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

% *Judgment delivered on: 13.01.2025*

\+ **ITA 687/2019**

PR. COMMISSIONER OF INCOME TAX- 9 .....Appellant

Through: Mr. Indruj Singh Rai, SSC, Mr. Sanjeev Menon, JSC, Mr. Rahul Singh, JSC & Mr. Anmol Jagga, Advocates

versus

M/S TATA POWER DELHI DISTRIBUTION LTD.
(FORMERLY KNOWN AS M/S NORTH DELHI POWER LIMITED) .....Respondent

Through: Mr. Shashi M Kapila, Mr. Pravesh Sharma and Mr. Sushil Kumar, Advocates

CORAM
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The Revenue has preferred the present appeal under Section 260A of the Income Tax Act, 1961 [hereafter '***the Act***'] impugning an order dated 29.10.2018 [hereafter '***the impugned order***'] passed by the learned Income Tax Appellate Tribunal [hereafter '***the learned***

ITAT'], in ITA No. 4848/Del/2010, in respect of the assessment year (AY) 2006-07.

FACTUAL BACKGROUND

2. The respondent – M/s Tata Power Delhi Distribution Limited – [hereafter '***the assessee***'] is a joint venture between Tata Power Company Limited and the Government of NCT of Delhi, wherein Tata Power Company Limited, along with Tata Sons Limited, holds 51% of the shares, while the remaining 49% of the shares are held by the Government of NCT of Delhi. The assessee is engaged in the power generation and distribution of electricity in North and North West Delhi.

3. For the AY 2006-07, the assessee filed its return of income declaring a total income of ₹29,76,44,446/- under the normal provisions, and ₹162,35,14,954/- as book profits under Section 115JB of the Act. The return was processed under Section 143(1) of the Act on 04.12.2007, at the declared returned income. The return was selected for scrutiny, and a notice under Section 143(2) of the Act was issued to the assessee on 12.10.2007, which was duly served upon the assessee. Subsequently, further notices under Sections 143(2) and 142(1) of the Act, accompanied by detailed questionnaires, were issued on 01.02.2008, 31.07.2008, 04.11.2008 and 17.11.2008.

4. On 23.12.2008, the learned Assessing Officer [hereafter '***the AO***'] passed an order under Section 143(3) of the Act, assessing the

total income of the assessee at ₹121,30,35,243/- and computing the book profit under Section 115JB of the Act at ₹162,64,31,954/-. The AO's findings on the computation of book profit under Section 115JB of the Act were that the assessee had reduced the book profit by ₹21,01,025/- on account of dividend income exempt under Section 10(34) of the Act. However, no expenditure related to the exempt income was added back to the book profit as per the provisions of Explanation (f) to Section 115JB(2) of the Act. The AO estimated such expenditure at ₹29,17,000/- and added the same while computing the book profit, which was finally assessed at ₹162,35,14,954. The relevant findings of the AO are reproduced below:

> "6. **Computation of Book Profit u/s 115 JB**
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> Assessee company while computing the book profit has reduced the book profit by Rs. 21,01,025/- being the dividend income exempt u/s 10 (34) of the I.T. Act. No expenditure relatable to this exempt income were added back to the book profit as per the provisions of explanation (f) of section 115JB (2) of the I.T Act. As discussed above such expenditure are estimated at Rs. 29,17,000/- same would be added back while computing the book profit."

5. Aggrieved by the assessment order, the assessee filed an appeal before the learned Commissioner of Income Tax (Appeals)-XVII [hereafter '***the CIT(A)***'] on 02.02.2009. The CIT(A), by way of order dated 26.08.2010, granted partial relief to the assessee, but also enhanced the book profit by ₹27.52 crores. During the appellate proceedings, the CIT(A) noted that the assessee had debited ₹27.52 crores in its profit and loss account as a provision for doubtful debts.

This amount was required to be added back to the book profit under Clause (i) of Explanation 1 to Section 115JB of the Act, but the assessee had failed to do so. Consequently, a show cause notice under Section 251(2) of the Act was issued on 04.08.2010, proposing the enhancement of book profit by ₹27.52 crores. After considering the assessee's reply, the CIT(A) concluded that ₹27.52 crores on account of the provision for doubtful debts needed to be added to the taxable income for the purpose of Minimum Alternate Tax [hereafter '***MAT***']. As a result, the assessee's income under MAT was enhanced from ₹162.35 crores to ₹189.87 crores, leading to an additional tax liability of ₹2.32 crores, excluding interest, which was admitted by the assessee. The relevant findings of the CIT(A) are reproduced below:

> "6.2 I have carefully considered the submissions of the appellant. It is clear from the above that an amount of Rs. 27.52 crores on account of provision for doubtful debts requires to be added in taxable income for the purpose of MAT. Accordingly, the income of the appellant company under MAT is enhanced from Rs. 162.25 crores to 189.87 crores, which will result into additional tax liabilities of Rs.2.32 crores, excluding interest as admitted by the appellant. The AO is directed to issue revised notice of demand, after verification of tax calculation and applicable interest as per law."

6. Aggrieved by the order of the CIT(A), the assessee filed an appeal (ITA No. 4848/Del/2010) before the learned ITAT, challenging the enhancement of book profit under Section 115JB of the Act. The learned ITAT allowed the assessee's appeal and directed the deletion of the additions made to enhance the book profit. The learned ITAT

relied on the decision of the Kerala High Court in ***Kerala State Electricity Board v. Deputy Commissioner of Income-tax:*** *(2010) 329 ITR 91*, and held that the ratio of this decision applied to the present case. The learned ITAT observed that no exceptional circumstances had been brought to its notice to deviate from the ratio laid down in the said decision. The relevant extract of the impugned order is extracted hereunder:

> "34. Grounds No. 5 to 7 are in respect of the enhancement of profit under section 115 JB. Argument of the Ld. AR is that the assessee is a company engaged in the business of distribution of electricity and in view of the decision reported in Kerala State Electricity Board vs. DCIT (2010) 3 29 ITR 0091, the provisions under section 115 JB have no application to the assessee. There is no dispute as to the nature of business conducted by the assessee. Ld. DR relied upon the orders of the authorities below.
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> * * *
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> 36. Above decision is applicable to the facts of the case in hand on all fours. No circumstances are brought to our notice not to follow the ratio laid down in the above decision. We, therefore, while respectfully following the same hold that section 115 JB has no application to the facts of the case in hand and accordingly the additions made to enhance the book profits under section 115 JB are directed to be deleted."

7. Aggrieved by the decision of the learned ITAT, the Revenue has preferred the present appeal.

QUESTION OF LAW

8. The present appeal was admitted on the following Question of Law, for this Court's consideration:

> "Whether in the facts and circumstances of the case, and in law, the ITAT was justified in deleting the additions made on account of Book Profit under Section 115 JB of the Income-tax Act, 1961?"

SUBMISSIONS BEFORE THIS COURT

Submissions on Behalf of the Revenue

9. The learned counsel appearing for the Revenue contended that Section 115JB of the Act, a successor to Section 115JA, is a standalone provision aimed at bringing "zero tax companies" into the tax net. The objective of MAT, introduced through Section 115JB of the Act, is to ensure that companies with substantial book profits pay taxes despite availing tax concessions. It was argued that what was exempt under the erstwhile Section 115JA of the Act cannot be presumed to be exempt under the new regime unless expressly provided for. The learned counsel contended that the reliance placed on the Kerala High Court's decision in ***Kerala State Electricity Board v. Deputy Commissioner of Income-tax*** *(supra)* is fallacious, since that decision pertained to Section 115JA of the Act and the Court had relied on Central Board of Direct Taxes [hereafter '***CBDT***'] Circular No. 762, which specifically exempted electricity companies under the erstwhile regime. He however contended that the Kerala High Court failed to consider that Section 115JA of the Act was a precursor to Section 115JB and that Section 115JA was replaced with Section 115JB for the very reason that the efficacy of the erstwhile provision

had declined in view of "exclusion of various sectors from the operation of MAT and the credit system" as evident from the Explanatory Notes to Finance Act, 2000 which had inserted Section 115JB of the Act. It was also argued that the fact that power generation and distribution companies are not exempted was evident from the fact that it does not find mention in the exempted categories of companies, as evident from para 43.5 of the Explanatory Notes to Finance Act, 2000 which read as follows: "43.5 The export profits under sections 10A, 10B, 80HHC, 80HHE and 80HHF are kept out of the purview of this provision as these are being phased out. The new provisions also exempt companies registered under section 25 of the Companies Act."

10. Next, it was argued that the decision in ***Kerala State Electricity Board v. Deputy Commissioner of Income-tax*** *(supra)* is distinguishable as it involved a wholly government-owned board operating under the Electricity Supply Act, 1948, whereas the present assessee is a joint venture with 51% private shareholding, and therefore, the said decision would not be applicable to the facts of the present case. The learned counsel for the Revenue further contended that the principles laid down in said decision have been impliedly overruled by the Hon'ble Supreme Court in ***Andhra Pradesh Power Coordination Committee v. Lanco Kondapalli Power Ltd.:*** *(2016) 3 SCC 468*. In the said case, the Hon'ble Supreme Court noted that MAT, under Section 115JA of the Act, was not applicable to power

generating companies till 31.03.2001; however, MAT, under Section 115JB of the Act, was made applicable to all the targeted corporate entities, including power-generating companies, from 01.04.2001 onwards.

11. On behalf of the Revenue, it was further contended that Explanation 3, inserted by the Finance Act, 2012, is a clarificatory amendment which clarifies that the companies referred to in the second proviso to Section 129(1) of the Companies Act, 2013, namely "any company engaged in the generation of supply of electricity" has an option for any assessment year prior to 01.04.2012 to prepare its statement of profit and loss either in accordance with the Companies Act, 2013 or in accordance with provisions of any special act governing such company. However, this clarification does not grant exemption from MAT but instead outlines procedural flexibility.

12. It was argued that reliance placed on the Bombay High Court's decision in ***Commissioner of Income-tax-LTU v. Union Bank of India****: (2019) 13 ITR-OL 655* is also misplaced, as the findings therein are *ex-facie* contrary to the provisions of the Act and *per incuriam*. The Revenue has challenged this decision before the Hon'ble Supreme Court, where leave has been granted, which places the finality of this judgment in jeopardy. It was contended that Bombay High Court erred in not considering that proviso to Section 115JB(2) of the Act provides an assessee to prepare annual accounts, including profit and loss account, in accordance with the provisions of Section 210 of the

Companies Act, 1956; and in this regard, it is relevant to note that for the purpose of Section 210, the contents 'Balance Sheet' and 'Profit & Loss Account' are enumerated under Section 211 of the Companies Act, 1956, and the said Section 211 as well as the Accounting Standards (AS)-5 carves out an exception for the insurance/banking/electricity companies to prepare balance sheet as per the governing Act. Thus, the option to the assessee to prepare its profit and loss account as per the governing Act was always available under Section 115JB of the Act, and to further clarify this position of law and for the sake of removal of doubts, the insertion of Explanation 3 to Section 115JB of the Act was rightly done *vide* the Finance Act, 2012.

13. In light of the above submissions, it is prayed that the order of the learned ITAT to the aforesaid extent be set aside, and the additions made by the CIT(A) under Section 115JB of the Act, for the purpose of computing book profits, be restored.

Submissions on Behalf of the Assessee

14. On behalf of the assessee, it was submitted that Section 115JB of the Act creates a legal fiction regarding the expression "total income" as defined in Section 2(45) of the Act, and Section 115JB(2) mandates that where the tax payable on the "total income" computed under the normal provisions of the Act is less than a specified percentage of the "book profit" determined under the Companies Act, the specified percentage of the "book profit" becomes the total

income. It was contended that the preparation of the profit and loss account in accordance with Part II and III of Schedule VI of the Companies Act is mandatory under Section 115JB of the Act. However, the assessee, as a company engaged in the generation and distribution of electricity, is required by the Electricity Act, 2003 and the Electricity (Supply) Act, 1948, to prepare its accounts under these special statutes, and not under the Companies Act.

15. It is argued that the issue in this case – that is whether the MAT provisions under Section 115JB of the Act are applicable to the assessee for the period relevant to AY 2006-07, i.e., prior to the amendment introduced by the Finance Act, 2012 – was addressed by the Kerala High Court in ***Kerala State Electricity Board v. Deputy Commissioner of Income-tax*** *(supra)* and later by the Bombay High Court in ***Commissioner of Income-tax-LTU v. Union Bank of India*** *(supra)*. It is submitted that the Kerala High Court held that Section 115JB of the Act was inapplicable to electricity companies because the machinery provisions in Sub-section (2) are inoperable for such companies, and the same render the charging section unenforceable. It was argued that the Kerala High Court relied on the judgment of the Hon'ble Supreme Court in ***Commissioner of Income Tax v. B.C. Srinivasa Setty:*** *(1981) 128 ITR 294*, which held that a charging section and its machinery provisions constitute an integrated code, and the inoperability of the machinery provisions negates the applicability of the charging section. This principle was reaffirmed by the Hon'ble

Supreme Court in ***Commissioner of Income Tax v. Eli Lilly and Co. (India) P. Ltd:*** *(2009) 312 ITR 225*, which clarified that the failure of a computation provision implies the inapplicability of the charging section.

16. The assessee submitted that the Finance Act, 2012 introduced a substantive amendment to Section 115JB of the Act, granting electricity, banking, and insurance companies the option to prepare their profit and loss accounts either under their governing statutes or in accordance with the provisions of Part III Schedule VI to the Companies Act. Further, the Explanation (3) to sub-section (2) of Section 115JB of the Act, inserted by the Finance Act, 2012, states that in case of a company to which second proviso to section 129(1) of the Companies Act, 2013 is applicable, would have an option to prepare its statement of profit and loss either in accordance with the provisions of Part III Schedule VI to the Companies Act, or in accordance with the provisions of the Act governing such company. It was thus contended that a combined reading of second proviso to Section 129(1) of the Companies Act, Clause (b) of sub-section (2) of Section 115JB of the Act, and the Memorandum explaining the provisions made in the Finance Bill, 2012, makes it clear that prior to the said amendment, MAT provisions as contemplated under Section l l5JB of the Act were not applicable to electricity, banking and insurance companies, and would apply only prospectively i.e. with

effect from 01.04.2013. Therefore, it was prayed that the impugned order be upheld and the present appeal be dismissed.

ANALYSIS & FINDINGS

17. The primary issue for our determination is whether Section 115JB of the Act would be applicable to the assessee, who is engaged in the business of electricity generation and distribution, during the period relevant to AY 2006-07.

18. In this regard, the relevant extract of Section 115JB of the Act, as it stood at the relevant time, i.e. during AY 2006-07, is set out below:

> "**115JB**. Special provision for payment of tax by certain companies.—
>
> **(1)** Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the Income-tax, payable on 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, 2007 is less than ten per cent. of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of Income-tax at the rate of ten per cent.
>
> **(2)** 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) :
>
> Provided that while preparing the annual accounts including profit and loss account,
>
> (i) the accounting polices ;
>
> (ii) the accounting standards adopted for preparing such accounts including profit and loss account ;

(iii) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956) :

Provided further that where the company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under this Act,

(i) the accounting policies ;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account ;

(iii) the method and rates adopted for calculating the depreciation,

shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including profit and loss account for such financial year or part of such financial year falling within the relevant previous year…"

19. Plainly, Section 115JB of the Act creates a legal fiction regarding the 'total income'. It provides that if a company's income tax liability, calculated under the normal provisions of the Act, is less than 10% of its book profit for a given financial year, then the book profit will be treated as the company's total income, and the company will be required to pay income tax at the rate of 10% on this deemed total income.

20. Sub-section (2) of Section 115JB of the Act mandates as to how the companies must prepare their profit and loss account for the purpose of this section. It specifies two important things:

(i) *Firstly*, that the accounts should comply with the provisions of Parts II and III of Schedule VI of the Companies Act, 1956; *and*

(ii) *Secondly*, that the same accounting policies, standards, and methods for calculating depreciation used in preparing the accounts for the annual general meeting under Section 210 of the Companies Act, 1956 must also be used for the purpose of this section.

21. At this juncture, it would be relevant to note that in terms of Section 210 of the Companies Act, 1956, Board of Directors of every company, including the assessee, are required to lay before the company, its balance sheet as well as profit and loss account. However, it is an undisputed fact that as per Section 211 of the Companies Act, 1956, the electricity companies (such as the assessee) are required to prepare their balance sheet as well as the profit and loss accounts as per the provisions of the special statutes governing such companies, and not as per Schedule VI of the Companies Act, 1956. Section 211 of of the Companies Act, 1956, in this respect, reads as under:

> "**211. Form and Content of Balance Sheet and Profit and Loss Account**
>
> ***
>
> (2) Every profit and loss account of a company shall give a true and fair view of the profit or loss of the company for the

financial year and shall, subject as aforesaid, comply with the requirements of Part II of Schedule VI, so far as they are applicable thereto :

Provided that nothing contained in this sub-section shall apply to any insurance or banking company or any company engaged in the generation or supply of electricity, or to any other class of company for which a form of profit and loss account has been specified in or under the Act governing such class of company."

22. Thus, the accounts, laid down in the annual general meeting of an electricity company, would have been prepared in accordance with the special statutes, such as the Electricity Act, 2003 and the Electricity (Supply) Act, 1948. However, as noted above, sub-section (2) of Section 115JB of the Act clearly mandates that the accounts prepared must comply with Schedule VI of the Companies Act, 1956, and use the same accounting policies, standards, etc. as those adopted for preparing accounts for the annual general meeting under Section 210 of the Companies Act, 1956; *whereas* the electricity companies are not required to prepare their accounts in terms of Schedule VI of the Companies Act, 1956.

23. Therefore, in view of the aforesaid, it would *prima facie* appear that Section 115JB of the Act, as it stood during AY 2006-07, would become inapplicable to an electricity company.

24. This also becomes clear in light of the amended Section 115JB of the Act. The relevant portion of Section 115JB of the Act, as it read post amendment by Finance Act, 2012, is set out below:

"**115JB**. Special provision for payment of tax by certain companies.—

(1) Notwithstanding anything contained in any other provision of this Act, where, in the case of an assessee, being a company, the Income-tax, payable on 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, 2012, is less than (eighteen and one-half per cent.) of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of Income-tax at the rate of eighteen and one-half per cent.

(2) Every assessee,—

(a) being a company, other than a company referred to in clause (b), shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Part II of Schedule VI to the Companies Act, 1956 (1 of 1956); or

(b) being a company, to which the proviso to sub-section (2) of section 211 of the Companies Act, 1956 (1 of 1956) is applicable, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of the Act governing such company :

Provided that while preparing the annual accounts including profit and loss account,—

(i) the accounting policies ;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account ;

(iii) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956)"

25. Clearly, the amended sub-section (2) of Section 115JB of the Act created two different classes of companies.

(i) *Firstly*, those companies which are required to prepare their accounts as per Schedule VI to the Companies Act, 1956. Such companies, for the purpose of this section, would prepare their profit and loss account as per Schedule VI to the Companies Act, 1956 only.

(ii) *Secondly*, those companies which are not required to prepare their accounts as per Schedule VI to the Companies Act, 1956, in view of proviso to sub-section (2) Section 211 of the Act. Such companies, for the purpose of this section, would prepare their profit and loss account as per the provisions of the Acts governing such companies.

26. Therefore, the amended Section 115JB of the Act takes into account the anomaly discussed in preceding paragraphs, insofar as the applicability of Section 115JB of the Act to electricity companies, etc. is concerned, and aims to resolve the same by including the electricity companies, etc. within its ambit by way of sub-section 2(b). The intent of this amendment is also amplified in the Memorandum Explaining the Provisions made in the Finance Bill, 2012, in relation to MAT. The relevant extract of the Memorandum reads as under:

> " ***Minimum Alternate Tax (MAT)***
>
> I. Under the existing provisions of section 115JB of the Act, a company is liable to pay minimum alternate tax of eighteen and one-half per cent. of its book profit in case tax on its total income computed under the provisions of the Act is less than the minimum alternate tax liability. **Book profit for this purpose is computed by making certain adjustments to the**

profit disclosed in the profit and loss account prepared by the company in accordance with the Schedule VI of the Companies Act, 1956.

As per section 115JB, every company is required to prepare its accounts as per Schedule VI of the Companies Act, 1956. However, as per the provisions of the Companies Act, 1956, certain companies, e.g. insurance, banking or electricity company, are allowed to prepare their profit and loss account in accordance with the provisions specified in their regulatory Acts. In order to align the provisions of the Income-tax Act with the Companies Act, 1956, it is proposed to amend section 115JB to provide that the companies which are not required under section 211 of the Companies Act to prepare their profit and loss account in accordance with Schedule VI of the Companies Act, 1956, profit and loss account prepared in accordance with the provisions of their regulatory Acts shall be taken as a basis for computing the book profit under section 115JB.

II. It is noted that in certain cases, the amount standing in the revaluation reserve is taken directly to general reserve on disposal of a revalued asset. Thus, the gains attributable to revaluation of the asset is not subject to minimum alternate tax liability.

It is, therefore, proposed to amend section 115JB to provide that the book profit for the purpose of section 115JB shall be increased by the amount standing in the revaluation reserve relating to the revalued asset which has been retired or disposed, if the same is not credited to the profit and loss account.

III. It is also proposed to omit the reference of Part III of Schedule VI of the Companies Act, 1956 from section 115JB in view of omission of Part III in the revised Schedule VI under the Companies Act, 1956.

These amendments will take effect from April 1, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years."

(Emphasis supplied)

27. The Memorandum clarified that the amendment to Section 115JB of the Act was introduced to address inconsistencies between the Act and the Companies Act, 1956, particularly concerning electricity companies and similar entities. In this regard, the Memorandum, in clear and unambiguous terms, clarified that previously, Section 115JB of the Act required all the companies to prepare their profit and loss accounts as per Schedule VI of the Companies Act, 1956. However, certain companies, like electricity companies, were allowed to prepare their accounts according to their respective regulatory Acts. This created inconsistencies while applying MAT provisions. The new amendment allowed such companies to compute their book profits under Section 115JB of the Act using accounts prepared as per their regulatory Acts, thereby aligning the provisions of the Act with the Companies Act, 1956, and ensuring consistency in tax computation for these special categories of companies. However, the Memorandum also clarified that these amendments were prospective in nature and applicable from AY 2013-14 onwards.

28. We also note that the same issue was considered and decided by the Kerala High Court in ***Kerala State Electricity Board v. Deputy Commissioner of Income-tax*** *(supra)*, against the Revenue. The Court analysed the history of the provisions, including its precursors i.e. Section 115J and 115JA of the Act, and observed that Section 115J of the Act expressly excluded from its scope "a company engaged in the

business of generation or distribution of electricity". Thereafter, such express exclusion was missing in Section 115JA of the Act, which succeeded Section 115J; however, Circular No. 762, dated 18.02.1998, issued by the CBDT provided that the companies engaged in the business of generation and distribution of power were exempted from the levy of MAT. The Court held that the same could be inferred in respect of Section 115JB of the Act also, which was substantially similar to Section 115JA of the Act.

29. The Bombay High Court in ***Commissioner of Income-tax-LTU v. Union Bank of India*** *(supra)* also answered a similar question (though in context of banking companies) against the Revenue. It held that Section 115JB of the Act, prior to its amendment in 2012, cannot be made applicable to a banking company as the machinery provision provided in the sub-subsection (2) of Section 115JB of the Act was wholly unworkable and in-operable in the case of a banking company and, therefore, when the machinery provision fails, the charging section can have no applicability. It was observed that on one hand, in terms of Section 210 of the Companies Act, 1956, the bank would be under an obligation to lay before the Annual General Meeting its annual accounts including the profit and loss account, which would be prepared as per the Banking Regulation Act, 1949. On the other hand, sub-section (2) of Section 115JB of the Act requires preparation of the accounts in terms of the Companies Act, 1956, and proviso to sub-section (2) require maintaining the same parameters in relation to the

accounting policies, accounting standards and method and rate of depreciation, as adopted for the purpose of preparing the accounts, which would ultimately be laid before the Annual General Meeting. It was observed that a banking company, may either in terms of sub-section (2) of Section 115JB of the Act, prepare additional accounts as per Schedule VI of the Companies Act, 1956, or fulfil the requirements of the proviso to sub-section (2), but it cannot fulfill both the conditions. The Court further expressed that after the amendment in the year 2012, Section 115JB of the Act had been bifurcated into two parts, and the second part now allowed the companies, such as insurance or banking company or any company engaged in the generation or supply of electricity, to prepare their profit and loss account as per their respective regulatory Acts for the purpose of Section 115JB of the Act also. Thus, it was held that Section 115JB of the Act , as it stood prior to its amendment by virtue of Finance Act, 2012, would not be applicable to a banking company.

30. Further, the Bombay High Court in the above-noted case had also dealt with an argument of the Revenue that Explanation 3 to sub-section (2) of Section 115JB of the Act, inserted by Finance Act, 2012, was a clarificatory amendment, which clarified that companies such as banking, insurance or electricity companies, have an option for any AY prior to 01.04.2012 to prepare their profit and loss account either in accordance with the Companies Act, 1956 or in accordance with provisions of any special act governing such company. In this

regard, the Bombay High Court observed that *firstly*, in the original form, sub-section (2) of Section 115JB of the Act did not offer any option to a banking company, insurance company or electricity company to prepare its profit and loss account at its choice either in terms of its governing Act or as per terms of Section 115JB of the Act. *Secondly*, by virtue of this explanation, if an anomaly which has been noticed is sought to be removed, the same had not been achieved inasmuch as it was not a case of retrospective legislative amendment, and when the plain language of sub-section (2) of Section 115JB of the Act did not permit any ambiguity, one cannot say that the legislature by introducing a clarificatory or declaratory amendment can cure a defect without resorting to retrospective amendment, which in the present case has not been done, since the amendment was a prospective amendment.

31. Similarly, the Rajasthan High Court in ***Principal Commissioner of Income Tax v. Ajmer Vidyut Vitran Nigam Ltd:*** *(2022) 447 ITR 186* dealt with the issue, i.e. whether Section 115JB of the Act applied to an electricity company prior to its amendment in 2012. The Rajasthan High Court, in this regard, relied on the decisions of the Kerala High Court in ***Kerala State Electricity Board v. Deputy Commissioner of Income-tax*** *(supra)* and the Bombay High Court in ***Commissioner of Income-tax-LTU v. Union Bank of India*** *(supra)*, and taking note of the same, the Court dismissed the appeal of the Revenue.

32. It will be apposite to note that all the afore-mentioned three decisions in ***Kerala State Electricity Board v. Deputy Commissioner of Income-tax*** *(supra),* ***Commissioner of Income-tax-LTU v. Union Bank of India*** *(supra)* and ***Principal Commissioner of Income Tax v. Ajmer Vidyut Vitran Nigam Ltd*** *(supra)* were challenged by the Revenue before the Hon'ble Supreme Court by way of Special Leave Petitions. The main grounds of the present appeal, as well as the contentions raised in the written submissions filed on behalf of the Revenue, were that the decisions in aforesaid cases were bad in law, contrary to the provisions of the Act, and that SLPs against the same were pending before the Hon'ble Supreme Court.

33. However, concededly, during the pendency of the present appeal, the appeals preferred against the decisions in ***Kerala State Electricity Board v. Deputy Commissioner of Income-tax*** *(supra)* and ***Principal Commissioner of Income Tax v. Ajmer Vidyut Vitran Nigam Ltd*** *(supra)* i.e. Civil Appeal No. 151/2015 and SLP (C) No. 11435/2022 respectively, were decided *vide* a common order dated 16.08.2022 by a Three-judge Bench of the Hon'ble Supreme Court, wherein all the appeals preferred by the Revenue were dismissed and the decisions in ***Kerala State Electricity Board v. Deputy Commissioner of Income-tax*** *(supra)* and ***Principal Commissioner of Income Tax v. Ajmer Vidyut Vitran Nigam Ltd*** *(supra),* amongst certain other decisions, were upheld. The relevant extract of order dated 16.08.2022 of the Hon'ble Supreme Court is set out below:

"**CIVIL APPEAL NO. 151 OF 2015**

Heard Mr. Arijit Prasad, learned senior advocate in support of the Revenue and Mr. Ritin Rai, learned senior advocate for the assessee.

The judgment under appeal was rendered by the Division Bench of the Kerala High Court in I.T.A. No.1710 of 2009 dated 12.11.2010.

We have gone through the circumstances on record and considered the rival submissions. In our view, no interference is called for. We, therefore, dismiss this appeal.

No costs.

Pending applications, if any, also stand disposed of.

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SLP(C) No.11435/2022, 11393/2022 and 12257/2022

Since the issue involved in the instant matters stand covered by the dismissal of Civil Appeal No.151 of 2015, the instant matters are also dismissed.

Pending applications, if any, also stand disposed of."

34. Thus, the primary argument of the Revenue that the decisions of Kerala High Court, Bombay High Court and Rajasthan High Court are contrary to law and fails to appreciate the statutory framework, etc. are now unmerited, in view of the decision of the Hon'ble Supreme Court by virtue of which the judgments delivered by the Kerala High Court and Rajasthan High Court on the same issue, in favour of electricity companies and against the Revenue, have been upheld and affirmed.

35. Insofar as the reliance placed by the Revenue on decision of the Hon'ble Supreme Court in ***Andhra Pradesh Power Coordination Committee v. Lanco Kondapalli Power Ltd.*** *(supra)* is concerned, it

shall suffice to note that the said decision was delivered by a Bench of Two-judges whereas the order dated 16.08.2022 passed in Civil Appeal No. 151/2015 was delivered by a Bench of Three-judges of the Hon'ble Supreme Court.

36. Therefore, in view of the aforesaid, the question of law as framed is answered in favour of the assessee and against the Revenue.

37. In view thereof, we are of the opinion that the order of the learned ITAT does not suffer from any infirmity or error and, is, therefore upheld.

38. The appeal is accordingly dismissed.

SWARANA KANTA SHARMA, J

VIBHU BAKHRU, ACJ

JANUARY 13, 2025/*at*