order was rectified under Section 154 of the Act by order dated 9.11.1993 in which the taxable income under the normal provisions of the Act was computed at ₹1,54,61,943/-. On 3.3.2000 the assessment was reopened by issue of a notice under Section 148 of the Act which was served on the petitioner on 16.3.2000. By letter dated 10.4.2000 the petitioner objected to the notice and also filed a return under protest. A request was also made for supply of the reasons recorded for reopening the assessment. A copy of the reasons recorded was given to the petitioner under cover of letter dated 3.11.2000. a perusal of the reasons shows that they are substantially similar to the reasons recorded for reopening the assessment of Super Cassettes Industries Ltd. in WP(C) 3406/2000. There is nothing on record to show that the petitioner filed any objections to the reasons recorded. On 7.11.2000, this Court issued Rule DB and made the interim order absolute.

13. In ***GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Ors.*** (2003) 259 ITR 19, the Supreme Court clarified that *"when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the notice is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the notice is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."* The judgment of the Supreme Court is dated 25.11.2002. The present writ petitions were filed in the year 2000. It is

only in respect of WP(C) Nos.3406/2000 and 6308/2000 that the petitioner has been given the reasons recorded for reopening the assessment. In respect of the other two writ petitions, the reasons recorded have not been furnished to the petitioner. Therefore, there is no question of the petitioner filing any objections to the same. In the two writ petitions in which the reasons have been provided to the petitioner, objections have been filed only in one namely, WP(C) 3406/2000; in respect of WP(C) 6308/2000, though reasons have been provided to the petitioner, it appears that no objections have been filed so far. We are of the view that the procedure envisaged by the Supreme Court in the judgment cited supra should be adopted and followed in the present writ petitions as the judgment is based on fairness and transparency in the action of the assessing authority in reopening the assessment. We therefore, issue the following directions : The assessing officer shall furnish the reasons recorded for reopening the assessment in WP(C) 6310/2000 and 6320/2000. This shall be done within three weeks from today. On receipt of the reasons recorded, the petitioner shall file its objections to the same within 15 days thereafter. In respect of WP(C) 6308/2010, the petitioner shall file its objections to the reasons for reopening the assessment within 15 days from today. All the objections filed by the petitioner in the four writ petitions shall be disposed of by the assessing officer on or before 31st January, 2013 by appropriate orders passed in writing and those orders shall be served on the petitioner within reasonable time thereafter. It will be open to the petitioner to approach this Court in appropriate proceedings, if necessary and if so advised, after receiving the orders passed by the assessing officer disposing of the objections.

14. The writ petitions are disposed of in the above terms with no order as to costs. We make it clear that we express no opinion on the merits.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

NOVEMBER 30, 2012
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