Cit vs Binani Cement Ltd on 4 March, 2016

FORM NO.(J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present:
Hon'ble Justice Girish Chandra Gupta
And
Hon'ble Justice Asha Arora

GA NO. 3094 of 2012
ITA NO. 7 of 2004

CIT, CENTRAL - I, KOLKATA
Versus
BINANI CEMENT LTD.

Advocate for the Appellant — Mr. R. N. Bandopadhyay, Adv.
Mr. Aniket Mitra, Adv.

Advocate for the Respondent — Mr. J.D. Mistri, Sr. Adv.

Mr. Madhur Agarwal, Adv.

Mr. Moloy Dhar, Adv.

Mr. Ajoy Kr. Dey, Adv.

Hearing concluded on: February 5, 2016.

Judgment delivered on : 04/03/2016.

GIRISH CHANDRA GUPTA J. This is an appeal u/s. 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') preferred by the Revenue against a judgement and order dated 30th March, 2012 passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') 'B' Bench, Kolkata in ITA No.239/KOL/2011 pertaining to the assessment year 2006-07.

This Court by an order dated 25th March, 2014 had disposed of this appeal by setting aside the impugned order of the Tribunal and remanding the matter back to the assessing officer. The assessee approached the Supreme Court by special leave against the aforesaid order of this Court. By an order dated 26th October, 2015 the Supreme Court has remanded the matter back to this Court on the ground that no substantial questions of law were formulated by this Court while allowing the appeal by the order dated 25th March, 2014.

In the circumstances the appeal is once again taken up for hearing.

The following substantial questions of law have been proposed by the revenue for consideration in the instant appeal:-

> i)Whether on the facts and in the circumstances of the case, the Learned Income Tax Appellate Tribunal "B" Bench, Kolkata was justified in quashing the order passed by the Commissioner of Income Tax (Central - I) Kolkata under Section 263 of the Income Tax Act without appreciating the ratio of the judgement delivered by the Delhi High Court in the case of Commissioner of Income Tax - Vs- Hari Machine Ltd.

reported in (2009) 311 ITR 285 (Del.)?

ii) Whether on the facts and in the circumstances of the case, the Learned income Tax Appellate Tribunal "B" Bench, Kolkata erred in law in holding the loss of an amount of Rs.919.52 lakhs on account of transfer of investment division of the assessee could not be adjusted in Section 115JB of the Act although this loss is booked in the Profit and Loss Account ?

iii) Whether on the facts and in the circumstances of the case, the order passed by the Learned Income Tax Appellate Tribunal "B" Bench, Kolkata is perverse, bad in law ?

Briefly stated the facts and circumstances of the case are as follows:-

> The assessee M/s. Binani Cement Ltd. is an Indian Company engaged in manufacture and sale of clinker and cement. The assessee filed its return of income for the assessment year 2006-07 disclosing total income at nil and book profit under Section 115JB of the Act at Rs.48,62,96,592/-. The same was processed under Section 143(1) of the Act. Subsequently, the scrutiny assessment proceeding was initiated and notice was issued under Section 143(2). The scrutiny assessment was completed under Section 143(3) by an order dated 5th November, 2008 whereby the total income was determined to be 'nil' and book profit u/s.115JB was found to be Rs.47,21,87,057/-. Furthermore, a claim for deduction of Rs.70,48,242/- u/s.35E of the Act was disallowed.
>
> The Commissioner of Income Tax (hereinafter referred to as 'the CIT') by an order dated 20th January 2011 u/s.263 of the Act observed that the assessee had debited an amount of Rs. 919.52 lakhs to the Profit and Loss Account in accordance with a scheme of arrangement for the transfer of its investment division to Daisy Commercials Pvt Ltd (hereinafter referred to as 'DCPL').
>
> The said scheme of arrangement is explained by note number 8 of Schedule 15 (titled 'Significant accounting policies and notes on accounts') of the Balance Sheet and Profit and Loss Account for the year ended 31st March 2006, which reads as follows:-

> "The Scheme of Arrangement between the Company and Daisy Commercials Private Limited (DCPL) and their respective shareholders under sections 391 and 394 of the Companies Act, 1956 for transfer of the investment division of the Company, consisting of investments/application money for investments in various unlisted companies aggregating to Rs.2316.16 Lakhs, to DCPL with effect from 1st April, 2005, was approved by the shareholders on 15th July, 2005 and by the Hon'ble High Court at Calcutta by its order dated 17th August, 2005. Certified copy of the said order was filed with the Registrar of Companies on 6th September, 2005.
>
> In accordance with the terms of the said Scheme, the Company transferred the aforesaid investment division to DCPL on 28th September, 2005 against which DCPL has allotted 1,39,66,434 Equity Shares of Rs.10/- each credited as fully paid-up aggregating to Rs.1396.64 lakhs to the shareholders of the Company based on the option forms received by DCPL from the shareholders. On allotment of the aforesaid shares by DCPL, 13,66,434 Equity Shares of Rs.10/- each fully paid-up of the Company held by such shareholders stand cancelled and the paid up Share Capital of the Company is accordingly reduced to Rs.20310.13 lakhs divided into 20,31,01,274 Equity Shares of Rs.10 each fully paid-up. The difference of Rs.919.52 lakhs, has been adjusted against the balance in the Profit and Loss Account in accordance with the terms of the Scheme."

Therefore according to the sanctioned scheme, the assessee transferred its investment division worth Rs.23.16 crores to DCPL. The shareholders of the assessee company were issued shares of the value of Rs.13.96 crores in DCPL. The assessee reduced its share capital by Rs.13.96 crores. The difference between the investment value of Rs.23.16 crores and the share capital reduction of Rs.13.96 cores, that is, Rs.9.20 crores was debited to the Profit & Loss Account for the year ended March 31, 2006.

The CIT by the aforesaid order dated 20th January 2011 u/s.263 of the Act, further observed that the aforesaid amount of Rs 919.52 lakhs was not added back in computing the book profit u/s.115JB of the Act, and as such the assessment order dated 5th November, 2008, u/s.143(3) of the Act was erroneous and prejudicial to the interest of the revenue. Therefore the CIT set aside the order of assessment and directed the assessing officer to decide the issue in accordance with law. The CIT in his order made the following observations:-

> "I have gone through the assessment records and the written submissions of the assessee in response to the show-cause notice u/s.263. The facts of debiting Rs.929.52 lakh to the P/L A/c on share capital reduction for disinvestment in shares held as investment as per scheme of arrangement and of not adding back the same for the purpose of computation of book profit for MAT u/s 115JB of the Act, have not been disputed by the assessee.
>
> The relevant facts are available from Notes on A/cs. no.8 of Schedule-15 of the audited accounts of the assessee company. As per the Notes, in accordance with a

> scheme of arrangement the assessee company transferred the investment division of Daisy Commercials P. Ltd. (DCPL) on 28.09.2005 against which DCPL allotted 1,39,66,434 equity shares of Rs. 10 each credited as fully paid-up aggregating to Rs. 1396.64 lakh to the shareholders of the company based on options forms received by DCPL from shareholders. On allotment of the shares by DCPL, 13,66,434 equity shares of Rs. 10 each held by such shareholders were cancelled and the paid-up share capital of the company was reduced to Rs. 20,310.13 lakh divided into 20,31,01,274 equity shares of Rs. 10 each fully paid-up. The difference of Rs. 919.52 lakh has been adjusted against the balance in P/L A/c. as per terms of the Scheme...
>
> But the contentions raised by the assessee company are not justified or reasonable because of the following:-
>
> 1)It is apparent from record that the A.O. has not at all considered/examined the issue.
>
> 2)The contention is not correct since the debit of the amount under consideration is not as per Part- II & III of Schedule - VI of the Companies Act. It is already held by the Delhi High Court in the case of CIT vs. Hari Machine Ltd. (2009) 311 ITR 285 that such capital reduction is fictitious. On similar facts the Delhi ITAT held that such fictitious loss on capital deduction may a balance sheet adjustment but cannot be an item of P & L A/c and the loss booked in the P & L A/c is required to be added back for computation of book profit u/s.115JB. The Assessee's contention is not tenable because of prejudicial nature of the assessment regarding MAT payable for this year.
>
> 3) The case decisions relied upon by the assessee are not relevant/applicable since the issues in those cases before the Court/lTAT's were totally different.
>
> 4) The issue is required to be decided after examining whether the accounts were pared as per Part-II & III of Schedule-VI of the Companies Act and the case decision as referred to in (2) above.

The basic issue is whether the condition stipulated in sub- section (2) of Sec. 115JB that the accounts have to be prepared as per Part-ll & III of Schedule-VI of the Companies Act, is satisfied or not. From the facts stated above it is apparent that the loss booked in the P/L A/C. is for share-capital reduction. There is no scope for such accounting as per Part-ll & III of Schedule-VI of the Companies Act. Besides, such loss fictitious as held by ITAT, Delhi in quantum appeal in a similar case of debit in the case of Hari Machines Ltd. This is evident from the report of the case of CIT Vs. Hari Machines Ltd. in 166 Taxman 84 (2008), which was in respect of penalty u/s 271 (1)(c) but in the facts such finding of ITAT has been discussed. Therefore, such share capital reduction cannot be an item of P/L Ac. As per Part- ll III of Schedule-VI of the Companies Act. The decision of the Hon'ble Apex Court in the case of Apollo Tyres Ltd. in respect of adjustments only as per explanation-1 is applicable only after the accounts have been prepared as provided in sub-section (2) of Sec. 115JB of the Act. The condition not having been satisfied, the amount was required to be added back in computation of Book profit for MAT u/s 115JB. But it is apparent from the records that the issue has not been examined by the AO at all while passing the assessment order and no such addition has been made Therefore, it is held that the assessment order u/s.143(3) dated 05.11.2008 passed by the A.O. is erroneous and prejudicial to the interest of the revenue so far as the above mentioned issue is concerned and accordingly, the order is set aside to that extent and the A.O. is directed to decide the issue in accordance with law after giving reasonable opportunity to the assessee."

Against the order of the CIT the assessee appealed before the Tribunal. The Tribunal by an order dated 30th March, 2012 while allowing the appeal of the assessee held as follows:-

> "We find that irrespective of whether or loss such a loss is deductible in. computation of taxable income or not, what we have to really decide 'is whether or not the Assessing Officer could 'have made adjustment in respect of this loss, as. booked in the profit and loss account, in computation of book profits u/s.-1-15JB. It is, therefore, not material whether the loss in question was allowable deduction in nature. Learned CIT reliance on Hon'ble Delhi High Court's judgement in the case of Hari Machines Ltd. (supra) which deals with penalty in respect of quantitative disallowance in computation of income is thus wholly misplaced. We are also of the considered view that the loss in question is a loss on reduction of capital, because the entry in question is not in respect of the reduction of capital is not in the case of the assessee. As far as assessee is concerned; the assessee has been given shares in consideration of it's transfer of investments. There is nothing in Schedule VI of the Companies Act which prohibits this loss being booked in the profit and loss account nor could learned Departmental Representative point out the same. Unless it is pointed out that the book profit is not arrived at on the basis of profit and loss account computed in accordance with Part II and III of Schedule VI to the Companies Act, or unless there are no Specific enabling provisions for adjustment in Section. 115JB itself, the book profit as per profit and loss, duly approved by the auditor and duly adopted by the Company, cannot be tinkered with Hon'ble Supreme Court's judgment in the case of Apollo Tyres Ltd. -vs.- CI'T' (255 ITR 273) holds so. As regards note no. 8 in the balance sheet, it is not an objection or qualification by the auditor but it is a part of significant accounting policies and notes on account's. Which is mainly informative in nature. By no stretch of logic, this can be treated as qualification in the auditors report. In view of these discussions, in our considered view, the adjustment directed by the CIT is devoid of legally sustainable merits.
>
> For the reasons set out above, we vacate the impugned revision order. As the assessee has succeeded on merits, we see no need to deal with other peripheral legal issues raised by the assessee."

Mr. J. D. Mistri learned Senior Advocate appearing for the assessee made the following submissions:-

> 1) According to the mandate of s.115JB(2)(a) the assessee company had maintained its accounts as per the provisions of Part II and Part III of Schedule VI of the Companies Act 1956. The same was scrutinized and certified by the statutory auditors and was approved by the assessee company in its annual general meeting. As such the assessing officer had no jurisdiction to question the correctness of the accounts. In support of his submission he relied on the judgement of the Apex Court in the case of Apollo Tyres Ltd. -Vs- CIT reported in (2002) 255 ITR 273 wherein the following issue arose for consideration:-
>
> "Can an Assessing Officer while assessing a company for income tax under Section 115-J of the Income Tax Act question the correctness of the profit and loss account prepared by the assessee company and certified by the statutory auditors of the company as having been prepared in accordance with the requirements of Parts II and III of Schedule VI to the Companies Act?"

Answering the aforesaid question in the negative the Apex Court held as follows:

> "For deciding this issue, it is necessary for us to examine the object of introducing Section 115-J in the IT Act which can be easily deduced from the Budget speech of the then Hon'ble Finance Minister of India made in Parliament while introducing the said section which is as follows:
>
> "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 80- VVA 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% of its book profit. In other words, a domestic widely held company will pay tax of at least 15% of its book profit. This measure will yield a revenue gain of approximately Rs 75 crores."

The above speech shows that the Income Tax Authorities were unable to bring certain companies within the net of income tax because these companies were adjusting their accounts in such a manner as to attract no tax or very little tax. It is with a view to bring such of these companies within the tax net that Section 115-J was introduced in the IT Act with a deeming provision which makes the company liable to pay tax on at least 30% of its book profits as shown in its own account. For the said purpose, Section 115-J makes the income reflected in the companies' books of accounts as the deemed income for the purpose of assessing the tax. If we examine the said provision in the above background, we notice that the use of the words "in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act" was made for the limited purpose of empowering the assessing authority to rely upon the authentic statement of accounts of the company. While so looking into the accounts of the company, an Assessing Officer under the IT Act has to accept the authenticity of the accounts with reference to the provisions of the Companies Act which obligates the company to maintain its account in a manner provided by the Companies Act and the same to be scrutinised and certified by statutory auditors and will have to be approved by the company in its General Meeting and thereafter to be filed before the Registrar of Companies who has a statutory obligation also to examine and satisfy that the accounts of the company are maintained in accordance with the requirements of the Companies Act. In spite of all these procedures contemplated under the provisions of the Companies Act, we find it difficult to accept the argument of the Revenue that it is still open to the Assessing Officer to rescrutinize this account and satisfy himself that these accounts have been maintained in accordance with the provisions of the Companies Act. In our opinion, reliance placed by the Revenue on sub-section (1-A) of Section 115-J of the IT Act in support of the above contention is misplaced. Sub-section (1-A) of Section 115-J does not empower the Assessing Officer to embark upon a fresh inquiry in regard to the entries made in the books of account of the company. The said sub-section, as a matter of fact, mandates the company to maintain its account in accordance with the requirements of the Companies Act which mandate, according to us, is bodily lifted from the Companies Act into the IT Act for the limited purpose of making the said account so maintained as a basis for computing the company's income for levy of income tax. Beyond that, we do not think that the said sub-section empowers the authority under the Income Tax Act to probe into the accounts accepted by the authorities under the Companies Act. If the statute mandates that income prepared in accordance with the Companies Act shall be deemed income for the purpose of Section 115-J of the Act, then it should be that income which is acceptable to the authorities under the Companies Act. There cannot be two incomes, one for the purpose of the Companies Act and another for the purpose of income tax, both maintained under the same Act. If the legislature intended the Assessing Officer to reassess the company's income, then it would have stated in Section 115-J that "income of the company as accepted by the Assessing Officer". In the absence of the same and on the language of Section 115-J, it will have to be held that the view taken by the Tribunal is correct and the High Court has erred in reversing the said view of the Tribunal.

Therefore, we are of the opinion, the Assessing Officer while computing the income under Section 115-J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increases and reductions as provided for in the Explanation to the said section. To put it differently, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to Section 115-J."

The views expressed by the Apex Court in Apollo Tyres (supra) was quoted with approval by the Apex Court in Malayala Manorama Co. Ltd. -Vs- CIT reported in (2008) 300 ITR 251.

2) The views expressed in Apollo Tyres (supra) was followed by this Court in the case of CIT -Vs- Ispat Industries Ltd reported in (2008) 2 DTR (Cal) 133 wherein a Division bench of this Court held as follows:

> "Accordingly, it appears that the learned Tribunal correctly held that the AO has to accept the authenticity of the account maintained in accordance with the provisions

> of the Companies Act in particular Part II and Part III of Sch VI to the said Act which are specifically certified by the auditors and approved by the company in the annual general meeting."

The Bombay High Court also followed the views expressed by the Apex Court in Apollo Tyres in the case of CIT -Vs- Adbhut Trading Company Pvt. Ltd. reported in (2011) 338 ITR 94 and held as follows:

> "According to the Revenue, the assessee has intentionally prepared a wrong profit and loss' account. Once the accounts' including the profit and loss account are certified by the 'authorities under the Companies Act it is not open to the Assessing Officer' to contend that the profit and loss account has not been prepared in accordance with the provisions of the Companies Act, 1956."

3) The Registrar of Companies, Statutory auditors and share-holders are the only authorities to check whether accounts are in accordance with Part II and III of Schedule - VI of the Companies Act 1956.

4) By an order dated 17th August, 2005 this Court sanctioned the proposed scheme of arrangement between the assessee company and DCPL. The accounting treatment for the proposed arrangement was also laid down in Part II of Schedule A of the scheme of arrangement which reads as follows:-

> "8. Accounting:
>
> 8.1 The assets and liabilities of the Investment Division shall be transferred to DCPL at their respective values as appearing in BCL's book of account as on the date immediately preceeding the Appointed Date. The said assets and liabilities shall be recorded in the books of accounts of DCPL at the said values.
>
> 8.2 The difference between the book value of the said assets and liabilities of the Investment Division recorded in the books of account of DCPL as reduced by the aggregate face value of the Equity shares issued and allotted by DCPL in terms of clause 7 above shall be credited to General Reserves in the books of account of DCPL 8.3 In the books of account of BCL the difference between the assets and liabilities of the Investment Division as reduced by the Share Capital of BCL which shall stand cancelled in terms of this Scheme shall also be adjusted against the balance in Profit and Loss Account of BCL."

Thus in view of accounting treatment expressly laid down in the scheme of arrangement sanctioned by this Hon'ble Court it was obligatory on the part of the assessee to debit the amount of Rs 919.52 lakhs towards loss on account of the transfer of the Investment Division of the assessee company to the Profit and Loss account.

5) The CIT by his order u/s.263 did not disclose any provision of Part II and III of Schedule VI of the Companies Act 1956 which was allegedly contravened. In fact the CIT by his order dated 20th January 2011 made a bald statement by holding as follows:-

> "From the facts stated above it is apparent that the loss booked in the P/L A/c is for share-capital reduction. There is no scope for such accounting as per Part-II & III of Schedule-VI of the Companies Act. Besides, such loss fictitious as held by ITAT, Delhi in quantum appeal in a similar case of debit in the case of Hari Machines Ltd. This is evident from the report of the case of CIT Vs. Hari Machines Ltd. in 166 Taxman 84 (2008), which was in respect of penalty u/s 271 (1)(c) but in the facts such finding of ITAT has been discussed. Therefore, such share capital reduction cannot be an item of P/L Ac. As per Part-II & III of Schedule-VI of the Companies Act."

6) The CIT by his order u/s.263 wrongly relied on the judgment of CIT - Vs- Hari Machines Ltd reported in (2009) 311 ITR 285 which has no manner of application to the facts of the instant case. In Hari Machines (supra) the issue was regarding imposition of penalty under Section 271(1)(c) of the Act and it was not a case dealing with Section 115JB. In that case, the assessee had a paid up capital of Rs 25 lakhs however according to the assessee the intrinsic value of the equity shares was Rs 19.5 lakhs odd. Thus the assessee decided to reduce the share capital to Rs 20 lakhs and applied to the Calcutta High Court for permission, which was granted. The assessing officer was of the view that reduction in share capital did not represent a loss incurred by the assessee and taxed the amount of Rs 5 lakhs allegedly shown as a loss. The CIT(Appeals) as well as the Tribunal upheld the action of the assessing officer. The Tribunal came to a conclusion that the loss shown on account of reduction of share capital was a fictitious loss with the intention of creating a scheme or device to defraud the Revenue. In the meanwhile, the assessing officer initiated penalty proceedings against the assessee under Section 271(1)(c) of the Act. The CIT(A) and the Tribunal cancelled the levy of penalty, which was upheld by the Delhi High Court.

In the instant case, the CIT in his order u/s.263 relied on Hari Machines (supra) and the observations of the Delhi ITAT recorded therein to reach the conclusion that such capital reduction amounts to fictitious loss. To be precise the CIT held as follows:-

> "It is already held by the Delhi High Court in the case of CIT
>
> -Vs- Hari Machine Ltd. (2009) 311 ITR 85 that such capital reduction is fictitious. On similar facts the Delhi ITAT held that such fictitious loss on capital deduction may a balance sheet adjustment but cannot be an item of P & L A/c and the loss booked in the P & L A/c is required to be added back for computation of book profit u/s.115JB... From the facts stated above it is apparent that the loss booked in the P/L A/c is for share-capital reduction. There is no scope for such accounting as per Part-II & III of Schedule-VI of the Companies Act. Besides, such loss is fictitious as held by ITAT, Delhi in quantum appeal in a similar case of debit in the case of Hari Machines Ltd. This is evident from the report of the case of CIT Vs. Hari Machines Ltd. in 166 Taxman 84 (2008), which was in respect of penalty u/s 271 (1)(c) but in the facts

> such finding of ITAT has been discussed. Therefore, such share capital reduction cannot be an item of P/L Ac. As per Part-ll & III of Schedule-VI of the Companies Act."

However a close scrutiny of the judgement in Hari Machines (supra) reveals that the issue for consideration before the Delhi High Court was only regarding imposition of penalty and not regarding addition to book profit for purpose of section 115JB. In fact the Delhi High Court held that the finding recorded by the Tribunal in the quantum appeal that the loss was fictitious was harsh.

The Delhi High Court while upholding the order of deletion of penalty observed as follows:-

> "In the present case, there is no allegation that there was any gross or wilful neglect on the part of the assessee to declare the correct income. The question that arises is whether the assessee has committed any kind of fraud.
>
> It is difficult to say, on the facts of the present case, that the assessee had committed any fraud notwithstanding the strong words used by the Tribunal in the quantum matter. The assessee was entitled to determine the intrinsic value of its shares, which it did. Thereafter, in order to reduce its share capital, the assessee is obliged to proceed in accordance with law and so the assessee approached the Calcutta High Court for reduction of its share capital. After considering the materials on record, the Calcutta High Court permitted the assessee to reduce its share capital in terms of its order dated December 21, 1972.
>
> It is nobody's case that the Calcutta High Court was defrauded by the assessee. That being the position we must proceed on the basis that the decision rendered by the Calcutta High Court was correct and there was no attempt on the part of the assessee to mislead the Calcutta High Court. On the other hand, the Calcutta High Court could have refused to entertain the prayer made by the assessee, if the assessee had tried to mislead the court.
>
> Under these circumstances, we are of the opinion that the Tribunal was correct in upholding the order passed by the Commissioner of Income-tax (Appeals) cancelling the levy of penalty against the assessee and holding that the assessee had not committed any fraud. The question of law referred to us is answered in the affirmative, that is in favour of the assessee and against the Revenue."

7) The jurisdiction u/s.263 was wrongly exercised on an erroneous reading of the judgement in Hari Machines (supra) which has no manner of application to the facts of this case. The CIT in his order u/s.263 did not disclose any material on the basis of which he could arrive at the conclusion that the assessment order under consideration is "erroneous in so far as it is prejudicial to the interests of the revenue".

8) The note number 8 of Schedule 15 (titled 'Significant accounting policies and notes on accounts') of the Balance Sheet and Profit and Loss Account for the year ended 31st March 2006 was not provided by the statutory auditors rather it is a note made by the company. Regarding note number 8 the Tribunal had held as follows:

> "As regards note no. 8 in the balance sheet, it is not an objection or qualification by the auditor but it is a part of significant accounting policies and notes on account's which is mainly informative in nature. By no stretch of logic, this can be treated as qualification in the auditors report."

9) That revisional jurisdiction u/s.263 of the Act cannot be exercised where two views are possible and the assessing officer has taken one of the possible views. In support of his submissions he relied on a judgement in the case of Malabar Industrial Company -Vs- CIT reported in (2000) 243 ITR 83 wherein their Lordships discussed the scope of s.263 and held as follows:-

> "...The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent -- if the order of the Income Tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue -- recourse cannot be had to Section 263(1) of the Act.
>
> There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.
>
> The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in Dawjee Dadabhoy & Co. v. S.P. Jain [(1957) 31 ITR 872 (Cal)] , the High Court of Karnataka in CIT v. T. Narayana Pai [(1975) 98 ITR 422 (Kant)] , the High Court of Bombay in CIT v. Gabriel India Ltd. [(1993) 203 ITR 108 (Bom)] and the High Court of Gujarat in CIT v. Minalben S. Parikh [(1995) 215 ITR 81 (Guj)] treated loss of tax as prejudicial to the interests of the Revenue...
>
> The phrase "prejudicial to the interests of the 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 interests of the Revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial

> to the interests of the Revenue unless the view taken by the Income Tax Officer is unsustainable in law."

In view of the authoritative pronouncement of the Apex Court in Appollo Tyres (supra) the assessing officer while computing the income under Section 115-JB has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increases and reductions as provided for in the Explanation 1 to the section 115JB(2). Thus, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation 1 to Section 115JB. The amount of Rs 919.52 lakhs debited to the Profit and Loss A/c towards the loss on account of the transfer of the Investment Division of the assessee company, cannot be added back for computing the book profit u/s.115JB because the Explanation 1 to s.115JB(2) does not provide for such addition. Hence the assessing officer in the instant case could not have made any addition for the said amount. Thus the view taken by the assessing officer in not making any addition to the book profit for purpose of s.115JB cannot be called erroneous. In fact it was the only possible view that could have been taken. Furthermore the CIT in his order u/s.263 did not hold that the order of the assessing officer was unsustainable. Hence, in view of the mandate in Malabar Industrial Company Ltd., the exercise of revisional jurisdiction under Section 263 was bad as the preconditions for exercise of revisional power did not exist. The views expressed in Malabar Industrial Company (supra) were reiterated by the Apex Court in CIT -Vs- Max India Ltd. reported in (2007) 295 ITR 282.

An erroneous order is one which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. An order can be said to be "prejudicial to the interests of the Revenue" if it is not in accordance with the law and consequently the lawful revenue due to the State is not realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two conditions are present. If not, he has no authority to initiate proceedings for revision u/s.263 of the Act. The said provision does not allow the Commissioner to substitute his own view for that of the assessing officer unless the conditions precedent u/s.263 are satisfied. In support of his submission he relied on a judgement of the Bombay High Court in CIT -Vs- Gabriel India Ltd. reported in (1993) 203 ITR 108 wherein the court has elaborately discussed the scope of s.263 in the following words:-

> "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 acocounts 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 termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. 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.

We, therefore, hold that in order to exercise power under sub- section (1) of section 263 of the Act there must be material before the Commissioner to consider that the order passed by the Income-tax Officer was erroneous in so far as it is prejudicial to the interests of the Revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the Income-tax Officer without making any enquiry in undue haste. We have also held as to what is prejudicial to the interests of the Revenue. An order can be said to be prejudicial to the interests of the Revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on the record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power. It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on record to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant objective factors were available from the records called for and examined by such authority... So far as calling for the records and examining the same is concerned, undoubtedly, it is an administrative act, but on examination "to consider" or in other words, to form an opinion that the particular order is erroneous in so far as it is prejudicial to the interests of the Revenue, is a quasi-judicial act because on this consideration or opinion the whole machinery of re-examination and reconsideration of an order of assessment, which has already been concluded and

> controversy which has been set at rest, is set again in motion. It is an important decision and the same cannot be based on the whims or caprice of the revising authority. There must be materials available from the records called for by the Commissioner."

10) The accountant's certificate under Sub-section 4 of Section 115JB of the Act was not challenged by the CIT in his order u/s.263 of the Act. Mr. Bandopadhyay learned advocate appearing for the revenue contended that the loss could not have been debited to the P/L account. Therefore, it is not in accordance with the provisions of Section 115 JB hence it is erroneous and prejudicial to the Revenue. Therefore, exercise u/s.263 was proper.

We have heard at length the arguments advanced at the Bar and carefully perused the record.

What is required of us is to examine the legality of exercise of power under Section 263 of the Act by the CIT. It is a fact that the assessee incurred loss of a sum of Rs.9.20 crores by resorting to transfer of its investment division to Daisy Commercials Private Ltd. The loss was debited to the profit and loss account. The assessment was under

> Section 115JB of the Act. The assessing officer did not question the act of debiting loss arising out of the transfer to the P/L account.
>
> The CIT was of the opinion that the loss could not have been debited to the P/L account and the amount was required to be added back for computation of book profit under Section 115JB.
>
> The accounting standards laid down by the institute however provide for recognition of the profit or loss arising out of investment in the profit and loss account.
>
> Reference in this regard may be made to Clauses 21 and 25 of Accounting Standard 13.
>
> "21. On disposal of an investment, the difference between the carrying amount and the disposal proceeds, net of expenses, is recognised in the profit and loss statement.
>
> 25. The following disclosures in financial statements in relation to investments are appropriate:--
>
> (a) the accounting policies for the determination of carrying amount of investments;
>
> (b) the amounts included in profit and loss statement for:
>
> (i) interest, dividends (showing separately dividends from subsidiary companies), and rentals on investments showing separately such income from long term and current investments.

Gross income should be stated, the amount of income tax deducted at source being included under Advance Taxes Paid;

(ii) profits and losses on disposal of current investments and changes in carrying amount of such investments;

(iii) profits and losses on disposal of long term investments and changes in the carrying amount of such investments;

(c) significant restrictions on the right of ownership, realisability of investments or the remittance of income and proceeds of disposal;

(d) the aggregate amount of quoted and unquoted investments, giving the aggregate market value of quoted investments;

(e) other disclosures as specifically required by the relevant statute governing the enterprise."

The disclosure made in the financial statements is in pursuance of the requirement of Clause- 25 quoted above and is also in pursuance of Clause 2(b) of Part II of Schedule VI to the Companies Act, 1956 which is not to be construed as any qualification indicating any inaccuracy in the accounts. There was, thus no mistake on the part of the assessee in debiting the loss to the profit and loss account.

In the computation of income under Section 115JB there is authoritative pronouncement laid down by the Apex Court in Apollo Tyres (supra) which is as follows:-

> "Therefore, we are of the opinion, the Assessing Officer while computing the income under Section 115-J has only the power of examining whether the books of account are certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increases and reductions as provided for in the Explanation to the said section. To put it differently, the Assessing Officer does not have the jurisdiction to go behind the net profit shown in the profit and loss account except to the extent provided in the Explanation to Section 115-J."

Once it is realized that the assessee had correctly debited the profit and loss account for the loss arising out of the transfer of investment division, there remains no difficulty in realizing that the CIT proceeded on a wrong premise which was responsible for exercise of jurisdiction under Section 263 which he would not have done if he had realized the correct position as would appear from the following paragraph:-

> "Therefore, such share capital reduction cannot be an item of P/L Ac. As per Part-ll III of Schedule-VI of the Companies Act. The decision of the Hon'ble Apex Court in the case of Apollo Tyres Ltd. in respect of adjustments only as per explanation-1 is

> applicable only after the accounts have been prepared as provided in sub-section (2) of Sec. 115JB of the Act. The condition not having been satisfied, the amount was required to be added back in computation of Book profit for MAT u/s 115JB. But it is apparent from the records that the issue has not been examined by the AO at all while passing the assessment order and no such addition has been made."

Had it not been a case of section 115JB the capital loss incurred on transfer of investments would have been dealt as follows:

> 1. Under section 70(2) short term capital loss would be set off against either short term or long term capital gain.
>
> 2. Under section 70(3) long term capital loss would be set off against long term capital gain only.
>
> 3. Under section 71(3) if the net result of computation under the head "Capital gain" is a loss then such loss cannot be set off against income under any other head.
>
> 4. Under section 74(1)(a) short term capital loss would be carried forward to the following assessment year and be set off against either short term or long term capital gain.
>
> 5. Under section 74(1)(b) long term capital loss would be carried forward to the following assessment year and be set off against long term capital gain only.

In that view of the matter, the only conclusion which can be arrived at is that the order passed by the learned Tribunal is unexceptionable.

For the aforesaid reasons the question no. (I) is answered in the affirmative.

We can only add that the judgment of the Delhi High Court in the case of CIT -Vs- Hari Machines Ltd. had no applicability to the facts and circumstances of the case. Rest of the questions need not be answered.

The appeal is therefore, dismissed.

```
                                          (GIRISH CHANDRA GUPTA, J.)



        I agree.                                  (ASHA ARORA, J.)
```