

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

DECIDED ON: 24.08.2012

+ **ITA Nos. 324/2012**

CIT Appellant
Through : Mr. Rajiv Rajpal, Advocate

versus

BHUSHAN STEEL LTD. Respondent
Through: Mr. Ajay Vohra with Ms. Kavita Jha &
Mr.Somnath Shukla, Advocates.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

%

1. This appeal impugns the order dated 3.7.2010 passed by the Income Tax Appellate Tribunal (Tribunal, in short) in ITA No. 706/Del/2010 for the assessment year 2007-08 whereby the Tribunal had partially allowed the assessee's appeal. The short question that arises herein is regarding treatment of FBT (Fringe Benefit Tax) while computing "book profit" in terms of Explanation 1 to Section 115JB of the Income Tax Act, 1961 (the Act, in short).

2. The relevant facts are that during the assessment proceedings, the Assessing Officer (AO) noticed that the assessee had reduced the

net profit for the relevant previous year (2007-08) by an amount of ₹.1,17,68,617/- on account of Provision for Fringe Benefit Tax. The AO by order dated 18.3.09 added back this amount holding that such deduction is not permissible under Explanation 1 to Section 115JB of the Act. In first appeal, the CIT(A) vide order dated 04.01.2010 held as follows on this issue:

“6.3 Since the item Fringe Benefit is not included in the above items [Explanation 2 to section 115JB], the provision in respect of the same has to be reduced from the Book profit for the purposes of calculating MAT liability and the Ld. AO’s action in this connection is uncalled for and deserves to be negated.”

3. In second appeal, relying upon another ITAT Delhi Bench decision in *ITO v. Vintage Distillers Ltd.* (2010) 130 TTJ 79 (Del), the Tribunal by order dated 22.09.2011 decided the issue in favour of the assessee.

4. During the appeal, learned counsel for the revenue assailed the Tribunal’s decision on this issue on the ground that FBT is not a permissible deduction under Section 115JB. Reliance was placed on Explanation 1 to section 115JB to contend that none of the items which are to be reduced from the net profit for computing “book profit” for the purposes of the section included FBT.

5. Learned counsel for the assessee, on the other hand, relied on the definition of “tax” in Section 2(43) and contrasted it with the term income, under the Act to say that it is only tax on income

(defined or deemed to arise by operation of law) which has to be added back.

6. The provisions of the Act relevant for deciding the issue at hand are reproduced as under:

“Section 2(43): “tax” in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under section 115WA.

Section 115JB as it existed during the relevant previous year (2007-08):

115JB. (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) ****

Explanation 1.—For the purposes of this section, “book profit” means the net profit as shown in the profit and loss

account for the relevant previous year prepared under sub-section (2), as increased by—

- (a) the amount of income-tax paid or payable, and the provision therefor; or*
- (b) the amounts carried to any reserves, by whatever name called, other than a reserve specified under section 33AC; or*
- (c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or*
- (d) the amount by way of provision for losses of subsidiary companies; or*
- (e) the amount or amounts of dividends paid or proposed ; or*
- (f) the amount or amounts of expenditure relatable to any income to which section 10 (other than the provisions contained in clause (38) thereof) or 73[***] section 11 or section 12 apply; or*
- (g) the amount of depreciation,*
- (h) the amount of deferred tax and the provision therefor,*

if any amount referred to in clauses (a) to (h) is debited to the profit and loss account, and as reduced by—

- (i) the amount withdrawn from any reserve or provision (excluding a reserve created before the 1st day of April, 1997 otherwise than by way of a debit to the profit and loss account), if any such amount is credited to the profit and loss account:*

Provided *that where this section is applicable to an assessee in any previous year, the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or*

provisions (out of which the said amount was withdrawn) under this Explanation or Explanation below the second proviso to section 115JA, as the case may be; or

(ii) the amount of income to which any of the provisions of section 10 (other than the provisions contained in clause (38) thereof)] or ⁷⁸[section 10A or section 10B or section 11 or section 12 apply, if any such amount is credited to the profit and loss account; or

(iia) the amount of depreciation debited to the profit and loss account (excluding the depreciation on account of revaluation of assets); or

(iib) the amount withdrawn from revaluation reserve and credited to the profit and loss account, to the extent it does not exceed the amount of depreciation on account of revaluation of assets referred to in clause (iia); or

(iii) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.

Explanation.—For the purposes of this clause,—

(a) the loss shall not include depreciation;

(b) the provisions of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation is nil; or

(iv) the amount of profits eligible for deduction under section 80HHC, computed under clause (a) or clause (b) or clause (c) of sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in that section; or

(v) the amount of profits eligible for deduction under section 80HHE computed under sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in that section; or

(vi) the amount of profits eligible for deduction under section 80HHF computed under sub-section (3) of that section, and subject to the conditions specified in that section; or

(vii) the amount of profits of sick industrial company for the assessment year commencing on and from the

assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17₈₁ of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation.—For the purposes of this clause, “net worth” shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986); or
(viii) the amount of deferred tax, if any such amount is credited to the profit and loss account.

Explanation 2.— For the purposes of clause (a) of Explanation 1, the amount of income-tax shall include—
(i) any tax on distributed profits under section 115-O or on distributed income under section 115R;
(ii) any interest charged under this Act;
(iii) surcharge, if any, as levied by the Central Acts from time to time;
(iv) Education Cess on income-tax, if any, as levied by the Central Acts from time to time; and
(v) Secondary and Higher Education Cess on income-tax, if any, as levied by the Central Acts from time to time.

CHAPTER XIIIH INCOME-TAX ON FRINGE BENEFITS

B.—Basis of charge

115WA. Charge of fringe benefit tax.

(1) In addition to the income-tax charged under this Act, there shall be charged for every assessment year commencing on or after the 1st day of April, 2006, additional income-tax (in this Act referred to as fringe benefit tax) in respect of the fringe benefits provided or deemed to have been provided by an employer to his employees during the previous year at the rate of thirty per cent on the value of such fringe benefits.

(2) Notwithstanding that no income-tax is payable by an employer on his total income computed in accordance with the provisions of this Act, the tax on fringe benefits shall be payable by such employer.

Section 40. Amounts not deductible.

Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head “Profits and gains of business or profession”,—

(a) in the case of any assessee—

(ic) any sum paid on account of fringe benefit tax under Chapter XIIIH”

Analysis

7. The basis for the AO’s action of disallowing deduction was that deduction on account of Provision for Fringe Benefit is not permissible under Explanation 1 to Section 115JB. The CIT(A) reasoned that FBT is not included in Explanation 2 to Section 115JB to hold that provision in respect of FBT has to be reduced from the book profit for the purposes of calculating MAT (maximum alternate tax) liability. The Commissioner’s order on this point, upon a plain reading, appears to be in favour of the assessee; however, since ultimate relief was not given to the assessee who went in appeal to the Tribunal on this issue. The Tribunal’s reasoning consists of reliance it placed on the judgment in the *Vintage Distillers’* case (supra). The relevant excerpts from the judgment are reproduced hereunder:

“10... [W]e find that as per Clause (a) of the Explanation, provision for income-tax has to be added back if it was debited to the P&L a/c. Now, the question is whether the term income-tax includes FBT also.

11. From the definition of the term "tax", we find that the term "tax" is a wider term than the term "income-tax". The term "tax" includes "income-tax" as well as "FBT". By the Finance Act, 2005 w.e.f. 1st April, 2006, there is an amendment in Section 2(43) and in the definition of "tax", in addition to "income-tax" and "super tax" chargeable under the provisions of IT Act, 1961 "FBT" was also added payable under Section 115WA of the IT Act, 1961. This definition of the term "tax" proves beyond doubt that the term "tax" includes both "income-tax" as well as "FBT" and hence the term "income-tax" cannot include the term "FBT". When there was amendment made in Section 2(43) by the Finance Act, 2005 w.e.f. 1st April, 2006, no amendment was made in Clause (a) of Explanation to Section 115JB by either including the term "FBT" in addition to the term "income-tax" or by substituting the words "income-tax" by the term "tax" and thereby bringing "FBT" also within the purview of Clause (a) of Explanation to Section 115JB. The above discussion clearly proves that as per Clause (a) of Explanation to Section 115JB, payment or provision for "FBT" is not required to be added back for the purpose of computing book profit under Section 115JB of the IT Act, 1961. This is also important to note that there was controversy as to whether provision for "deferred income-tax" is required to be added back for computing book profit under Section 115JB. As per retrospective amendment w.e.f. 1st April, 2001 by the Finance Act, 2008, a new Clause (h) was added in Expln. 1 to Section 115JB to the effect that if provision for deferred tax is debited to the P&L a/c, the same is to be added back for computing book profit. At this time also, there is no such provision to add back provision for "FBT". It is also

worth noting that as per Section 40(a)(ic), it was provided that FBT is not allowable as deduction for computing taxable income. Hence it is seen that this is an expenditure for the assessee company, which is specifically disallowed as per Section 40(a)(ic) but there is no such provision for adding back the same in Explanation to Section 115JB. Hence, we do not find any reason to add back "FBT" for computing book profit under Section 115JB. Board's circular relied upon and followed by the learned CIT(A) is in line with this decision of us without taking any help from Board circular.

12... [W]e have seen that in the present case, the provisions of Expln. 1 to Section 115JB are clear and as per these provisions, payment or provision for "FBT" is not required to be added back for the purpose of computing book profit under Section 115JB of the Act because we have seen that the term used in this clause of Explanation is "income-tax", which does not include "FBT" and in spite of this fact that there is a term "tax" already on the statute book, which includes "FBT" also, the legislature has not used that term and has used the term "income-tax" in Explanation to Section 115JB."

8. This Court agrees with the reasoning employed and the conclusion reached in *Vintage Distillers'* case (supra). Section 2(43) defines tax as income tax chargeable under the Act, as well as FBT payable under section 115WA. Even though this definition of "tax" was amended after the introduction of the chapter on FBT, no corresponding amendment was made in respect of Explanation 1(a) of section 115JB. It is thus clear that for the purposes of Explanation 1(a) to section 115JB, "income tax" does not include FBT. FBT, therefore, need not be added back to net profit for computing book profit.

Crucially Section 115 WA enacts that FBT is a tax “in addition” to income tax.

9. In *Vintage Distillers’s* case (supra), the AO had, to compute book profit for the purposes of section 115JB, added an amount (provision for taxes) which included the provision for FBT. The assessee claimed this as a deduction on the ground that FBT was not included in “income tax” for the purposes of Explanation 1(a) to section 115JB. Learned CIT(A), and the Tribunal, both had accepted the assessee’s contention, and allowed the deduction of the amount for provision of FBT (or deleted the addition of the amount to net profit).

10. The question is accordingly answered in favour of the assessee on the ground that the AO had wrongly added back FBT to net profit, when the same is an allowable deduction as FBT does not fall under the expression “income tax”, under Explanation 1 to section 115JB (2). Consequently the Revenue’s contentions fail and its appeal is dismissed.

(S.RAVINDRA BHAT)

JUDGE

(R.V. EASWAR)

JUDGE

24th August, 2012