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

ITA No. 1366/2010

Reserved on: 22nd October, 2013
Date of decision: 9th December, 2013

(Assessment Year 2000-01)

THE COMMISSIONER OF INCOME TAX (CENTRAL-II) ..... Appellant

Through Mr. Rohit Madan, Advocate.

versus

FEDERAL-MOGUL GOETZE (INDIA) LIMITED ..... Respondent

Through Mr. S. Ganesh, Sr. Advocate with Ms. Geetanjali Mohan and Ms. Mansi Gautam, Advocates.

\+ **INCOME TAX APPEAL No. 1979/2010**

(Assessment Year 2001-02)

THE COMMISSIONER OF INCOME TAX (CENTRAL-II) ..... Appellant

Through Mr. Rohit Madan, Advocate.

versus

FEDERAL MOGUL GOETZE (INDIA) LIMITED .....Respondent

Through Mr. S. Ganesh, Sr. Advocate with Ms. Geetanjali Mohan and Ms. Mansi Gautam, Advocates.

ITA No. 2106/2010

(Assessment Year 2001-02)

THE COMMISSIONER OF INCOME TAX (CENTRAL-II) ..... Appellant

Through Mr. Rohit Madan, Advocate.

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By:AMULYA

versus

MOGUL GOETZE (INDIA) LIMITED ..... Respondent
Through Mr. S. Ganesh, Sr. Advocate with Ms. Geetanjali Mohan and Ms. Mansi Gautam, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.:

For detailed order see ITA 1179/2010, ***The Commissioner of Income Tax (Central-II) Vs. Goetze (India) Limited*** pronounced today.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

DECEMBER 9th, 2013
NA

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **INCOME TAX APPEAL No. 1179/2010**

Reserved on: 22nd October, 2013
Date of decision: 9th December, 2013

(Assessment Year 2000-01)

THE COMMISSIONER OF INCOME TAX (CENTRAL-II) ..... Appellant
Through Mr. Rohit Madan, Advocate.

versus

GOETZE (INDIA) LIMITED ..... Respondent
Through Mr. S. Ganesh, Sr. Advocate with Ms. Geetanjali Mohan and Ms. Mansi Gautam, Advocates.

ITA No. 1366/2010
(Assessment Year 2000-01)

THE COMMISSIONER OF INCOME TAX (CENTRAL-II) ..... Appellant
Through Mr. Rohit Madan. Advocate.

versus

FEDERAL-MOGUL GOETZE (INDIA) LIMITED ..... Respondent
Through Mr. S. Ganesh, Sr. Advocate with Ms. Geetanjali Mohan and Ms. Mansi Gautam, Advocates.

INCOME TAX APPEAL No. 1979/2010

(Assessment Year 2001-02)

THE COMMISSIONER OF INCOME TAX (CENTRAL-II) ..... Appellant
Through Mr. Rohit Madan, Advocate.

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versus

FEDERAL MOGUL GOETZE (INDIA) LIMITED .....Respondent
Through Mr. S. Ganesh, Sr. Advocate with Ms. Geetanjali Mohan and Ms. Mansi Gautam, Advocates.

ITA No. 2106/2010
(Assessment Year 2001-02)

THE COMMISSIONER OF INCOME TAX (CENTRAL-II) ..... Appellant
Through Mr. Rohit Madan, Advocate.

versus

MOGUL GOETZE (INDIA) LIMITED ..... Respondent
Through Mr. S. Ganesh, Sr. Advocate with Ms. Geetanjali Mohan and Ms. Mansi Gautam, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.:

ITA Nos. 1179/2010 and 1366/2010

These two appeals by the Revenue under Section 260A of the Income Tax Act, 1961 (Act, for short) relate to Assessment Year 2000-01. We note that the name of the assessee- Goetze (India) Limited underwent a name change and is now known as Federal-Mogul Goetze (India) Limited. In ITA Nos. 1179/2010 and 1366/2010 by order dated 16th May, 2012, the following substantial question of law was framed:-

> "Whether the Income Tax Appellate Tribunal was right in setting aside the order passed by the

Commissioner of Income Tax under Section 263 of the Income Tax Act, 1961?"

2. The respondent-assessee for the assessment year 2000-01 had filed return of income on 31st November, 2000 declaring loss of Rs.3,05,26,654/- under normal provisions and positive book profit of Rs.2,86,09,379/- under Section 115JA of the Act. This return was subsequently revised on 28th March, 2002 and the positive book profit declared under Section 115JA was reduced to Rs.1,92,73,285/-. By assessment order dated 28th February, 2003, income declared under Section 115JA was accepted but some additions were made on income computed under the normal provisions and it was enhanced to Rs.2,45,57,950/-.

3. Commissioner of Income Tax, thereafter passed an order under Section 263 of the Act observing that income computed under Section 115JA by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue on two accounts; (a) the Assessing officer had wrongly allowed deduction of Rs.1.53 crores made in the revised return and excluded this figure from the book profits; (b) expenditure of Rs.183.63 lacs was incurred for earning of exempt dividend income under Section 14A of the Act but this expenditure was not disallowed though the respondent-assessee had earned dividend income of Rs.157.85 lacs, which was exempt under Section 10(33) of the Act.

4. Consequently, the Assessing Officer vide order dated 5th January, 2005 passed an order giving effect to the order passed by the Commissioner under Section 263 of the Act. The respondent-assessee preferred an appeal before the Commissioner of Income tax (Appeals) against the said order but the same was rejected on the two issues in question vide order dated 29th November, 2006 read with order dated 23rd June, 2008 under Section 154 of the Act.

5. The respondent-assessee preferred further appeal before the tribunal being ITA No. 409/Del/2007 and also preferred an appeal against the order of Commissioner of Income Tax under Section 263, which was registered as ITA No. 208/Del/2005. The said appeals have been allowed, with the order under section 263 being quashed/set aside.

6. The first question raised is whether the order under Section 263 of the Act is justified and in accordance with law. Section 263 has been elucidated and explained in ***Commissioner of Income Tax versus Nagesh Knitwears Private Limited***, (2012) 345 ITR 135 (Delhi). In the said decision, reference was made to ***Malabar Industrial Company Limited versus CIT***, (2000) 243 ITR 83 (SC) and decisions of Delhi High Court in ***Nabha Investments Private Limited versus Union of India***, (2000) 246 ITR 41 (Delhi) and ***ITO versus DG Housing Projects Limited***, (2012) 343 ITR 329 (Delhi). It has been observed in

Nagesh Knitwears Private Limited (Supra):-

> "10. Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. Section 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression 'prejudicial to the interest of the Revenue' is of wide import and is not confined to merely loss of tax. The term 'erroneous' means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.
>
> 11. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word 'erroneous' includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.
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> 12. Delhi High Court in *Gee Vee Enterprises* v. *Additional Commission of Income-Tax, Delhi-I*, (1975) 99 ITR 375, has observed as under:-

"The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

7. Reference was also made to decisions of the Supreme Court in ***Rampyari Devi Saraogi versus CIT***, (1968) 67 ITR 84 (SC) and ***Tara Devi Aggarwal (Smt) versus CIT***, (1973) 88 ITR 323 (SC) wherein it has been observed that where the Assessing Officer had accepted a particular contention or issue without inquiry whatsoever, the order was erroneous and prejudicial to the interest of Revenue. These two decisions were explained in the case of ***DG Housing Project Limited***

(supra) in the following words:-

> "These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return.
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> 14. The aforesaid observations have to be understood in the factual background and matrix involved in the said two cases before the Supreme Court. In the said cases, the Assessing Officer had not conducted any enquiry or examined evidence whatsoever. There was total absence of enquiry or verification. These cases have to be distinguished from other cases (i) where there is enquiry but the findings are incorrect/erroneous; and (ii) where there is failure to make proper or full verification or enquiry."

8. In ***Nagesh Knitwears Private Ltd.*** (supra), reference was made to ***CIT Vs. Sunbeam Auto Ltd.*** (2011) 332 ITR 167, with the following quote from the later decision:-

> "15. In the case of *CIT v. Sunbeam Auto Ltd* (2011) 332 ITR 167 (Delhi), the Delhi High Court was considering the aspect, when there is no proper or full verification and it was held as under (page 179)
>
> "We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income-tax

under section 263 of the Income-tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the Assessing Officer did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as revenue expenditure. However, that by itself would not be indicative of the fact that the Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under section 263 of the Act, merely because he has a different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In Gabriel India Ltd. [1993] 203 ITR 108 (Bom), law on this aspect was discussed in the following manner (page 113):

.... From a rending of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is 'erroneous in so far as it is prejudicial to the interests of the Revenue'. It is not an arbitrary or unchartered power, it can be

exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. (See *Parashuram Pottery Works Co. Ltd.* v. *ITO* [1977] 106 ITR 1 (SC) at page 10) ... From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself.

> The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be formed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion ... There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed ... "

9. Thereafter, it was observed and elucidated in ***Nagesh Knitwears Private Limited*** (Supra), when and how power under Section 263 can be exercised where there was no proper or full verification and when the twin pre-conditions are satisfied:-

> "Thus, in cases of wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under Section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. CIT cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate

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enquiry but not lack of enquiry, again the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the CIT and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in Law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record *per se* justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under Section 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

This distinction must be kept in mind by the CIT while exercising jurisdiction under Section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interest of Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is

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erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the CIT hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous. Therefore CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the CIT [see *CIT* v. *Shree Manjunathesware Packing Products*, 231 ITR 53 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

It is in this context that the Supreme Court in *Malabar Industrial Co. Ltd.* v. *Commissioner of Income Tax*, (2000) 243 ITR 83 (SC), had observed that the phrase 'prejudicial to the interest of Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of Revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of Revenue. Thus, when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to Revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the

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> Assessing Officer is unsustainable in law. In such matters, the CIT must give a finding that the view taken by the Assessing Officer is unsustainable in law and, therefore, the order is erroneous. He must also show that prejudice is caused to the interest of the Revenue."

10. In the facts of the present case, as we examine the factual position, the Commissioner in her order under Section 263 has recorded specific findings as to why and for what reason she felt that the order passed by the Assessing Officer on two accounts was erroneous and prejudicial to the interest of Revenue. For the reasons set out in the order, which we need not at this stage elaborate as this is a question of merits, we reject the contention of the respondent-assessee and also the findings and reasoning of the tribunal that the Commissioner could not have invoked power and jurisdiction under Section 263 of the Act, because the Assessing Officer had taken a probable view, which may be debatable and not acceptable to the Revenue. When an Assessing Officer takes a view but the said view is not correct, erroneous as per the findings recorded by the Commissioner, along with the finding that the order passed by the Assessing Officer was prejudicial to the interest of the Revenue, then the order of the Commissioner cannot be set aside on the ground that the two views were possible or probable. In such cases, the order under Section 263 of the Act can be set aside if the findings accorded

by the Commissioner taking the particular view, whether on facts or in law, is wrong or incorrect or the order of the Assessing Officer was not prejudicial to the interest of the Revenue. The first aspect is essentially a question of merits and not a question relating to whether or not two views were possible. Commissioner can examine the issue on merits even when the same issue was examined by the assessing officer. Principles of change of opinion do not apply. If an order of the assessing officer is held to be erroneous and prejudicial to the interest of the revenue, it can be revised. The contention of the assessee and the reasoning of the tribunal in this regard is clearly fallacious as Revenue does not have any right to appeal against the order of the Assessing Officer. It is in these circumstances that power of revision has been conferred on the Commissioner under Section 263 of the Act to correct erroneous orders which are also prejudicial to the interest of Revenue. Observations of the Supreme Court in the case of ***Malabar Industrial Company Limited*** (supra) have to be understood in the context in which they were made. An order will not be erroneous, if the Commissioner does not decide whether the order of the assessing officer is erroneous but observes that two views are possible and yet remits the issue for fresh decision by the Assessing Officer. However, it would be incorrect to state as a broad proposition that an order of the Assessing officer cannot be erroneous, if the Assessing Officer has

taken one of the two views possible. In such cases the order of the assessing officer is erroneous provided the Commissioner holds and is able to demonstrate that the view taken by the Assessing Officer was not plausible, being legally unsustainable and incorrect. But the said finding must be recorded. This would satisfy the statutory requirement that the order passed and made subject matter of revision was erroneous, subject to the second condition that the order under review should also be prejudicial to the interest of the Revenue.

11. This brings us to the question of computation under Section 115JA of the Act and the order passed by the Commissioner on merits directing that Rs.1.53 crores should be added to the book profits on account of transfer from the revaluation reserve. The question is whether the Commissioner was right in holding that the order of the assessing officer on the said aspect was erroneous on merit? The following facts may be noticed:

(i) Respondent-assessee had passed entries in the books of accounts on 30th June, 1986 debiting Rs.40.84 crores to the asset revaluation account and crediting the same to capital reserve. This entry was not routed through the profit and loss account. Thus, the profit and loss account did not reflect this entry.

(ii) The respondent-assessee had claimed depreciation on the enhanced value of the assets, which stood enhanced w.e.f. 30th June,

1986 by Rs.40.84 crores.

(iii) In the year in question, Rs.1.53 crores was withdrawn from this reserve and was credited to the depreciation account. Thus reducing the enhanced value of the assets and increasing the book profits.

(iv) As per the annual report and audit report filed with the Registrar of Companies by the respondent-assessee, Rs.1.53 crores was credited to the profit and loss account and this enhanced the profits by this figure. The book profits calculated and audited in accordance with the provisions of Companies Act included this amount of Rs.1.53 crores.

(v) In the return filed on 30th November, 2000, Rs.1.53 crores was included in the computation sheet declaring the book profits as per Section 115JA of the Act.

(vi) In the revised return filed on 28th March, 2002, book profits were recalculated for the purpose of the income tax return, and not for the purpose of the return or statements filed before Registrar of Companies, by reducing this amount of Rs.1.53 crores from the book profits on which tax under section 115JA was payable.

12. Before the Commissioner, the respondent-assessee had submitted that the reserve was created prior to 1st day of April, 1997 and, therefore, withdrawal from the reserve was required to be reduced from the profit and loss account in terms of clause (i) of proviso of Explanation to Section 115JA. The said Explanation was amended by

Finance Act, 2000 with effect from 1st April, 2001 to exclude reserves created on or after 1st day of April, 1997 but ending before the 1st day of April, 2001, otherwise than by debit to the profit and loss account. Reliance was placed upon the decision of the tribunal in the case of ***SRF Limited versus ACIT***, reported in (1993) 47 ITD 504.

13. The Commissioner rejected the said contentions observing that clause (i) was applicable only when the amounts were withdrawn from any reserve which had been credited to profit and loss account. Once sub-clause (i) was not applicable, book profits calculated in accordance with the provisions of the Companies Act cannot be disturbed or recalculated in terms of the judgment of the Supreme Court in ***Apollo Tyres Limited versus Commissioner of Income Tax,*** (2002) 255 ITR 273 (SC). It was observed that the respondent had claimed depreciation on enhanced value and as per accounting standards, withdrawal from the capital reserve was to be debited to the depreciation account and credited to the profit and loss account. Withdrawals from the reserve were required to be credited to profit and loss account, as at the time of creation of reserve it was not routed through the profit and loss account. Judgment of the tribunal in the case of ***SRF Limited*** (supra) was not applicable as it was not in consonance with the law declared by the Supreme Court in ***Apollo Tyres Limited*** (supra).

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14. Tribunal in the impugned order on merits did not agree with the Commissioner and has observed that clause (i) permits reduction of amount withdrawn from any reserve if such amount was credited to profit and loss account. The proviso, which incorporates an exception, was inapplicable as the provision/reserve was not created during the period 1st April, 1997 till 30th March, 2001. Thus, book adjustment for these years was permissible and not barred under the proviso.

15. In order to appreciate the controversy on merits, we would like to reproduce the relevant portion of Section 115JA, which reads as under:-

> "**115JA. Deemed income relating to certain companies.**--(1) Notwithstanding anything contained in any other provisions of this Act, where in the case of an assessee, being a company, 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, 1997 2but before the 1st day of April, 2001 (hereafter in this section referred to as the relevant previous year) is less than thirty per cent. of its book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent. of such book profit.
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> (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);

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Provided that while preparing profit and loss account, the depreciation shall be calculated on the same method and rates which have been adopted for calculating the depreciation for the purpose of preparing the 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):

Provided further that where a company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under the Act, the method and rates for calculation of depreciation shall correspond to the method and rates which have been adopted for calculating the depreciation for such financial year or part of such financial year falling within the relevant previous year.

Explanation.--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; 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 any of the provisions of Chapter III applies;

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

(i) the amount withdrawn from any reserves or provisions 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 (including the relevant 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, but ending before the 1st day of April, 2001 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

(ii) the amount of income to which any of the provisions of Chapter III applies, if any such amount is credited to the profit and loss account; or

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

16. Sub-section (1) begins with a non-obstante expression, which gives overriding effect to the provisions of Section 115JA. Sub-Section 2 states that the assessee being a company shall prepare profit and loss accounts for the previous year in accordance with the provisions of Parts II and III of Schedule VI of the Companies Act,

1956. First and the second proviso to Section 115JA need not be examined as they are not relevant. Explanation in the first part refers to increase of the book profits by the amounts specified in sub-paras (a) to (g). Thereafter, the Explanation states that, it shall be reduced under clauses (i) to (iii). Clause (i) states that the book profit shall be reduced by the amount withdrawn from the reserve or provision if any such amount was credited to the profit and loss account. The proviso to the said clause states that such reduction shall not be made if the amount was withdrawn from the reserves or provisions during the period 1st April, 1997 and 31st March, 2001, unless the book profit of such year was increased by the reserve or provision out of which the said amount was withdrawn. The core dispute and issue relates to clause (i) and the proviso appended to it.

17. The contention of the respondent-assessee is simple that the amount withdrawn from the reserve or provision must be reduced once the said amount was credited to the profit and loss account. It is stated that Rs.1.53 crores was withdrawn from the reserve and credited to the profit and loss account and, therefore, this reduction is mandated and required and we need not go into the question whether such reduction is justified and equitable or even the reason/purpose behind the provision. As the language of the statue is clear, the proviso is not applicable as the reserve was not created during the period 1st April,

1997 and 31st March, 2001 but was created earlier on 30th June, 1986.

18. The said contention though attractive and appealing has been specifically rejected by this Court in ***CIT versus SRF Limited***, ITR No. 164/1995 decided on 4th August, 2011. We note that the High Court reversed the decision of the tribunal in the case of ***SRF Limited*** (supra) on the said aspect. In the impugned order in the present case, tribunal followed their decision in the case of SRF Limited. The reasoning given by the Division Bench in the case of SRF Limited, which dealt with Sections 115J and 115JB is as under:-

> "20. As would be evident on a bare perusal of both section 115JB and Section 115J the explanation defines as to the manner in which book profit for the purposes of levy of MAT is to be calculated. Broadly, in both Sections, book profit means net profit as shown in the profit and loss account which is to be increased and reduced in terms of provisions contained therein. Book profits are required to be calculated bearing in mind the provisions part II and III of Schedule VI of the Companies Act, 1956.
>
> 21. Before we proceed further we may notice the relevant distinction in clause (i) of the Explanation appended to Sections 115JB and 115J, respectively. In clause (i) of the explanation in Section 115JB, in the bracketed portion, the following words appear "excluding a reserve created before the 1st day of April, 1997, otherwise than by way of a debit to the profit and loss account". There is no such mention in clause (i) to the explanation contained in Section 115J. Furthermore, in the

proviso appended to clause (i) to the explanation in Section 115JB, there is a reference to the effect that where the section is applicable to an assessee in any previous year, the amount withdrawn from reserves created or provisions made in the previous year relevant to the assessment year commencing on or after 1st April, 1997, shall not be reduced from the book profit unless the book profit of such year has been increased by the reserves of provisions. As against this in the proviso to clause (i) of the explanation contained in Section 115J, the wording is identical save and to the extent date mentioned in the proviso is: "on or after 1st day of April, 1998". A conjoint reading of clause (i) to the explanation appended to Section 115JB, read with, the proviso gives a clear clue that it covers period both prior to 01.04.1997 as well as that which commences on or after 01.04.1997. As indicated above, the bracketed portion, which appears in clause (i) to the explanation appearing in Section 115JB, does not find mention in Section 115J.

21.1 This is in so far as the distinction in the two Sections goes. The issue, therefore is, whether the assessee ought to be allowed to deduct the amount withdrawn from the revaluation reserves by invoking the provisions of clause (i) of the explanation given in Section 115J. It is not disputed that when the revaluation reserves were first created in 1983 and 1986, the increase in the value of the assets was reflected by debiting the asset account and crediting the revaluation reserve account. The profit and loss account by this methodology was kept undisturbed. In these circumstances, can it be said that when the amount is withdrawn from the reserves it reflects the difference in the depreciation calculated on the revalued or the enhanced value of the assets and that which is calculated on the historical cost. In other words can the assessee be permitted to

reduce the amount withdrawn from the revaluation reserve if in the first instance was created not by crediting any amount to the profit and loss account but to the revaluation reserve account.

22. Mr Ganesh has argued that clause (i) appended to the explanation appearing in Section 115J would have to be given its full play. As noticed above, it was his contention that the only situation in which such a reduction is not permissible where reserves are created by an assessee on or after 01.04.1988. Therefore, his contention is, that since, the revaluation reserves were created in 1983 and 1986 the assessee ought to be allowed a reduction of the amounts drawn from the revaluation reserve. In our view at first blush this argument appears to be both plausible and attractive as well. However, a closer scrutiny would show that clause (i) appended to the explanation appearing in Section 115J would get triggered only if amount is withdrawn from reserves or provisions, if such reserve or provision was created by crediting the amount to the profit and loss account. Admittedly, such is not the situation in the instant case. The intention of the legislature in inserting clause (i) appended to the explanation to Section 115J is to counter a situation where credit is made to the profit and loss account in the first instance at the time of creation of the reserve. When such a situation arises the book profit would stand increased and thus consequently, any withdrawal from the revaluation reserve would stand squared off by reducing the amount from the book profit. Since such a situation did not arise in the instant case, the assessee in our view cannot be allowed reduction in the amount. To that extent the Assessing Officer is right in his conclusion. We are fortified in our view by the observations made in this regard by the Supreme Court. The Supreme Court has considered the matter from various angles. One such angle from which the

matter has been considered and the resultant view and the observations made by the supreme court completely negate, in our opinion, the submissions made by Mr Ganesh before us. We can do no better than extract the observation of the Supreme Court in that regard:

"The matter could be examined from another angle. To recapitulate the facts, the fixed assets of the assessee were revalued in the earlier assessment year 2000-01 (i.e., financial year ending March 31, 2011) (sic March 29, 2000) and amount of enhancement in valuation was 288,58,19,000 which was credited to the revaluation reserve. In other words, at the time of revaluation of assets, the said figure of Rs 288,58,19,000 was added to the historical cost of assets on the assets side of the balance sheet and in order to equalize both sides of the balance sheet the revaluation reserve to that extent was created on the liabilities side. Thus, the figure of profit remained untouched so far as the revaluation of assets to the tune of Rs 288,58,19,000 is concerned. The profits were not increased by the said amount when the asset was revalued. During the assessment year in question, i.e., the assessment year 2001-02, an amount of Rs 26,11,74,000, being the differential depreciation, was transferred out of the said revaluation reserve of Rs 288,58,19,000 and credited to the profit and loss account which the Assessing Officer disallowed by placing reliance on the proviso to clause (i) of the Explanation to Section 115JB(2). Consequently, the Assessing officer added back the said amount of Rs 26,11,74,000 to the net profits. We agree with the Assessing Officer. Under the provisions, as they then existed certain adjustments were required to be made to the net profit as shown in the profit and loss account. One such adjustment stipulated that the net profit shall be reduced by the amount(s) withdrawn from any reserves, if any

such amount is credited to the profit and loss account. Thus, if the reserves created had gone to increase the book profits in any year when the provisions of Section 115JB were applicable, the assessee became entitled to reduce the amount withdrawn from such reserves if such withdrawal iscredited to the profit and loss account. Now, from the above facts, it is clear that neither the said amount of Rs 288,58,19,000 nor Rs 26,11,74,000 had ever gone to increase the book profits in the said year ending march 31, 2000 (being the financial year). Thus, when such amount(s) has not gone to increase the book value at the time of creation of reserve(s), there is no question of reducing the amount transferred from such revaluation reserves to the profit and loss account. Thus, the proviso to clause (i) of the Explanation to section 115JB(2) comes in the way of the claim for reduction made by the assessee. In our view, the reduction under clause (i) to the Explanation could have been availed of only if such revaluation reserve had gone to increase the book profits."

(emphasis is ours)

23. Mr Ganesh had tried to take advantage of the fact that in the observations extracted hereinabove there is a reference to the proviso appended to clause (i) of the explanation to Section 115JB. A closer scrutiny of the observations made by the Supreme Court would show that the main burden of the rationale supplied by the Supreme Court is not pivoted on the proviso. As noticed by us hereinabove clause (i) of the explanation appearing in Section 115JB read with the proviso covers the period both before and after 01.04.1997. Even though this is not specifically mentioned in clause (i) to the explanation to Section 115J, the plain reading of the said clause would show that it only applies in those situations where credit is made to the profit and loss account at the time of creation of the reserve or the provision.

24. If there was any doubt it stands clarified by having regard to the "Memorandum Explaining the Provisions in the Finance Bill, 1989" (in short the memorandum). The memorandum, according to us, clearly indicates that the proviso was inserted to clause (i) of the explanation appended to Section 115J to deal with a situation where some delinquent companies were taking advantage of clause (i) of the explanation appended to Section 115J by reducing their net profit by the amount withdrawn from the reserve created or provision made in the same year itself, though the reserve when created was not added to the book profit. It was to clarify this position that the memorandum stated that clause (i) to the explanation contained in Section 115J would apply to amounts withdrawn from the reserves or provision only if reserves had been created before 01.04.1988 or where reserves or provisions have been made after 01.04.1988 and have gone to increasethe book profits in any year when the provisions of Section 115J of the Income-Tax Act were applicable.

25. A close reading of the memorandum to the amendment would show that the initial object of allowing reduction under clause (i) to the explanation contained in Section 115J was not diluted. In other words the reduction of the amount withdrawn from the reserves created or provisions made was only available if such an amount in the first instance have been credited to the profit and loss account. This is clear if one adverts to the following extract from the memorandum:

"....Under the existing provisions certain adjustments are made to the net profit as shown in the profit and loss account. One such adjustment stipulates that the net profits is to be reduced by the amount withdrawn from

> reserves or provisions, if any, such amount is credited to the profit and loss account....." (emphasis is ours)
>
> 26. Therefore, the submission of Mr Ganesh that it is only when the proviso is attracted that the assessee would be disabled from seeking reduction in terms of clause (i) to the explanation appended to Section 115J even though the reserves when created or provision made did not get reflected in the profit and loss account, is a submission, according to us, that cannot be accepted."

19. Learned counsel appearing for the respondent-assessee tried to distinguish the said judgment on two grounds. It was submitted that book profits computed in the case of SRF Limited filed under Section 115J showed loss of Rs.10.50 crores, but the Assessing Officer had calculated the book profits at a positive figure of Rs.2.15 crores. Thus, substantial addition was made to the book profits. Secondly, the Assessing Officer had observed that transfer from the valuation reserve was essentially an equalisation device meant to ensure that the depreciation continued in the books at the original cost, prior to such valuation and that the accounts presented a true and correct picture of net profits. The amount withdrawn from the valuation reserve was, therefore, not covered under clause (i) of the Explanation. It was also highlighted that in the case of ***Indo Rama Synthetics India Limited versus Commissioner of Income Tax,*** (2011) 330 ITR 363 (SC) the reserve was created in the Assessment Year 2000-01, i.e., financial

year ending 31st March, 2000 (wrongly mentioned as financial year ending 31st March, 2011). The assessment year involved in the case of ***Indo Rama Synthetics India Limited*** (supra) was Assessment Year 2001-02 and differential amount of Rs.26,11,74,000/- being the differential depreciation was transferred out of the revaluation reserve and credited to the profit and loss account.

20. In ***SRF Limited*** (supra) the attempt to distinguish decision of the Supreme Court in the case of ***Indo Rama Synthetics India Limited*** (supra) was as the reserve was created during the financial year ending 31st March, 2000 and in the next year amount of Rs.26,11,74,000/- being differential depreciation was transferred out of revaluation reserve and taken to the profit and loss account, was specifically rejected. The Supreme Court it was observed had held that under clause (i) to Explanation the said amount shall not be reduced from the profit and loss account. This could be only reduced when reserves were created by increasing book profits in any year when the MAT provisions were applicable. Rs.26,11,74,000/- had never reflected in increase of the book profits in the year ending 31st March, 2000 and, therefore, there was no question of reducing the said amount and the proviso to clause (i) of the Explanation was fully applicable. The said judgment as held in ***SRF Ltd.*** (supra) indicates, explains and elucidate the reason why the Legislature has carved out exception in respect of

reserves or provisions in the proviso. The proviso is applicable not only when the reserve or provision was created during this period on 1st April, 1997 to 31st March, 2001, but whenever reserve/provision was created unless the book profits had been increased by those reserves or provisions at the time of creation and out of the said increase, the amount has been withdrawn.

21. Literal interpretation in the manner suggested by the appellant of clause (i) to Explanation 115JA and specially its proviso will lead to absurdities and incongruities. Minimum alternation taxation on book profits became a part of the Act, i.e., Income Tax Act, 1961, by Finance Act, 1987 with effect from 1st April, 1988 with insertion of Section 115J. The said Section became applicable with effect from 1st April, 1989 and was applicable till 1st April, 1991. Clause (i) of the Explanation and the proviso thereto, which was introduced by Finance Act, 1989 with retrospective effect from 1st April, 1988 were as under:

> "i) the amount withdrawn from reserves (other than the reserves specified in section 80HHD) or provisions, 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 (including the relevant 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, 1988 shall not be reduced from the book profit unless the book profit of such year has been increased by

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those reserves or provisions (out of which the said amount was withdrawn) under this Explanation; or"

22. Reading of the proviso to Section 115J elucidates that reference to the date 1st April, 1988 is not with reference to the date on which reserve or provision was created but with reference to the date on which an amount was withdrawn from reserves created or provision made. Thus, amount withdrawn from the reserves created or provision made after 1st day of April, 1988 as per the proviso to clause (i) of Explanation could be adjusted only if the book profit had been increased at the time of creation of those reserves or provision made and not otherwise. Section 115JA was inserted by Finance (No.2) Act, 1996 with effect from 1st April, 1997. The words "1st day of April, 1997" in the proviso to clause (i) of the Explanation is not with reference to the date on which reserve was created or provision was made but with reference to the amount withdrawn from the reserve created or provision made. The proviso specifically stipulates that reduction under clause (i) would not be allowable unless book profits were increased by the reserves or provisions made at the time of increase. The increase may relate to any period and even can be before 1st day of April, 1997. The words "but ending before the 1st day of April, 2001" are the cause of confusion but these words were inserted by Finance Act, 2000 with effect from 1st April, 2001 and would

accordingly be applicable to the Assessment Year 2001-02 and not the assessment year in question. These words were introduced as the Legislature had inserted a new provision for minimum alternative tax by inserting Section 115JB with effect from 1st April, 2001. The original clause (i) to Explanation 1 to Section 115JB was as under:-

> "(i) the amount withdrawn from any reserves or provisions, 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 (including the relevant 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, 2001 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"

23. As there was possibility of ambiguity and doubt, the said clause (i) and the proviso was substituted by Finance Act, 2002 but with retrospective effect from 1st April, 2001 as under:-

> "(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"

24. In view of the aforesaid discussion, it is crystal clear that under proviso to clause (i) of the Explanation to Section 115JA reserve or provision made may relate to any period and not during the period between 1st April, 1997 and 31st March, 2001. These two dates are relevant as Section 115JA is applicable during this period. Clause (i) operates when an amount is withdrawn from provision made or reserve created but as per the proviso adjustment can be made only when at the time of creation of reserve or the provision, the amount in question was duly accounted for by increasing the book profits by the said reserve or provision.

25. Thus, the respondent-assessee is clearly misreading the said proviso and the purport and the purpose behind the proviso of clause (i) to the explanation of Section 115JA.

26. The distinction and facts pointed out, as far as case of ***SRF Limited*** (Supra) is concerned, are not the basis or the foundation of the ratio in the said decision. The exact figure on account of revaluation of assets withdrawn from the reserve was not indicated or mentioned.

The contention that the Assessing Officer had given a finding that the transfer from the reserve was essentially an equalisation device, i.e., to ensure that depreciation to be provided in the books at the original cost prior to revaluation and, therefore, the amount withdrawn should not be covered under clause (i) of the Explanation cannot be accepted as the basis or the foundation of the decision in ***SRF*** case. The Assessing Officer in the said case had recorded that transfer from revaluation reserve either should have been credited to the profit and loss account or reduced from the depreciation provided in the books.

27. In the facts of the present case, it is apparent that the respondent-assessee had credited the same amount to the depreciation account and also the profit and loss account in the year in question. On being asked why both the heads were duly credited, learned counsel for the respondent-assessee could not give any explanation or answer. It could not be also answered why the revaluation or reduction of Rs.1.53 crores was made to the revaluation reserve. Commissioner in her order has specifically recorded that enhanced depreciation on re-valued reserve was claimed in the earlier assessment years.

28. Commissioner in her order under Section 263 on the second aspect has recorded that the Assessing Officer had failed to disallow expenditure in respect of exempt income as per the mandate of Section 14A of the Act. Commissioner held that the said provision was

applicable and the Assessing Officer had erred and had passed an erroneous order prejudicial to the interest of the Revenue as the respondent-assessee had earned gross exempt dividend income of Rs.1.34 crores and Rs.23.43 lacs, but no disallowance under Section 14A was made. She worked out and calculated the disallowance of expenditure under Section 14A to be Rs.183.63 lacs.

29. It is accepted and admitted that the Assessing Officer had not applied Section 14A and no deduction under the said Section was made. In respect of the present assessment year, i.e., Assessment Year 2000-01, the contention of the respondent-assessee is that in view of the proviso to Section 14A, the said provision could not have been invoked in a revision. It is not possible to accept the said contention. Section 14A was introduced by Finance Act, 2001, which was tabled in the Parliament on 28th February, 2001. The said provision was introduced with retrospective effect from 1st April, 1962 and reads as under:-

> "14-A. Expenditure incurred in relation to income not includible in total income.-For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the Assessee in relation to income which does not form part of the total income under this Act:
>
> Provided that nothing contained in this section shall empower the Assessing Officer either to

reassess under Section 147or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the Assessee under Section 154, for any assessment year beginning on or before the 1st day of April, 2001."

30. Interpreting the said provision in ***Honda Siel Power Products Limited versus Deputy Commissioner of Income Tax and Another***, (2012) 340 ITR 53 (Delhi), it has been held as under:-

> "8. The Petitioner has relied upon the proviso to Section 14A of the Act. The proviso according to us is not applicable in view of the factual matrix of the present case and does not protect or come to the aid of the Petitioner. In the present case, after return of income for the assessment year 2000-01 was filed on November 30, 2000, the case was taken up in scrutiny. Assessment order under Section 143(3) of the Act was passed on March 7, 2003. The proviso only bars reassessment/rectification and not original assessment on the basis of the retrospective amendment. The proviso does not stipulate and state that Section 14A of the Act cannot be relied upon during the course of the original assessment proceedings. The Assessing Officer was, therefore, required to disallow expenses incurred for earning exempt or tax free income. Failure on the part of the Assessing Officer to apply Section 14A when he passed the assessment order under Section 143(3) of the Act dated March 7, 2003 has prima facie resulted in escapement of income. The proviso is not intended to apply to the cases of the present nature. The object and purpose of the proviso is to ensure that the retrospective amendment is not made as a tool to reopen past cases, which have attained finality."

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31. In view of the aforesaid legal position, we hold that the Commissioner was justified in invoking Section 263 of the Act as the order of the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. The assessment order was made on 28th February, 2003, which is after Section 14A of the Act was enacted. The Assessing Officer should have been applied the said Section. Failure to invoke Section 14A had resulted in an order both erroneous and prejudicial to the interest of the Revenue.

32. On the question of quantum of deduction to be made under Section 14A, the tribunal has not gone into the said question of quantum. The deduction or quantum has to be decided in light of decision of the Delhi High Court in the case of ***Maxopp Investment Limited versus Commissioner of Income Tax,*** (2012) 347 ITR 272 (Delhi) and other cases.

33. In view of the aforesaid position, the substantial question of law is decided in favour of the Revenue and it is held that the Commissioner had rightly invoked Section 263 of the Act as the order of the Assessing Officer was erroneous and prejudicial to the interest of the Revenue to the extent that adjustment of Rs.1.35 crores should not have been allowed under clause (i) to Explanation to Section 115JA and deduction should have been also made towards expenditure to earn dividend income, which did not form part of taxable income under

Section 14A of the Act. However, on the question of quantum of deduction to be made under Section 14A, the matter is remanded to the tribunal.

ITA Nos. 2106/2010 and 1979/2010

34. These appeals by the Revenue relates to Assessment Year 2001-02. The respondent-assessee, as noticed above, namely, Federal-Mogul Goetze (India) Limited, had filed return of income on 31st October, 2001 declaring 'nil' income after setting for brought forward losses and depreciation. Tax payable under Section 115JB was also computed at 'nil'. The return was taken up for scrutiny assessment and assessment order under Section 143(3) dated 29th March, 2004 was passed. Total income under the normal provisions in spite of various disallowances etc. was computed at 'nil' but income taxable under Section 115JB was computed at Rs.90,40,4,412/-.

35. In this year, i.e., the Assessment Year 2001-02, the Assessing Officer had noticed that there was withdrawal of Rs.1,49,55,335/- from the valuation reserve, but the amount had not been added to the profit and loss accounts filed with the income tax return for computing book profits under Section 115JB. The assessee had placed reliance on clause (i) of Explanation below Section 115JB (2) but the Assessing Officer rejected the said contention. The assessee did not succeed in the first appeal and the tribunal has observed that reliance placed on

the order of the tribunal for the Assessment Year 2000-01 in ITA No. 208/Del/2005 was distinguishable as it related to the jurisdiction of the Commissioner under Section 263 of the Act. In other words, tribunal did not accept the plea of the respondent-assessee.

36. By order dated 16th May, 2012, the following substantial questions of law were framed in the present appeals:-

> "(i) Whether the Income Tax Appellate Tribunal was right in holding that while computing book profit under Section 115JA (sic. Section 115JB) of the Income Tax Act, 1961, no disallowance under Section 14A was required to be made?
>
> (ii) Whether the Income Tax Appellate Tribunal was right in deleting interest under Section 234D of the Income Tax Act, 1961?"

37. Learned counsel for the respondents-assessee, during the course of hearing, has fairly conceded that the first question has to be answered in favour of the Revenue and against the assessee in view of specific provisions in the Explanation 1 below Section 115JB(2) clause (f). The Assessing Officer it is stated had made an addition of Rs.88,292/- to the book profits towards expenditure incurred having nexus with dividend income, which were exempt under Section 10(33). Recording the said statement, the first question is answered in favour of the appellant-Revenue and against the respondent-assessee.

38. Question No. (ii) is required to be answered in favour of the appellant-Revenue and against the respondent-assessee in view of Explanation 2 to Section 234D, which was inserted by Finance Act, 2012 with retrospective effect to assessments made on or after 1st June, 2003. We clarify that we are not required to examine the constitutional validity of the said amendment with retrospective effect in the present appeals.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

DECEMBER 9th, 2013
VKR