Malayala Manorama Co. Ltd vs Commissioner Of Income Tax,Trivandrum on 10 April, 2008

Equivalent citations: 2008 AIR SCW 3407, 2008 (12) SCC 612, AIR 2008 SC (SUPP) 1794, 2008 TAX. L. R. 465, (2008) 300 ITR 251

Author: Dalveer Bhandari

Bench: Ashok Bhan, Dalveer Bhandari

CASE NO.:
Appeal (civil) 5420-5423 of 2002

PETITIONER:
Malayala Manorama Co. Ltd.

RESPONDENT:
Commissioner of Income Tax,Trivandrum

DATE OF JUDGMENT: 10/04/2008

BENCH:
Ashok Bhan & Dalveer Bhandari

JUDGMENT:

J U D G M E N T Dalveer Bhandari, J.

These appeals are directed against the judgment passed by a Division Bench of the Kerala High Court at Ernakulam on 13th November, 2001 whereby the High Court has decided Income Tax Reference Nos.245, 259, 289 and 293 of 1999 by a common judgment.

The main question which arose for consideration before the Court below was:

> Whether in respect of a company consistently charging depreciation in its books of account at the rates prescribed in the Income-tax Rules, the Income Tax Officer has jurisdiction under section 115J of the Income Tax Act, 1961 to rework net profits by substituting the rates prescribed in Schedule XIV of the Companies Act, 1956? The concept of a minimum tax on zero tax companies was introduced under section 80VVA of the Income Tax Act, 1961 (hereinafter referred to as the 1961 Act) when a ceiling was placed on allowances by the Finance Act, 1983 with effect from the Assessment Year 1984-85. However, the allowances unabsorbed, because of the restriction imposed by the ceiling, were carried forward, so that they could be absorbed in a later year, if adequate profits are available. Section 80VVA was dropped from the statute by the Finance Act, 1987, with effect from A.Y. 1988-89,

when replaced Book Profits Tax by section 115J of the 1961 Act. But it was materially different in one respect that no part of the tax on book profits could be adjusted against tax on regular assessment at a future date.

It may be pertinent to mention that the Book Profit Tax was abandoned with effect from A.Y. 1990-91 by the Finance Act, 1990. It was re- introduced with a new name Minimum Alternate Tax with effect from A.Y. 1997-98 under section 115JA.

For ready reference, we deem it appropriate to reproduce section 115J of the 1961 Act as under:

15-J. Special provisions relating to certain companies. (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 such book profit.

(1-A) 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).

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 (1-A), as increased by

(a) the amount of income tax paid or payable, and the provision therefor; or

(b) the amounts carried to any reserves other than the reserves specified in Section 80-HHD or sub-section (1) of Section 33-AC, 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; or

(g) the amount withdrawn from the reserve account under Section 80-HHD, where it has been utilised for any purpose other than those referred to in sub-

section (4) of that section; or

(h) the amount credited to the reserve account under Section 80-HHD, to the extent that amount has not been utilised within the period specified in sub- section (4) of that section;

(ha) the amount deemed to be the profits under sub-section (3) of Section 33-AC;

if any amount referred to in clauses (a) to (f) is debited or, as the case may be, the amount referred to in clauses (g) and (h) is not credited to the profit and loss account, and as reduced by,

(i) the amount withdrawn from reserves other than the reserves specified in Section 80-HHD 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 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 amounts as arrived at after increasing the net profit by the amounts referred to in clauses (a) to (f) and reducing the net profit by the amounts referred to in clauses (i) and (ii) attributable to the business, the profits from which are eligible for deduction under Section 80-HHC or Section 80-HHD; so, however, that such amounts are computed in the manner specified in sub-section (3) or sub-section (3-A) of Section 80-HHC or sub-section (3) of Section 80-HHD, as the case may be; or

(iv) the amount of the loss or the amount of depreciation which would be required to be set off against the profit of the relevant previous year as if the provisions of clause (b) of the first proviso to sub-section (1) of Section 205 of the Companies Act, 1956 (1 of 1956), are applicable.

(2) 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 32-A or clause (ii) of sub-section (1) of Section 72 or Section 73 or Section 74 or sub-section (3) of Section 74-A or sub- section (3) of Section 80-J. A new Chapter XII-B containing section 115J was inserted by the Finance Act, 1987 with effect from Ist April, 1988. This new section made provisions for levy of minimum tax on book profits of certain companies. The scope and effect of these provisions have been elaborated in the following portion of the departmental circular No.495, dated 22nd September, 1987:-

"New provisions to levy minimum tax on "book profit" of certain companies:

36.1 It is an accepted cannon of taxation to levy tax on the basis of ability to pay.

However, as a result of various tax concessions and incentives certain companies making huge profits and also declaring substantial dividends, have been managing their affairs in such a way as to avoid payment of income-tax.

36.2 Accordingly, as a measure of equity, section 115J has been introduced by the Finance Act. By virtue of the new provisions, in the case of a company whose total income as computed under the provisions of the Income-tax Act is less then 30% of the book profit computed under the section, the total income chargeable to tax will be 30 % of the book profit as computed. For the purposes of section 115J, book profits will be the net profit as shown in the profit and loss account prepared in accordance with the provisions of Schedule VI to the Companies Act, 1956, after certain adjustments. The net profit as above will be increased by income-tax paid or payable or the provisions thereof, amount carried to any reserve, provision made for liabilities other than ascertained liabilities, provision for losses of subsidiary companies, etc., if the amounts are debited to the profit and loss account. Liabilities relating to expenditure which has been incurred or which has accrued in respect of expenses which are otherwise deductible in computing income will not be added back. The amount so arrived at is to be reduced by-

(i) amounts withdrawn from reserves, if any such amount is credited to the profit and loss account;

(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; and

(iii) the amount of any brought forward losses or unabsorbed depreciation whichever is less as computed under the provisions of section 205(1)(b) of the Companies Act, 1956, for the purposes of declaration of dividends. Section 205 of the Companies Act requires every company desirous of declaring dividend to provide for depreciation for the relevant accounting year. Further, the company is required under section 205 to set off against the profit of the relevant accounting year, the depreciation debited to the profit and loss account of any earlier year(s) or loss whichever is less.

36.3 Section 115J, therefore, involves two processes. Firstly, an assessing authority has to determine the income of the company under the provisions of the Income-tax Act. Secondly, the book profit is to be worked out in accordance with the Explanation to section 115J(1) and it is to be seen whether the income determined under the first process is less than 30 per cent of the book profit. Section

115J would be invoked if the income determined under the first process is less than 30 per cent of the book profit. The whole purpose of section 115J was to tax a company which had no taxable income, but showed a book profit. For instance, a company which adopted the method of straight-line depreciation (as it is entitled to do under the Companies Act, 1956 (hereinafter referred to as the 1956 Act), or a company which had not debited to its profit and loss account, the capital expenditure on scientific research and development which is fully deductible under section 35 of the 1961 Act would be assessed to tax under this section.

It was submitted on behalf of the appellant that in the profit & loss account the assessee has debited depreciation at the rates prescribed by the Income-tax Rules, 1962. This has been the consistent practice of the assessee throughout. Section 211(2) of the 1956 Act mandates that every profit and loss account of a company shall give a true and fair view of the profit or loss of the company for the financial year and shall comply with the requirements of Parts-II of Schedule VI so far as they are applicable thereto. The accounts of the assessee for the relevant assessment years 1988-89 and 1989-90 are audited under section 227 of the 1956 Act. The audit report confirms that the accounts of the assessee represent a true and fair view . The accounts have further been passed and approved by the general body of shareholders at the Annual General Meeting. The said accounts have been filed with the Registrar of Companies and no objections have been raised in relation to them.

It was further submitted that under section 115J the assessee has the obligation to prepare his profit and loss account as per Parts-II and III of Schedule VI to the 1956 Act. No dispute has been raised at any stage of the proceedings by the revenue that the profit & loss account of the assessee is not in compliance with the provisions of the 1956 Act, particularly Schedule VI, Parts II and III. In Schedule VI, there is no reference to sections 205 and 350 or Schedule XIV to the 1956 Act.

The appellant referred to Note 3 (iv) to Part II (Requirements as to profit and loss account) of Schedule VI to the 1956 Act which reads as under:

> The amount provided for depreciation, renewals or diminution in value of fixed assets.
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> If such provision is not made by means of a depreciation charge, the method adopted for making such provision.
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> If no provision is made for depreciation, the fact that no provision has been made shall be stated and the quantum of arrears of depreciation computed in accordance with section 205(2) of the Act shall be disclosed by way of a note. This makes it clear that Schedule VI to the 1956 Act does not create any obligation on a company to provide for any depreciation much less provides for depreciation as per Schedule XIV to the Act.
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> It was also submitted by the appellant that it is a long-standing accepted position by the Company Law department that the rates of depreciation prescribed in Schedule

XIV are the minimum rates (See: Circular No.2 of 1989 dated 7th March, 1989). Paragraph 1 of the said Circular reads as under:

. Can higher rates of depreciation be charged? - It is stated that Schedule XIV clearly states that a company should disclose depreciation rates if they are different from the principal rates specified in the Schedule. On this basis, it is suggested that a company can charge depreciation at rates which are lower or higher than those specified in Schedule XIV.

It may be clarified that the rates as contained in Schedule XIV should be viewed as the minimum rates and, therefore, a company shall not be permitted to charge depreciation at rates lower than those specified in the Schedule in relation to assets purchased after the date of applicability of the Schedule . Moreover, note 5 of Schedule XIV contemplates that rates may be different from the rates specified in the said Schedule. This note reads as under:

. The following information should also be disclosed in the accounts:

(i) depreciation methods used; and

(ii) depreciation rates or the useful lives of the assets, if they are different from the principal rates, specified in the Schedule. It was submitted by the learned counsel on behalf of the appellant that this case is squarely covered by a three-Judge Bench decision of this Court in Apollo Tyres Ltd. etc. v. Commissioner of Income Tax, Kochi etc. (2002) 9 SCC 1. In this view of the matter, we deem it proper to examine the Apollo Tyres s case in detail.

In Apollo Tyres (supra), this Court examined the object of introducing section 115J in the 1961 Act. The Court relied on the budget speech of the then Hon ble Finance Minister of India made in the Parliament while introducing the said section. The relevant portion of the speech is reproduced as under:

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 Court held that the purpose of introducing this section was 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 115J was introduced in the 1961 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 115J 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 Income Tax 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 scrutinized 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, the Court observed that it is 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. The Court categorically held that:

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. Mr. Joseph Vellapally, learned senior counsel appearing on behalf of the appellant reiterated that this case is fully covered by detailed reasoning given by this Court in the case of Apollo Tyres. He further submitted that the reasoning of this case has been accepted in a large number of judgments of the High Courts.

Mr. Vellapally placed reliance on a division bench judgment of the Punjab & Haryana High Court in Commissioner of Income Tax v. Sona Woolen Mills Pvt. Ltd. (2007) 160 Taxman 22 and submitted that in this case also the assessee had provided for depreciation in its profit & loss account by adopting the rates prescribed in the Income-tax Rules. The Assessing Officer claimed that the depreciation for the purposes of section 115J was permissible as per Schedule XIV to the Companies Act. The High Court relying upon the decision in Apollo tyres rejected the view taken inter alia by the Kerala High Court in Malayala Manorama (2002) 253 ITR 378.

Mr. Vellapally also submitted that the respondent revenue has accepted the judgment delivered by the High Court of Punjab & Haryana in the aforesaid judgment and did not challenge the same by filing Special Leave Petition before this Court.

Mr. Vellapally has also drawn our attention to the division bench judgment of the Bombay High Court in Kinetic Motors v. Deputy Commissioner of Income Tax (2003) 262 ITR 33 and submitted that in this case the Bombay High Court relied on the said judgment of Apollo Tyres and held the issue in favour of the assessee. In this case, the Division Bench of the Bombay High Court observed as under:

> The short question that arises for consideration in this tax appeal is whether it is open to the Assessing Officer to make adjustment to the book profits beyond what is authorised by the definition given in Explanation to Section 115J of the Income- tax Act, if the accounts are prepared and certified to be in accordance with Parts II and III of Schedule VI to the Companies Act, 1956. In the case of Apollo Tyres Ltd. [2002] 255 JTR 273, the apex court held that while computing the income under Section 115J of the Income-tax Act, the Assessing Officer has only power to examine whether the books of account were certified by the authorities under the Companies Act as having been properly maintained in accordance with the Companies Act. It is further held that the Assessing Officer thereafter has limited powers of making increases and reductions as provided for in the Explanation to the said section. The apex court further held that the Assessing Officer does not have the jurisdiction to go beyond the net profits shown in the profit and loss account, except to the extent provided in the Explanation to Section 115J of the Income-tax Act. In the instant case, the accounts maintained by the assessee are certified by the auditors. Under the circumstances, the book adjustment made by the Assessing Officer being contrary to the decision of the apex court, question No. 1 is answered in the negative and in favour of the assessee.

In view of our answer to question No. 1, question No. 2 becomes academic. It is not in dispute that under the Companies Act, 1956, both straight line method and written down value method are recognised. Therefore, once the amount of depreciation actually debited to the profit and loss account is certified by the auditors, then, as per the decision of the apex court in the case of Apollo Tyres Ltd. [2002] 255 ITR 273, question No. 2 has to be answered in the negative and in favour of the assessee. Mr. Vellapally further placed reliance on Commissioner of Income Tax v. Loyal Textiles Mills Ltd. (2003) 261 ITR 307 (Madras), Commissioner of Income Tax v. Thiroo Arooran Sugars Ltd. (2006) 152 Taxman 344 (Madras), Cochin Cadalas (P) Ltd. v. Commissioner of Income Tax (2002) 125 Taxman 47 (Kerala) and Rajasthan Spinning & Weaving Mills v. Deputy Commissioner of Income Tax (2006) 281 ITR 177 (Rajasthan). All these judgments have been decided on the basis of the ratio of the decision of this Court in Apollo Tyres (supra). He further submitted that the respondent revenue has accepted the decisions of the High Courts in all these cases and did not challenge the same by filing Special Leave Petitions before this Court.

Mr. Vikram Gulati, learned counsel appearing on behalf of the respondent-Revenue submitted that in the instant case three questions were raised before the High Court, one at the instance of the Revenue and two questions at the instance of assessee.

The question raised by the revenue was:

> Whether on the facts and in the circumstances of the case, the tribunal was right in upholding the order of the CIT (Appeals) directing the assessing officer to allow the claim of depreciation as per the Income Tax Rules for the purposes of computing the book profit under section 115J of the Companies Act? The questions raised by the assessee are as under:
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> . Whether on the facts and in the circumstances of the case, the tribunal was justified in upholding the finding of the CIT (Appeals) that the proceeding of the assessing authority dated 09.10.2002, was a valid order under section 154 of the Income Tax Act?
>
> 2. Whether on the facts and in the circumstances of the case, the tribunal was justified in law in upholding the computation under section 115J through the order passed on 09.10.1992? Mr. Gulati submitted that the facts of this case are that for the assessment years 1988-89, the assessee filed a return declaring loss of Rs.1,12,293/-

and claimed the refund of Rs.8,62,730/- pre paid as tax. The Deputy Commissioner of Income Tax (Asst.), Special Range, Kottayam rejected the figures returned by the assessee and assessed the total income at Rs.47,26,270/- and imposed a tax of Rs.25,99,448/- as well as a surcharge of Rs.1,29,972/- totaling Rs.27,29,420/-. After adjusting advance tax paid, as well as the TDS deducted, the Assessing Officer created a total demand of Rs.26,83,327/-. It is relevant to mention here that since the provision of section 80VV stood deleted with effect from 01.4.1988 the claim made under that section was rejected.

It was submitted that Chapter XII-B containing special provisions relating to certain companies was introduced in the Income Tax Act by the Finance Act 1987 with effect from 01.4.1988. From the assessment year 1988-89, section 115J was introduced into the 1961 Act, which replaced section 80VV of the Act. Section 115J provided that where the total income of a company as computed under the Income Tax Act in respect of any accounting year was less than 30% of its book profit, as defined in the explanation, the total income of the company, chargeable to tax, shall be deemed to be an amount equal to 30% of such book profit. The whole purpose of this section was to tax a company, which has no taxable income, merely because it shows book profit. Book profit as explained in this section meant the net profit as shown in the profit and loss account for the relevant previous year prepared under sub section (1A) of section 115J as increased by the amounts referred to in clauses (a) to (ha) of the Act. It should be noted that the words prepared under sub-section (1A) were introduced by the Finance Act, 1989, with effect from 01.4.1989.

Sub-section (1A) to section 115J reads as follows:

> 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 Part II, and III of Schedule VI to the Companies Act, 1956 (1 of 1956).

This sub-section (1A) to section 115J of the 1961 Act would have application for the A.Y. 1989-90, which is the subject matter of ITR Nos.289 and 293 of 1999. But would have no application to the A.Y. 1988-89, which is the subject matter of ITR Nos.245 and 259 of 1999.

Explanation (ha) (iv) to section 115J, which would be relevant to both assessment years 1988-89, as well as 1989-90 and introduced w.e.f. 01.4.1989 reads as follows:

> (ha). The amount deemed to be the profits under sub-section (3) of section 33AC:
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> if any amount referred to in clauses (a) to (f) is debited or, as the case may be, the amount referred to in clauses (g) and (h) is not credited to the profits and loss account, as as reduced by.
>
> (i) xxx xxx xxx
>
> (ii) xxx xxx xxx
>
> (iii) xxx xxx xxx
>
> (iv) the amount of the loss or the amount of depreciation which would be required to be set off against the profit of the relevant previous year as if the provisions of clause (b) of the first proviso to sub-section (1) of section 205 of the Companies Act, 1956 (1 of 1956) are applicable. Mr. Gulati further submitted that before the High Court, it was argued by counsel for the revenue that section 205 of the Companies Act, 1956 has been legislatively incorporated into the Income Tax Act for the purposes of section 115J and since this is a legislation by incorporation, the said provision of the Companies Act, 1956 has to be applied as indicated by that provision in the Companies Act. It was also pointed out that in section 205 of the Companies Act, it has been provided that for the purposes of calculating depreciation under section 205(1), the same could be provided to the extent specified under section 350 of the Companies Act. A reference to section 350 of the Companies Act would show that the amount of depreciation to be deducted shall be the amount, calculated with reference to the written down value of the assets, as shown by the books of the company at the end of the financial year expiring at the commencement of the Act or immediately thereafter and at the end of each subsequent financial year and the rates specified in Schedule XIV to the Companies Act. Therefore, according to the revenue, the calculation of depreciation in terms of the Companies Act and Schedule XIV thereof becomes a must, while assessing an assessee under section 115J of the Income Tax

Act.

Mr. Gulati further submitted that the question raised in the case of Sona Woolen Mills Pvt. Ltd. (supra) shows that the assessee was trying to claim depreciation as per Income Tax Rules on the ground that the same was based on the views expressed by the then chairman of the CBDT in a departmental publication. It is clear that the views expressed by the Chairman of the CBDT cannot override the Act and have clearly to be rejected in case they are not consistent with the Act. He submitted that the Kerala High Court in Commissioner of Income Tax v. Dynamic Orthopaedics Pvt. Ltd. (2002) 257 ITR 446 as well as Malayala Manorama (supra) and the M.P. High Court in the case of Commissioner of Income Tax v. Vandana Rolling Mills Ltd. (1998) 234 ITR 693 have all held that for the purposes of section 115J of the Act, depreciation could not be calculated as per provisions of the Income Tax Rules. Only the Gujarat High Court in the case of Deputy Commissioner of Income Tax v. Vardhman Fabrics (P) Ltd. (2002) 254 ITR 431 has upheld the view that the circular of the Company Law Board laid down only minimum depreciation for the purposes of distribution of the dividend and the company could decide to give a higher depreciation. Mr. Gulati also contended that the Punjab & Haryana High Court has preferred to follow the minority view and has ignored the majority view taken by two High Courts, namely the Kerala High Court as well as the M.P. High Court.

Mr. Gulati also relied upon the case of J.K. Industries Ltd. v. Union of India (2008) 297 ITR 176 (SC). On proper analysis of the said case, we find that this case also does not help the Revenue.

We have heard the learned counsel for the parties at length and carefully perused the written submissions filed by them. In our considered opinion, the controversy involved in this case is no longer res integra. A three Judge Bench of this Court in Apollo Tyres (supra) has clearly interpreted section 115J of the 1961 Act. There is no scope for any further discussion.

Consequently, the appeals are allowed and the impugned order of the High Court is accordingly set aside. In the facts and circumstances of the case, we direct the parties to bear their own costs.