Karnataka High Court Widia (India) Ltd. And Ors. vs Commissioner Of Income-Tax on 29 September, 1999 Equivalent citations: 2000 242 ITR 678 KAR, 2000 242 ITR 678 Karn Author: V Singhal Bench: V Singhal, T Vallinayagam JUDGMENT V.K. Singhal, J. 1. The Income-tax Appellate Tribunal has referred the following question of law arising out of its order under Section 256(1) of the Income-tax Act, 1961, in respect of the assessment year 1989-90 : "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding the amounts of brought forward losses/allowances were required to be adjusted to the extent to which such adjustments would be necessary by way of set-off of such losses/allowances against current year's net profit, computed in accordance with the regular method of determination of income of the assessee for this year in accordance with the ordinary provisions of the Income-tax Act (from Sections 28 to 43), for the purpose of carrying forward such losses/allowances to the next year, without paying any attention to the fact that actually the asses-see was charged to tax in this year in accordance with the provisions of Section 115J only ?" 2. The facts of the case, are, that the assessee-company was charged to income-tax on the basis of the computation made under Section 115J. It was claimed before the taxation authorities that, as it had been assessed to a total income as computed under Section 115J, all the other allowances like depreciation, investment allowance, etc., should be deemed not to have been allowed at all inasmuch as the income had been determined without reference to any of the provisions of the Income-tax Act, but by taking into consideration only the book profits computed in accordance with Parts II and III of Schedule VI to the Companies Act. It was further contended that, once the total income had been determined under Section 115J, the other allowances could not be deemed to have been allowed so as to reduce the income to nil. The amounts of unabsorbed losses, depreciation, investment allowance, etc., as brought forward from earlier years should also be carried forward without any change on the ground that no computation of total income of the assessee in the regular manner was done for this year. The Assessing Officer did not allow the claim of the assessee. The Commissioner of Income-tax (Appeals), however, accepted the contention of the assessee. The matter was taken up before the Tribunal, which held, that, while determining the total income in accordance with the regular provisions of the Act, the current year's depreciation and also, if necessary, part of the full amount out of unabsorbed depreciation, etc., is required to be set off against the gross income of the assessee. According to the Tribunal, the total income is first to be determined in the regular manner and in certain cases where the provisions of Section 115J(1) are applicable, the figure of total income as determined is replaced by the figure representing 30 per cent. of the adjusted book profits and that tax is levied on the said figure. The amount of unabsorbed business loss, depreciation, etc., were considered to have been adjusted to the extent set off out of such amounts required in connection with the computation of the total income of the assessee for the current year in the regular manner and the resultant amounts of brought forward loss, unabsorbed depreciation, etc., have to be carried forward to the next year. 3. In I. T. R. C. Nos. 137 and 138 of 1995, the following questions

have been referred : "(i) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the amounts of business loss, unabsorbed depreciation, unabsorbed investment allowance, etc., as at the beginning of the accounting year are required to be adjusted and set off to the extent such brought forward business loss, unabsorbed depreciation, etc., would have been adjusted and set off had the assessee been assessed to tax in the regular way in accordance with the provisions of Sections 28 to 43 of the Income-tax Act, 1961, and not by way of application of the provisions of Section 115J(1) and that the resultant amounts of losses, unabsorbed depreciation, unabsorbed investment allowance, etc., only will be required to be carried forward to the next year ? (ii) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the written down value of the assets will have to be adjusted by deducting therefrom the amounts of depreciation which would have been allowed on such assets in the regular method of assessment in accordance with the provisions of Sections 28 to 43 of the Income-tax Act, 1961, without applying the provisions of Section 115J(1), and the resultant amounts of written down value will only have to be carried forward to the next year ?" 4. In I.T.R.C. No. 144 of 1995, the following questions have been referred : "(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the amounts of business loss, unabsorbed depreciation, unabsorbed investment allowance, etc., as at the beginning of the accounting year are required to be adjusted and set off to the extent such brought forward business loss, unabsorbed depreciation, etc., would have been adjusted and set off had the assessee been assessed to tax in the regular way in accordance with the provisions of Sections 28 to 43 of the Income-tax Act, 1961, and not by way of application of the provisions of Section 115J(1) and that the resultant amounts of losses, unabsorbed depreciation, unabsorbed investment allowance, etc., only will be required to be carried forward to the next year ? (2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the written down value of the assets will have to be adjusted by deducting therefrom the amounts of depreciation which would have been allowed on such assets in the regular method of assessment in accordance with the provisions of Sections 28 to 43 of the Income-tax Act, 1961, without applying the provisions of Section 115J(1), and the resultant amounts of written down value will only have to be carried forward to the next year ?" 5. In I. T. R. Cs. Nos. 145 of 1995, 160 of 1995 and 173 of 1995, the following questions have been referred : "(1) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the amounts of business loss, unab-sorbed depreciation, unabsorbed investment allowance, etc., as at the beginning of the accounting year are required to be adjusted and set off to the extent such brought forward business loss, unabsorbed depreciation, etc., would have been adjusted and set off had the assessee been assessed to tax in the regular way in accordance with the provisions of Sections 28 to 43 of the Income-tax Act, 1961, and not by way of application of the provisions of Section 115J(1) and that the resultant amounts of losses, unabsorbed depreciation, unabsorbed investment allowance, etc., only will be required to be carried forward to the next year ? (2) Whether, on the

facts and in the circumstances of the case, the Tribunal was right in holding that the written down value of the assets will have to be adjusted by deducting therefrom the amounts of depreciation which would have been allowed on such assets in the regular method of assessment in accordance with the provisions of Sections 28 to 43 of the Income-tax Act, 1961, without applying the provisions of Section 115J(1), and the resultant amounts of written down value will only have to be carried forward to the next year ?" 6. On behalf of the assessee, it is submitted that Section 115J(2) has to be read with Section 115J(1) and making a computation of income under Section 115J(1) and its impact on items of carry forward like loss and depreciation and computation of written down value of assets in existence at the commencement of such accounting year as well as those acquired during the year have to be taken. It is submitted that, Section 115J starts with non-obstante clause and creates a deeming fiction that if the total income as computed under the Act is less than 30 per cent. of the book profit, the total income of such assessee chargeable to tax shall be deemed to be an amount equal to 30 per cent. of such book profit. The total income has to be computed under different heads and each head has got its own special provisions for allowing deductions against the receipts. Under Section 115J, instead of resorting to various heads of income and following the procedure laid down in various Sections, a ready method of computation of income is provided and, therefore, Section 115J is a mere computation machinery provision and nothing more. The profit and loss account of a company may include items of income which would be chargeable under various heads. But for Section 115J income under those heads would have been computed in the special manner provided under the Act. The income computed under Section 115J cannot be traced or relatable to a particular head of income and, as such, various provisions like Sections 72, 73 and 74, etc., cannot be invoked in the absence of computation of income under different heads. Even the capital gains cannot be taxed under the said section. 7. Section 115J does not provide for passing of an order of assessment. The assessment of total income or loss has to be under Section 143(3). The computation of income under Section 143 is depending on various other sections. Even if computation is made under Section 115J, it is only an order which is passed under Section 143(3). The other provisions like the provision for limitation under Sections 153 and 147 are also applicable. Sections 44AD and 44AE which provide for determination of business income in respect of certain categories, the assessment has to be made under Section 143(3). There are no two computations of assessed income in Section 115J and it is only for the purpose of examining the applicability of Section 115J at a preliminary stage a computation under the normal provisions of the Income-tax Act is made and such a computation cannot be equated with an assessment nor could it be considered as an assessed income. 8. It is submitted that, when Section 115J is invoked and an assessment order under Section 143(3) is made, obviously there might be depreciation debited to the profit and loss account of the company and 30 per cent. of it is determined as the taxable income after adjustment. Therefore, to that extent, at least, while making the assessment with reference to the book profits under Section 115J depreciation debited in the

profit and loss account should have been reckoned and considered as actually allowed. In the normal circumstances, the carry forward items like unabsorbed depreciation, losses, etc., would have to be carried forward to the subsequent year. A positive taxable income for that year would necessarily pre-sup-pose that all the carried forward items have been absorbed and the resultant figure of taxable income could be a positive figure. When the assessment of a positive income is made for the purpose of Section 115J, all the carry forward items have been absorbed and nothing is left to be carried forward to the subsequent years. The assets which were existing at the commencement of the previous year as well as acquired during the previous year the amount of depreciation taken into account while computing the income under Section 115J, it may be the actually allowable depreciation and, therefore, it has to be reduced from determined value. 9. Section 115J(2) does not contemplate two assessment orders and overlooks the fact of a positive income being" assessed by invoking Section 115J and also the allowance of book depreciation to some extent while applying Section 115J. Since no assessment under the normal computation of income is made, the computation made under Section 115J has to be overlooked. It is submitted that, if the total income normally computed is a negative figure, and there is no assessable income and the assessee is called upon to pay a tax on deemed income, he cannot further be penalised by denying the benefit of carry forward depreciation/loss, etc., and also the reduction in the written down value through a notional process. Section 32(2) provides for carry forward of depreciation where full effect cannot be given, owing to there being no profits or gains chargeable for that previous year and, therefore, carry forward under Section 32(2) is permissible if and only if effect cannot be given to depreciation allowable under Section 32(2) by reason of non-availability of profits. Under Section 72(1) the carry forward of loss is permitted where the loss cannot be wholly set off against any other income or where there is no income. Under Section 115J there is income, because, the loss is not set off. Under Section 43(6), written down value which is the basis for allowance of depreciation is arrived at by deducting the depreciation actually allowed from the actual cost or from the carried over written down value from the earlier year. Under Section 115J, the depreciation which is reckoned for the purpose of determining the profit to that extent is actually allowed and, therefore, such amount should be deducted for determining the written down value to be considered for the next year. 10. It is submitted that the Tribunal has wrongly proceeded on the basis that even though no assessment in the normal method of computation is made, the presumption of such an assessment has to be made. It is contrary to the provisions of Section 115J. Section 115J(2) does not provide for making such a notional assessment and even if the notional assessment is made as if the normal provisions are applicable, items like carry forward loss, carry forward depreciation and current year's depreciation could be deemed to have been not absorbed or adjusted. The loss is not set off in a notional assessment. 11. The carry forward of the allowance under Sections 70 and 71 is on actual basis and not on hypothetical one. The depreciation which is actu-ally allowed has been interpreted by the apex court in Madeva Upendra Sinai v. Union of India [1975] 98 ITR 209, and it

was observed that the phrase actually allowed is limited to depreciation actually taken into account or granted and given effect to, i.e., debited by the Income-tax Officer against the incomings of the business in computing taxable income of the assessee ; it cannot be stretched to mean notionally allowed or merely allowable on a notional basis. 12. Under Section 32A(3)(ii) the carried forward unabsorbed investment allowance from an earlier year should be set off against the profits computed under Section 115J. As in the case of Section 32(2) the unabsorption is not because of the business or insufficiency of profits in Section 115J but for some other reason. Therefore, the claim under Section 32A(3) in a later year would have been lost but for Section 115J(2). The expression "determination of the amounts in relation to the relevant previous year" contemplates that carried forward depreciation under Section 32(2) will have to be added to the depreciation of the current year and the aggregate becomes the depreciation of the current year. It is only the unabsorbed depreciation of the current year which is to be considered. If Section 115J(2) was not there, the determination of the current year's depreciation could not have been carried forward to a subsequent year, because, its non-absorption is not on account of paucity of profits. 30 per cent. may be adequate to absorb such entire depreciation and it could have been argued that the current year's depreciation under Section 32(2) for the reason that it cannot be carried forward. Similar is the position in respect of the provisions of Sections 72(2) and 80J(3) as the income in many cases could be income derived from business or income from the industrial undertaking. Set off under Section 72 is not against the income under the head "Business" but against the profits and gains of any business and, therefore, the income under Section 115J, though, it cannot be described as profits and gains of any business, and, as such, set off under Section 72(1) is possible, but the position is stated to be similar to Section 80J(3). 13. It is submitted that the loss is inclusive of depreciation as held in Garden Silk Weaving's case [1991] 189 ITR 512, wherein, it was observed by the Supreme Court that, unabsorbed depreciation is indeed a part of the "loss". This court also in Society of the Sisters of St. Anne's case [1984] 146 ITR 28, has taken the same view besides the decision of the Calcutta High Court in CIT v. Indian Jute Mills Association [1982] 134 ITR 68. 14. According to accounting principles, depreciation is money spent and is an expenditure as held in Indian Leaf Tobacco Development Co. Ltd. v. CIT . Section 32 is in respect of depreciation and Section 32A is for investment allowance. Section 72 is for cash losses, etc., and Section 80 refers to conditions under which losses cannot be carried forward which draws a distinction between cash loss, depreciation, investment allowance, speculation losses, etc. It is only for the purpose of carry forward and set-off of loss, such a distinction has been drawn. Under Section 115J, the method of computing the total income is with reference to the provisions of Section 205(1)(b) of the Companies Act and since that provision overrides any other provision. Therefore, the commercial concept as contemplated by the Companies Act has to prevail over a concept referred to in the Income-tax Act. Under Section 211(2) of the Companies Act, 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. Under Section 205 of the Com-

panies Act, the word "loss" should be interpreted to include depreciation. 15. We have considered over the matter. The provisions of Section 115J(1) are as under : "115J. (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee being a company (other than a company engaged in the business of generation or distribution of electricity), 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, 1988, but before the 1st day of April, 1991 (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 the such book profit." 16. Chapter XII-B relates to certain companies in relation to which special provision was inserted by Finance Act, 1987. The object and reason for insertion of the section has been given as hereunder (see [1987] 165 ITR (St.) 137) : "Under the proposed amendments, in the case of any company, whose total income as computed under the other provisions of the Income-tax Act in respect of any previous year is less than thirty per cent. of its book profit, the total income of such assessee chargeable to tax shall be deemed to be an amount equal to thirty per cent. of such book profit. For the purposes of the aforesaid provision, 'book profit' means the net profit as shown in the profit and loss account for the relevant previous year prepared in accordance with the provisions of Parts II and III of the Sixth Schedule to the Companies Act, 1956, subject to certain adjustments. It has also been provided that the aforesaid provision shall not affect the determination of the amounts to be carried forward to the subsequent year or years under the provisions of Sub-section (2) of Section 32, or subSection (3) of Section 32A or Clause (ii), of Sub-section (1) of Section 72 or Section 73 or Section 74 or Sub-section (3) of Section 74A or Sub-section (3) of Section 80)." 17. Sub-section (1) starts with a non-obstante clause. So far as the other provisions of the Income-tax Act are concerned, in respect of assessees which are companies, the total income has to be computed in accordance with the provisions of this Section if it is less than 30 per cent. of such book profit. A deeming fiction has been created that the amount equal to 30 per cent. of the book profit shall be deemed to be the income. "Book profit" has been explained in the Explanation to Section 115J(1A) as net profit as shown in the profit and loss account and prepared in accordance with subSection (1A). The amounts in respect of income-tax paid or payable and the provision therefor ; or the amounts carried to any reserves other than the reserves specified in Section 80HHD or Sub-section (1) of Section 33AC, by whatever name called, are also to be added, to the net profit. There are other amounts as mentioned in this section which are to be added. Subsection (2) of Section 115) provides : "Nothing contained in Sub-section (1) shall affect the determination of the amounts in relation to the relevant previous year to be carried forward to the subsequent year or years under the provisions of Sub-section (2) of Section 32 or Sub-section (3) of Section 32A or Clause (ii) of Sub- Section (1) of Section 72 or Section 73 or Section 74 or Sub-section (3) of Section 74A or Sub-section (3) of Section 80J." 18. There are certain deductions which are allowed in the computation of

profits and gains of business or profession. Various deductions are also allowed under Chapter VI-A in computing total income. As a result of these concessions, certain companies making huge profits, were managing their affairs, by which, the income-tax was not paid, are now made liable to pay tax. Sub-section (2) of Section 115J provides that the determination of the amounts in relation to the relevant previous year to be carried forward under various sections mentioned therein relating to unabsorbed depreciation, investment allowance, loss, etc., shall not affect the determination of the amounts to be carried forward to the subsequent year. Section 115J contemplates that the assessing authority has to determine the income of the company under the provisions of the Act first and then, secondly, the book profit has to be worked out in accordance with the provisions of Section 115J(1). If the income determined under the provisions of the Act, is less than 30 per cent. of the book profit, then only Section 115J could be invoked. Under Section 115J(1A), the profit and loss account has to be prepared in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956. The amounts as specified in the Explanation therein have to be added to the net profit as shown in the profit and loss account to arrive at the book profit. 19. Thus, it is the computation of total income in accordance with the normal provisions of the Income-tax Act and thereafter, it has to be determined in accordance with the provision of Section 115J and the higher of the two is ultimately deemed to be representing the total income. For computing the income under Section 115J(1), a specific provision has been made in respect of the carry forward of an unabsorbed depreciation, etc., under Section 115J(2), according to which, it has to be presumed as if the provision of Section 115J do not exist. The business loss, unabsorbed depreciation for the current year is required to be computed by taking into consideration the brought forward loss of the earlier year and setting off against the income of the assessee, if any, for the assessment year, and thereafter, the balance amount is carried forward to the next year. Under Section 115J(2), the amounts determined for the current year have to be carried forward to the subsequent year by way of business loss, unabsorbed depreciation, investment allowance, etc. This provision is to nullify the effect of Section 115J(1) and it will be considered as if Section 115J(1) is not existing. Under Section 115J(1), firstly, the loss and allowances have to be determined in the normal way in accordance with the provisions of the Income-tax Act and, thereafter, the provisions of Section 115J(1) are made applicable, if the book profit is less than 30 per cent. Under Section 115J(1), the total income is computed by allowing the total depreciation and setting off unabsorbed depreciation, etc., of the earlier years brought forward to the current year. After the set-off, the resultant figures are only required to be carried forward to the next year. It is true that, by this provision, in certain cases, the assessee suffers higher amount of tax by not giving the benefit denied by Section 115J(2), but that is the legislative wisdom. 20. In Surana Steels Pvt, Ltd. v. Deputy CIT , it was observed that the word “loss” as used in the proviso Clause (b) of Section 205(1) signifies the amount arrived at after taking into account the amount of depreciation and it has to be so read in the context of Section 115J of the Income-tax Act. The court observed (page 783) :

"A minimum corporate tax was sought to be ensured on prosperous companies. A plain reading of Section 115J shows that if the assessee be a company and its total income determined under the Income-tax Act in respect of a previous year be less than thirty per cent. of its book profit, fictionally it will be deemed that its total income chargeable to tax for the relevant previous year was an amount equal to thirty per cent. of such book profit. The total income of the assessee shall first be computed in accordance with the provisions of the Income-tax Act and if the total income so computed be less than thirty per cent. of the book profit, then the profit and loss account of the company for the relevant previous year shall have to be prepared under Sub-section (1A) of Section 115J in accordance with Parts II and HI of Schedule VI to the Companies Act. The book profit so arrived at under the Companies Act shall be suitably adjusted so as to satisfy the requirements of the Explanation. We are in this case concerned with the interpretation of Clause (iv) under the Explanation to Section 115J." 21. The term "loss" was interpreted as under (page 786) : "The term 'loss' as occurring in Clause (b) of the proviso to Section 205(1) of the Companies Act has to be understood and read as the amount arrived at after taking into account the depreciation. Then alone the formula prescribed in this clause would make sense and it would be consistent with the object sought to be achieved by enacting Section 115J of the Income-tax Act, 1961. If 'loss' were to be taken as pre-depreciation loss then the resultant computation will not be in conformity with the tenor of the provisions of Section 205. The language of Clause (b) of the proviso to Section 205(1) is clear. It applies to those cases where the depreciation has been provided in accordance with the provisions of Sub-section (1) of Section 205. The depreciation is provided for in the profit and loss account. The loss is arrived at after taking into account the depreciation provided. It is therefore clear that the word 'loss' as used in the proviso Clause (b) to Section 205(1) signifies the amount arrived at after taking into account the amount of depreciation and it has to be so read and understood in the context of Section 115J of the Income-tax Act, 1961." 22. In this case, the Budget Speech of the Finance Minister (see [1987] 165 ITR (St.) 14), to the following effect was also taken into consideration (page 784) : "It is only fair and proper that the prosperous should pay at least some tax. The phenomenon of so called 'zero tax' highly profitable companies deserves attention. In 1983, a new Section 80WA was inserted in the Act so that all profitable companies pay some tax. This does not seem to have helped and is being withdrawn. I now propose to introduce a provision whereby every company will have to pay a 'minimum corporate tax' on the profits declared by it in its own accounts. Under this new provision, a company will pay tax on at least 30 per cent, of its book profit . . . This measure will yield a revenue gain of approximately Rs. 75 crores." 23. In Suryalatha Suryalatha Spinning Mills Ltd. v. Union of India , it was found that the quantum of unabsorbed losses, unadjusted depreciation, etc., for the purpose of carrying forward has to be under the provisions of the Act, respecting the quantum of income determined under the provisions of Section 115J(1). The right to carry forward losses, unadjusted allowances, etc., was found kept intact by Section 115J(2). The contention of double tax-

ation was also rejected and it was observed that merely because the amount equal to income determined as taxable under Sub-section (1) is not treated as unabsorbed loss which under no provision of the Act can be treated, it cannot be said that there is double taxation. 24. In these circumstances, we are of the view that the Tribunal was right in holding that the amounts of brought forward losses/allowances were required to be adjusted to the extent to which such adjustments would be necessary by way of set-off of such losses/allowances against current year's net profit, computed in accordance with the regular method of determination of income of the assessee for this year in accordance with the ordinary provisions of the Income-tax Act (from Sections 28 to 43), for the purpose of carrying forward such losses/allowances to the next year, without paying any attention to the fact that actually the assessee was charged to tax in this year in accordance with the provisions of Section 115J only. 25. Reference is answered in favour of the Revenue and against the assessee.