

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "A", KOLKATA  
[Before Shri Mahavir Singh, JM & Shri M.Balaganesh, AM]

**ITA No.890/Kol/2013**  
**Assessment Year : 2007-08**

DPSC Ltd.  
Kolkata  
(PAN:AABCD0340G)  
(APPELLANT )

-versus-

D.C.I.T., Circle-VI,  
Kolkata  
(RESPONDENT)

For the Appellant : Shri Soumen Adak, FCA & Shri Amit Agarwal, ACA  
For the Respondent : Sallong Yaden, Addl. CIT, Sr.DR

Date of Hearing : 02.05.2016.  
Date of Pronouncement :

**ORDER**

**Per Shri M.Balaganesh, AM**

1. This appeal of the assessee arises out of the order of the Learned CIT(A)-VI, Kolkata in Appeal No. 1/CIT(A)-VI/Cir-6/2010-11/Kol dated 01.02 against the order of assessment framed for the Asst Year 2007-08 u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. During the course of hearing, the Learned AR stated that in view of the smallness of the amount involved , he is not pressing the ground no.1 on the issue of disallowance u/s 14A of the Act. Accordingly, the ground no. 1 is dismissed as not pressed.

3. The next issue to be decided in this appeal is as to whether the Learned CITA is justified in rejecting the additional grounds raised by the assessee before him on 10.1.2013 in the facts and circumstances of the case.

3.1. The brief facts of this issue are that the assessee is a public company engaged in the business of generation and distribution of electricity and being an electricity company, is governed by the provisions of Electricity Act, 2003 and has to prepare its

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accounts as per the policies and standards prescribed under the Electricity Act and its regulations. In terms of the said regulations and location of the assessee, the assessee is required to prepare its balance sheet and profit and loss account in accordance with West Bengal Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2005. Since the accounts were prepared not in accordance with the provisions of Part II of Schedule VI to the Companies Act, 1956, the assessee pleaded that the provisions of section 115JB of the Act could not be made applicable to the assessee company and had accordingly raised the additional grounds to this effect before the Learned CITA on 10.1.2013. The Learned CITA observed that the assessee had not adduced proper reasons as to why the same issue was not raised before the Learned AO. Moreover, he observed that the assessee itself had offered the income to tax under the provisions of section 115JB of the Act. Accordingly he refused to admit the additional grounds but proceeded to adjudicate the issue on merits. Aggrieved, the assessee had raised the following ground before us :-

*“2.0. That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) was not justified & erred in not admitting additional grounds filed before it, without considering the fact that, the additional grounds were merely questions of law on the facts available on record and essential in order to correctly assess the tax liability of an appellant.”*

3.2. We have heard the rival submissions. We find that the additional ground raised by the assessee before the Learned CITA is a legal issue and does not require any fresh investigation of facts and the Hon'ble Supreme Court in the case of NTPC Ltd vs CIT reported in 229 ITR 383 (SC) had already held that the issues involving question of law and not requiring investigation of facts could be raised for the first time even at the appellate proceedings. Respectfully following the said judgement, we hold that the dismissal of the additional ground raised by the assessee is not justified. Accordingly the ground no.2 raised by the assessee before us is allowed.

4. The next issue to be decided in this appeal is as to whether the provisions of section 115JB of the Act could be made applicable to the assessee company in the facts and circumstances of the case and for the assessment year under appeal.

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4.1. We have heard the rival submissions and perused the materials available on record. The Learned AR argued that the assessee being a electricity company is being governed by the provisions of the Electricity Act 2003 and the assessee is required to prepare its balance sheet and profit and loss account in accordance with West Bengal Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2005. The Learned CITA had a given a clear finding to this effect in his order. The Learned AR argued that as per the provisions of section 115JB(2) of the Act, for computing book profit under this section, the assessee has to prepare its accounts as per Part II and III of Schedule VI to the Companies Act, 1956 and not as per the Electricity Act, 2003. The Learned CITA had held that the amendment brought in section 115JB of the Act by the Finance Act 2012 is clarificatory in nature and hence has to be construed as retrospective in operation. We find that the section 211 and section 616 of the Companies Act, 1956 provides that in case of Electricity Companies, provisions of Electricity Act shall prevail over the provisions of Companies Act wherever they are inconsistent. For the sake of convenience, the provisions of section 616 of the Companies Act , 1956 is reproduced below:-

*Application of Act to Insurance, banking, electricity supply and other companies governed by special Acts .*

*The provisions of this Act shall apply- .*

*a) to insurance companies; except in so far as the said provisions are inconsistent with the provisions of the Insurance Act, 1938;*

*b) to banking companies. except in so far as the said provisions are inconsistent with the provisions of the Banking Companies Act, 1949;*

*c) to companies engaged in the generation or supply of electricity. except in so far as the said provisions. are inconsistent with the provisions of the Indian Electricity Act. 1910 of the Electricity Supply 1948; .*

*d) to any other company governed by any special Act for the time being in force, except in so far, as the said provisions are inconsistent with the provisions of such special Act;*

*e) to such body corporate, incorporated by any Act for the time being in force, as the Central Government may, by notification in the official Gazette, specify in this behalf, subject to such exceptions, modifications or adaptation, as may be specified in the notification.*

4.2. The Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 has since been repealed by the Electricity Act, 2003. From perusal of the above it could be

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noted that for an Electricity company, provisions of Electricity Act, 2003 shall override provisions of Companies Act wherever there is inconsistencies between the two. In other words, wherever the provisions of the Companies Act differ from that of the Electricity Act, 2003, the provisions of the Electricity Act would prevail over the provisions of the Companies Act.

4.3. Section 115JB(2) of the Income Tax Act, 1961.

Special provision for payment of tax by certain companies

(2) [Every assessee,—

(a) being a company, other than a company referred to in clause (b), 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 of Schedule VI to the Companies Act, 1956 (1 of 1956); or

(b) being a company, to which the proviso to sub-section (2) of section 211 of the Companies Act, 1956 (1 of 1956) is applicable, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of the Act governing such company:]

**Provided** that while preparing the annual accounts including profit and loss account,—

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account;

(iii) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956) :

**Provided further** that where the company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under this Act,—

(i) the accounting policies;

(ii) the accounting standards adopted for preparing such accounts including profit and loss account;

(iii) the method and rates adopted for calculating the depreciation,

shall correspond to the accounting policies, accounting standards and the method and rates for calculating the depreciation which have been adopted for preparing such accounts including profit and loss account for such financial year or part of such financial year falling within the relevant previous year.”

4.4. Section 211(1), 211(2), 211(3), 211(3A), 211(3B) and 211(3C) of Companies Act 1956:

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211. FORM AND CONTENTS OF BALANCE SHEET AND PROFIT AND LOSS ACCOUNT

(1) Every balance sheet of a company shall give a true and fair view of the state of affairs of the company as at the end of the financial year and shall, subject to the provisions of this section, be in the form set out in Part I of Schedule VI, or as near thereto as circumstances admit or in such other form as may be approved by the Central Government either generally or in any particular case; and in preparing the balance sheet due regard shall be had, as far as may be, to the general instructions for preparation of balance sheet under the heading "Notes" at the end of that Part:

**Provided** that nothing contained in this sub-section shall apply to any insurance or a banking company or any company engaged in the generation or supply of electricity, or to any other class of company for which a form of balance sheet has been specified in or under the Act governing such class of company.

(2) 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, subject as aforesaid, comply with the requirements of Part II of Schedule VI, so far as they are applicable thereto:

*Provided that nothing contained in this sub-section shall apply to any insurance or banking company or any company engaged in the generation or supply of electricity, or to any other class of company for which a form of profit and loss account has been specified in or under the Act governing such class of company.*

(3) The Central Government may, by notification in the Official Gazette, exempt any class of companies from compliance with any of the requirements in Schedule VI if, in its opinion, it is necessary to grant the exemption in the public interest.

Any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification.

[(3A) Every profit and loss account and balance sheet of the company shall comply with the accounting standards.

(3B) Where the profit and loss account and the balance sheet of the company do not comply with the accounting standards, such companies shall disclose in its profit and loss account and balance sheet, the following, namely;-

- (a) The deviation from the accounting standards;
- (b) The reasons for such deviation; and
- (c) The financial effect, if any, arising due to such deviation.

(3C) For the purposes of this section, the expression "accounting standards" means the standards of accounting recommended by the Institute of Chartered Accountants of India constituted under the Chartered Accountants Act, 1949 (38 of 1949), as may be prescribed by the Central Government in consultation with the National Advisory Committee on Accounting Standards established under sub-section (1) of section 210A:

**Provided** that the standards of accounting specified by the Institute of Chartered Accountants of India shall be deemed to be the Accounting Standards until the accounting standards are prescribed by the Central Government under this sub-section.]”

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4.5. Explanation 3 to Section 115JB of the Income Tax Act, 1961

*“For the removal of doubts, it is hereby clarified that for the purposes of this section, the assessee, being a company to which the proviso to sub-section (2) of section 211 of the Companies Act, 1956 (1 of 1956)<sup>16a</sup> is applicable, has, for an assessment year commencing on or before the 1st day of April, 2012, an option to prepare its profit and loss account for the relevant previous year either in accordance with the provisions of Part II and Part III of Schedule VI<sup>17</sup> to the Companies Act, 1956 or in accordance with the provisions of the Act governing such company.]*

4.5.1. The Explanation 3 to section 115JB of the Act has been inserted by the Finance Act 2012 to clarify that only assesses being companies and to whom provisions of the Companies Act , 1956 are applicable came within the ambit of section 115JB of the Act. In other words, unless an assessee comes within the ambit of section 211 of the Companies Act, 1956, it was not covered by the Explanation 3 to section 115JB and as a necessary corollary section 115JB was not applicable to it.

4.6. The Notes to Clauses to Finance Act, 2012 on the subject of Minimum Alternate Tax (MAT) is reproduced below:-

*i. Under the existing provisions of section 115JB of the Act, a company is liable to pay MAT of eighteen and one half per cent of its book profit in case of tax on its total income computed under the provisions of the Act is less than MAT liability. Book profit for this purpose is computed by making certain adjustments to the profit disclosed in the profit and loss account prepared by the company in accordance with the Schedule VI of the Companies Act, 1956.*

*As per section 115JB, every company is required to prepare its accounts as per Schedule VI of the Companies Act, 1956. However, as per the provisions of the Companies Act, 1956, certain companies e.g. insurance, banking or electricity company are allowed to prepare their profit and loss account in accordance with the provisions specified in their regulatory Acts. In order to align the provisions of Income-tax Act with the Companies Act, 1956, it is proposed to amend section 115JB to provide that the companies which are not required under section 211 of the Companies Act to prepare their profit and loss account in accordance with the Schedule VI of the Companies Act, 1956, profit and loss account prepared in*

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accordance with the provisions of their regulatory Acts shall be taken as a basis for computing the book profit under section 115JB.

ii. It is noted that in certain cases, the amount standing in the revaluation reserve is taken directly to general reserve on disposal of a revalued asset. Thus, the gains attributable to revaluation of the asset is not subject to MAT liability.

It is, therefore, proposed to amend section 115JB to provide that the book profit for the purpose of section 115JB shall be increased by the amount standing in the revaluation reserve relating to the revalued asset which has been retired or disposed, if the same is not credited to the profit and loss account.

iii. It is also proposed to omit the reference of Part III of the Schedule VI of the Companies Act, 1956 from section 115JB in view of omission of Part III in the revised Schedule VI under the Companies Act 1956.

*These amendments will take effect from 1<sup>st</sup> April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years.”*

4.7. In view of the above, we hold that in view of the legislative change brought about by the introduction of Explanation 3 in section 115JB of the Act by the Finance Act, 2012 the assessee's contention in fact stands more fortified. The Explanation 3 to section 115JB makes it evidently clear that section 115JB is applicable only to entities registered and recognized to be companies under the Companies Act, 1956. Since the assessee is not a company within the meaning of Companies Act, 1956, section 211(2) and proviso thereon is not applicable and therefore consequently we hold that the provisions of section 115JB of the Act are also not applicable.

4.8. The basic intention of MAT u/s 115JB is only to tax the book profits irrespective of nil or lesser taxable income due to various exemptions / deductions like sections 10A/ 10B/ 80IA / 80IB etc. The intention of MAT is that the companies were declaring huge profits as per their companies act and declaring dividends to its shareholders but paying nil tax or lesser tax under the IT act due to various exemptions / deductions like sections 10A/

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10B/ 80IA / 80IB. To justify the imposition, real income theory was stressed and it was held that the companies cannot be allowed to have two faces, one for shareholder and another for taxman. Section 115JA was enacted by restructuring the provisions of section 115J with certain minor changes and thereafter section 115JB was enacted by bringing minor changes in section 115JA. The provisions of section 115J, 115JA and 115JB are by and large similar to each other.

4.8.1. The scope and effect of section 115JA was elaborated in the Department Circular No. 762 dated 18.2.1998. The relevant portion is reproduced hereunder:-

*“Alternate minimum tax on companies-*

*46.1 In recent times, the number of zero-tax companies and companies marginal tax has grown. Studies have shown that in spite of the fact that companies have entered substantial book profits and have paid handsome dividends, no tax has been paid by them to the exchequer.*

*46.2 The Finance (No.2) Act, 1996, has inserted a new section 115JA of the Income-tax Act, so as to levy a minimum tax on companies who are having book profits and paying dividends but are not paying any taxes. The scheme envisages the payment of a minimum tax by deeming 30 per cent of the book profits computed under the Companies Act, as taxable income, in a case where the total income as computed under the provisions of the Income-tax Act, is less than 30 per cent of the book profit. Where the total income as computed under the normal provisions of the Income-tax Act, is more than 30 per cent of the book profit, tax shall be charged on the same. “*

4.8.2. The Memorandum explaining the provisions in the Finance (No. 2) Bill, 1996 categorise the amendment under the caption “Rationalisation and Simplification”. The relevant portion is reproduce hereunder:-

**‘RATIONALISATION AND SIMPLICATIONS**

*Minimum Alternative tax on companies*

*In recent times, the number of zero-tax companies and companies paying marginal tax has grown. Studies have shown that inspite of the fact that companies have earned substantial book profits and have paid handsome dividends, no tax has been paid by them to the exchequer.*

*The new proposal provides for those companies to pay tax on 30% of the book profits, whose total income as computed under the Income-tax Act is less than 30% of the book profits as per the books of account prepared in accordance with Parts II and III of Schedule VI of the Companies Act, 1956.*

*“Book profits” is defined and certain adjustments are provided in the proposed section.*

*The proposed amendment will take effect from 1-4-1997, and will accordingly, apply in relation to assessment year 1997-98 and subsequent years.”*

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4.8.3. **The Hon'ble Apex Court in the case of *Surana Steels P ltd vs DCIT* reported in (1999) 237 ITR 777 at page 783** considered the legislative intent for the introduction of section 115J. It was found that the section was introduced to take care of the phenomenon of prosperous zero-tax companies which had continued in spite of the enactment of section 80VVA. These were companies which were paying no income tax though they had profits and were declaring dividends. A minimum corporate tax was sought to be ensured on prosperous companies.

4.8.4. In fact in section 115JB, originally the companies entitled for exemptions u/s 10A / 10B and deductions u/s 80IA / 80IB were eligible for deduction from book profits u/s 115JB. But later to be in line with the underlying intention behind introduction of MAT provisions to tax the companies declaring huge dividends to shareholders by reporting higher profits as per companies act but paying lesser tax under IT act, the amendment was brought out in the statute book wherein the companies eligible to claim exemptions and deductions u/s 10A/ 10B/ 80IA / 80IB also would come under the ambit of MAT. From this, it could be safely concluded that the legislature in its wisdom had time and again applied the Heyden's Rule to prevent possible mischief in the taxing provision. In this regard, it is relevant to reproduce the following :-

*“To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act, to consider –*

- (i) *what was the law before the Act was passed;*
- (ii) *what was the mischief or defect for which the law had not provided;*
- (iii) *what remedy the Parliament has appointed; and*
- (iv) *the reason of the remedy.”*

4.8.5. A statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. The task of a judge is to go by the intent of the statute and fill the gaps. The two rules of most general application in construing a statute are that – first that it shall, if possible, be so interpreted **UT RES MAGIS VALEAT QUAM PEREAT** (that the thing may rather have effect than be destroyed) and secondly, that such a meaning shall be given to it as may carry out and effectuate to the fullest extent the intention of the legislature. Each law consists of two parts viz.,

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of body, and soul . The letter of the law is the body of law and th sense and reason of the law is the soul of the law. Law to a large extent, lives in the language even if it expands with the spirit of the statute.

4.9. We find that the accounts laid before the Annual General Meeting have followed the accounting policies which are required to be followed under the Electricity Act read with West Bengal Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2005 which are admittedly not in accordance with the Companies Act, 1956. We find that there are major differences with regard to the treatment of several items in the accounts in the Electricity Act vis a vis the Companies Act, 1956. Hence it can safely be concluded that the accounts of Electricity Companies are not prepared in accordance with Part II and III of Schedule VI to the Companies Act, 1956 and hence the provisions of section 115JB of the Act cannot be made applicable to the said companies.

4.9.1. We find that the issue is squarely covered by the following decisions in favour of the assessee:-

**Kerala State Electricity Board vs DCIT reported in (2010) 329 ITR 91 (Ker),**  
*wherein their Lordships of Kerala High Court held that :-*

*“ Section 115JB of the Income-tax Act, 1961 creates a legal fiction regarding the total income of assesses which are companies. The book profit of the company is deemed to be the total income of assessee in the circumstances specified in the section. The expression “book profit” for the purpose of the section is explained to mean the net profit as increased or decreased by the various amounts whon in the various sub-clause of the section. The “ net profit” itself must be the net profit as shown in the profit and loss account of the company. Sub-section (2) mandates that the profit and loss account of the company. Sub-section (2) mandates that the profit and loss account of the 115JB stipulates that the accounting policies, accounting standards, etc. shall be uniform both for the purpose of income-tax as well as for the information statutorily required to be placed before the annual general meeting conducted, in accordance with section 210 of the Companies Act, 1956.*

*Though the Kerala State Electricity Board, a statutory corporation constituted by virtue of section 5 of the Electricity (Supply) Act, 1948 answers the description of an Indian company and therefore a company within the meaning of section 2(17) of the Income-tax Act, 1961 it is not a company for the purpose of the Companies Act, 1956. It is not obliged to either to convene an annual general meeting or place its profit and loss account in such general meeting. On the other hand, under section 69 of the Electricity*

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*(Supply) Act, 1948, the Board is obliged to keep proper accounts, including the profit and loss account, and prepare an annual statement of accounts, balance sheet etc. in such form as may be prescribed by the Central Government and notified in the Official Gazette. Such accounts of the Board are required to be audited by the Comptroller and Auditor-General of India or such other person duly authorized by the Comptroller and Auditor-General of India. The accounts so prepared along with the audit report are required to be laid annually before the State Legislature and also to be published in the prescribed manner.*

*At the earliest point of time when section 115J was introduced, the section expressly excluded from its operation bodies like the Electricity Board. Though such express exclusion is absent in section 115JA, the Central Board of Direct Taxes issued Circular No.762 dated February 18, 1998 excluding bodies like the Electricity Board from the operation of section. Circular No.762 not only is binding on the Department, but also explains the purpose in introducing section 115JA which was to tax zero-tax companies. The CBDT understood that companies engaged in the business of generation and distribution of electricity and enterprises engaged in developing,, maintaining and operating infrastructure facilities, as a matter of policy, are not brought within the purview of section 115JA for the reason that such a policy would promote the infrastructural development of the country. Section 115JB, which is substantially similar to section 115JA cannot have a different purpose and need not be interpreted in a manner different from the understanding of the CBDT of section 115JA.*

*Where the computation provision could not be applied in a particular case, it is indicative of the fact that the charging section also would not apply.*

*The Electricity Board or bodies similar to it, which are totally owned by the Government, either State or Central, have no shareholders. Profit, if at all, made would be for the benefit of entire body politic of the State. Therefore, the enquiry as to the mischief sought to be remedied by the amendment becomes irrelevant. Therefore, the fiction fixed under section 115JB cannot be pressed into service against the Electricity Board while making the assessment of the tax payable under the Income-tax Act.”*

**Maharashtra State Electricity Board vs JCIT reported in (2002) 82 ITD 422 (Mumbai Tribunal), wherein it was held that :**

*“15. We find that sub-section (2) of section 115JA requires the company to prepare its Profit & Loss Account in accordance with the provisions of Parts II & III of Schedule VI to the Companies Act, 1956. The assessee was required to prepare its account in conformity with the provision of section 69 of the Electricity (Supply) Act. Besides proviso to section 115JA(2) provides that while preparing the annual accounts, depreciation has to be provided on the same rates, and as per the same method as was adopted for calculating depreciation for the purpose of preparing the Profit & Loss Account laid before the company at its AGM under section 210 of the Companies Act. This section cannot be applied in relation to the assessee. In fact, the very concept of a “meaning “is alien to MSEB. A meeting can be between two or more persons. In case of MSEB there is no other person. Similarly, second proviso to sub-section (2) provides that where a company has adopted or adopts a financial year under the Companies Act, 1956, which is different from the previous year under*

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*the Act, the methods and the rates of depreciation shall correspond to the method and rates, which have been adopted for calculating the depreciation, for which financial year or part of such financial year falling within or relevant previous year.*

16. *Only those companies, which are engaged in the generation or supply of electricity, will come within the ambit of section 616 of the Companies Act. For that it is necessary that assessee must be a company. If assessee is not a company, then provision of section 616( c) cannot be applied. For example, Tata Electric Company is a company registered under the Companies Act. It is company within the meaning of section 3 of the Companies Act. It is engaged in the business of generation or supply of electricity. As such it will come within the sweep of this provision. MSEB cannot be construed to be a company within the meaning of section 3 of the Companies Act, therefore, though it is engaged in the generation/distribution of electricity, it cannot be deemed as a company within the meaning of section 616( c).*

17. *Explanation to section 115JA defines the term “Book Profit” to mean the net profit as shown in the Profit & Loss Account for the relevant previous year prepared under sub-section (2)[ i.e. in accordance with Parts II & III of Schedule VI] as increased by..... We have noted that assessee did not prepare its accounts under Parts II & III of Schedule VI. Assessee was under no legal obligation to do so. As such the definition of “Book Profit” cannot be applied in the case of the assessee.*

18. *According to section 2(17) read with section 2(26) of the Act, MSEB could be deemed to be a company for the purpose of Income-tax Act. The term company as defined in the said section is, NOMEN GENERALISSIMUM (term of the most general meaning) and its meaning in the CONTEXT of section 115JA is to be gathered from the connection in which it is used and from the subject-matter to which it is applied. The definition as given in section 2 of the Act begins with the qualifying words, “UNLESS THE CONTEXT OTHERWISE REQUIRES”. Text and context are the basis of interpretation. If the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. Word in section is skin of the living though. It may vary in colour and content according to the context. It is a settled rule of interpretation canonized in the dictum: EX PRAECEDENTIBUS ET CONSEQUENTIBUS OPTIMA FIT INTERPRETATIO” ( the best interpretation is made from the context). Whether the same meaning, as has been given in the interpretation clause, should be given to the word wherever it occurs, will depend upon the context. Therefore, it becomes necessary not only to look at the words but also to look at the context, the collocation and the objects of such words relating to such matter.*

19. *It is true that the word used in section 115JA of the Act is ‘company’. The heading of this section is “Deemed income relating to certain companies. The provision begins with a non obstante clause. It applies to every assessee being a company. The panoply o the section is erected over the structure of Companies Act, 1956. The Minimum Alternate Tax (MAT) on companies was introduced by the Finance (No.2) Act, 1996 with effect from 1-4-1997. This was necessitated due to the rise in the number of zero tax companies. Studies have shown that in spite of the fact that companies have earned substantial book profits and have paid handsome dividends, no tax has been paid by them to the exchequer. To curb this mischief MAT*

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*was introduced by inserting section 115JA. This is a deeming provision. It is a trite law that deeming provision should be narrowly watched, jealously regarded and never to be pressed beyond its true limits. It is applicable to a company. The assessee is not a company. It is not required to distribute any dividend. As such it does not come within the mischief of this section.....”*

**State Bank of Hyderabad vs DCIT reported in (2013) 33 taxmann.com 312 (Hyderabad – Tribunal) vide order dated 7.9.2012 wherein it was held that:**

12. *The next issue is regarding the applicability of provision of Sec.115JB to the assessee bank. The contention of the assessee is that the assessee being a bank, the provisions of Companies Act will not apply to the assessee and hence the assessee will not be liable to tax u/s.115JB.*

13. *The provisions of Sec.115JB will be applicable to all companies. However, it is contended that Sec.115JB will be applicable only where the assessee is required to show profit & loss account in accordance with schedule VI of Companies Act. As the banks are required to prepare Balance Sheet and Profit & Loss Account in accordance with the Banking Regulation Act, provision of 115JB cannot be applied to the banks. In the case of Maharashtra State Electricity Board v. CIT [2002] 82 ITD 422(Mum.) it was held that provisions of book profit cannot be applied to Electricity Companies. Banking Companies and companies engaged in generation and supply of electricity do not have to prepare their accounts in accordance with parts II and III of Sch. VI of the Companies Act by the virtue of proviso to sec 211(2) of the Companies Act. We find that by the Finance Act 2012, with effect from 1.4.2013, even companies to which Proviso to sec 211(2) applies (the banking Companies and companies engaged in generating and distribution of electricity), should prepare their P&L and balance Sheet in accordance with the provisions of the Act governing such companies. This would mean that prior to AY 2013-14, provisions of sec 115JB will not apply to companies to which proviso to sec 211(2) of the companies Act, 1956 applies. The Assessee being a company to which proviso to sec 211(2) of the Companies Act 1956 applies, will not be liable to be taxed under sec 115JB.*

14. *The Mumbai Tribunal in the case of Krung Thai Bank v. Jt. CIT [2012] 49 SOT 70/[2011] 16 taxmann.com 239, to which one of us is a party has held that provision of Sec.115JB cannot be applied to the banking company.*

15. *In view of the above, as the amendment to sec 115JB by the Finance Act 2012 will be applicable only from the AY 2013-2014, we uphold the claim of the assessee that provision of Sec.115JB will not be applicable to the Assessee Bank and set aside the assessment made u/s 115JB on the Assessee company.*

**ICICI Lombard General Insurance Co Ltd vs ACIT reported in 2012 –TIOL-690-ITAT-Mum in ITA No. 2398/Mum/2009 dated 10.10.2012 for Asst Year 2003-04, wherein it was held that :**

*The proviso to section 211(2) of the Companies Act creates an exemption of applicability of subsection (2) inter alia in respect of insurance companies or banking companies or any other companies engaged in generation and supply of electricity for which a form of profit and loss account has been specified in or under the Act*

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*governing such class of company. Even if an insurance company does not disclose any matter in the balance sheet and profit and loss account because the same is not required to be disclosed by the Insurance Act shall not be treated as non-disclosure of a true and fair view of the state of affairs of the company as the said condition has been relaxed by subsection (5) of section 211 of the Companies Act. In order to align the provisions of the IT Act with the Companies Act, an amendment has been brought in to the statute by the Finance Act 2012 whereby section 115JB has been amended w.e.f. 1.4.2013 and therefore, prior to 1.4.2013, the amended provisions of section 115JB cannot be applied in case of Insurance, Banking, Electricity generation and distribution companies and other class of companies, which are not required to prepare their accounts and particularly Balance Sheet and profit and loss account as per Part II and III of Schedule VI of the Companies Act. Thus, when the Insurance Companies, Banking companies and electricity generation and distribution companies are treated in the same class as per the provisions of section 211 of the Companies Act in preparing the final accounts, then those companies cannot be treated differently for the purpose of section 115JB and accordingly, the provisions of section 115JB are not applicable in the case of the assessee.*

**Bank of India vs Addl CIT reported in 2014 (5) TMI 929 :n ITA No. 1498/Mum/2011 dated 9.4.2014– ITAT Mumbai, wherein it was held that**

6. Ground No. 5 is regarding applicability of provisions of section 115JB in case of Bank.

6.3 Having considered the rival submissions as well as relevant material on record, we note that this issue has been considered by this Tribunal in the series of decisions including the decision relied upon by the Ld. AR of the assessee. In the case of ICICI Lombard General Insurance (supra) the coordinate bench of this Tribunal has considered and decided an identical issue in para 6 as under:-

*As discussed above, the assessee is following the accounting policies under the Electricity Supply act and prepared its accounts in view of those very policies. Following those very policies, the accounts in accordance with part II & III of Schedule VI of the Companies Act are not applicable at all. Once there is no possibility for preparing the accounts in accordance with the part II & II of Schedule VI of Companies Act then the provisions of sec. 115JB cannot be forced. Therefore, in view of the above facts and circumstances and respectfully following the above decisions of the Hon'ble Supreme Court and the decision of the Tribunal for AY 88-89, we hold that provisions of sec. 115JB are not applicable on the facts of the present case."*

*Following the decisions of the coordinate Benches of this Tribunal, we hold that when the insurance companies, banking companies and electricity generation and distributions companies are treated in the same class as per the provisions of sec. 211 of the Companies Act in preparing their final accounts, then these companies cannot be treated differently for the purpose of sec. 115JB and accordingly, the provisions of sec. 115JB are not applicable in the case of the assessee."*

*Accordingly, this issue is decided in favour of the assessee and against the revenue".*

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*Though, section 115JB has been amended to bring all the Companies in its ambit vide Finance Act 2012, w.e.f 1.4.2013, however, the said amendment is not applicable in the assessment year under consideration.*

*Following the decision of co-ordinate bench of this Tribunal we decide this issue in favour of the assessee.*

**M/s. Reliance Energy Ltd. Vs ACIT in ITA No. 218/Mum/05 dated 24.01.2008– ITAT Mumbai, wherein it was held that**

*“24.4. The assessee further brought to our notice the case of depreciation. Rate of depreciation under the Electricity Supply Act is lower than the rates provided under the Companies Act and if the rates as provided in resented before the Annual General Meeting i.e. Electricity Act Accounts, the depreciation at the same rates in the accounts for the Companies Act will be below what is required under the Companies Act therefore the accounts so prepared under the Companies Act will not be in accordance with Parts II & III of Schedule VI.*

*24.5. The assessee also referred to the requirement of Electricity Supply Act as regards the real profits and Reasonable Return. In the accounts under the Electricity Supply Act, the excess of profits is required to be transferred to Tariff and Dividend Control Reserve and also to be distributed to the consumers. This treatment is not in consonance with the accounting policy which is permitted under the Companies Act as' the company is required to disclose the entire profit earned irrespective of the same being more or less than Reasonable Return. Part II of Schedule VI requires the profit and loss account shall be so made out as clearly to disclose the result of working of the company during the year. Therefore the above accounting policy of transferring the excess profits to be followed under the Electricity Supply Act cannot be followed under the Companies Act and if followed the accounts will not be in accordance with Parts II & III of Schedule VI.*

*24.6. It was, therefore, submitted that an electricity company can not prepare the accounts under Part II & III of Schedule VI of the Companies Act following the same accounting policies as followed in the accounts under the Electricity Supply Act which are presented before the company in Annual General Meeting. The assessee therefore submitted that the provisions of section 115JB(2) as mandated by the first proviso cannot be complied with.*

*24.7 Attention of the Bench was also drawn to the provisions of section 115JA. Proviso to section 115JA(2) has provided that, while preparing profit and loss account under Parts II & III of Schedule VI the same methods and rates which are adopted for calculation of depreciation in the accounts presented before the company in Annual General Meeting should be followed. There was no provision for following the same accounting policies and same accounting standards in both the accounts as prepared under the Electricity Supply Act and under the Companies Act, This material departure in section 115JD from the provisions in section 115JA has resulted in the accounts to be prepared under the Companies Act following the same accounting policies. Find same*

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*accounting standards unworkable and any such attempt to make the accounts will be not in accordance with the provisions of the Companies Act.*

25. *As per the contentions of the Id counsel or the assessee, there will be a big anomaly in preparing the accounts as per Electricity Supply Act and as per Companies Act. The Hon'ble Supreme Court in the case of CIT vs Official liquidator, Palai Central Bank Ltd., in 150 ITR 539, on which reliance was placed by the Id counsel of the assessee supports the case of the assessee, This case was under Super Profits Tax Act. In this case the assessee was a banking company, which went into liquidation. For A.Y.63-64 the Assessing Officer was of the opinion that their taxable income would attract liable to Super Profits Tax Act. Under the Act the Super Profits Tax is leviable in respect of chargeable profits, which are in excess of standard deduction as specified in Third Schedule in the said Act. Standard Deduction was defined to mean an amount equal to six percent of the capital of the company or Rs.50,000 whichever is higher. The issue arose as to whether a company in liquidation can be said to have a paid-up capital and reserves. The Supreme Court came to conclusion that after liquidation of company there cannot be any share capital. Supreme Court further held that once the provisions contained in the Act for computing the capital of the company and its reserves cannot have any application, the "standard deduction" is incapable of ascertainment, and the charge of Super Profits Tax under section 4 of the Act is not attracted. In this case the definition of "Standard Deduction" was to mean six percent of the capital or Rs.50,000 whichever is higher. Out of two limbs of the calculation, one limb being capital was not capable of ascertainment. Supreme Court held that when one limb is not capable of ascertainment. the whole provision fails, in other words there is "breakdown" of the whole provision and the provision cannot be applied.*

25.1 *While deciding so, the Hon'ble Supreme Court has taken into consideration its own decision in the case of CIT vs B C Srinivasa Setty in 128 ITR 294 wherein Supreme Court had pointed out that under the scheme of the Income Tax Act charge of tax will not get attracted unless the case or transaction falls under the governance of the relevant computation provisions. The Supreme Court in RC. Srinivasa Setty's case has observed as under -*

*"The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise, one would be driven to conclude that while a certain income seems to fall within the charging section. there is no scheme of computation for quantifying' it. The legislative pattern discernible in the Act is against such a conclusion "*

26. *After going through the ratio of the decisions of the Hon'ble Supreme Court, it is clearly seen that where something is not possible then the assessee cannot be forced to do so under specific provisions of law. Those provisions of law cannot be followed because it is impossible to do so. The doctrine of impossibility is squarely applicable on the facts of the present case because it is not possible to prepare the accounts under the Companies Act because the assessee is preparing the accounts as per the policies of Electricity Supply Act.*

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26.1. *The Hon'ble Supreme Court in the case of Kwaliti Biscuits Ltd in 284 ITR 434 has held that provisions of sec. 234B & 234C are not applicable in respect to computation of deduction u/s 115J because the computation of profit under the provisions of sec. 115J has to be made on the basis of book profit and since the entire exercise of computing the income under section 115J can only be done at the end of the financial year, and the provisions of sec. 207,208, 209 & 210 cannot be made applicable until and unless the accounts are audited and the balance sheet prepared. The ratio of this decision helps the case of the assessee because it is not possible to prepare the accounts in accordance with part II & III of Schedule VI of the Companies Act for the purpose of provisions of sec. 115jB. Therefore, in view of the ratio of this decision, in our considered view, the provisions of sec. 115JB cannot be attracted on the facts of the present case.*

27. *The issue in regard to doctrine or impossibility has been discussed In a decision of the Tribunal in the case of M/s Divine Holdings Pvt Ltd in ITA No. 180/Mum/2000 vide order dated 26.6.2001. The Tribunal in para 8 has observed that the assessee did whatever was possible on its part. It is well-known principles "law canonized in the dictum "lex non cogit ad impossibilia". Law cannot compel you to do the impossible." Again this ratio has been considered in the case of Shri Hitewsh S.Mchlam in ITA No. 2469/Mum/2002 vide order dated 7.5.2004. In the case of Growmore Leasing Investments Ltd, the Tribunal has again taken into consideration the ratio of the decision of the Tribunal in case of Divine Holdings Pvt .Ltd (supra) and has held that the assessee cannot Force to do something, which is not possible for it. In view of the above facts and circumstances, .it can be easily held that a person cannot be forced to do something impossible. The law does not compel a man to do that which he cannot possible perform. The law creates a duty or charge, and the party is disable to perform it, without any default in him, and has no remedy over, there the law will in general excuse him and though impossibility of performance is in general no excuse for not performing an obligation which a party has expressly undertaken by contract yet when the obligations one implied by law, impossibility of performance is a good excuse. Thus in a case in which consignees of a cargo were prevented from unloading a ship promptly by reason of a dock strike, the Court, after holding that in the absence of an express agreement to unload in a specified time there was implied obligation to unload within a reasonable time, held that the maxim lex non cogit ad impossibilia applied.*

28 *As discussed above when it is not possible to prepare the accounts under the Companies Act for the purpose of computation u/s 115JB, therefore, the assessee cannot be forced to prepare the accounts when it is not possible. Therefore, we are in agreement with the contentions of the assessee in as much as the accounting policies following in the electricity accounts if followed for the preparation of Companies Act amount will not disclose true and fair view and will not be in accordance with part n and m of Schedule VI of the Companies Act. The ratio of the decisions of the Hon'ble Supreme Court and the ratio of the: decision of the Tribunal discussed above arc in support of the contentions of the assessee. We further found that the issue of applicability of sec. 115J came before the Tribunal for AY 88-89. Taking into consideration the preparation of accounts under the Electricity Act and other contentions the assessee including the decisions of the Supreme Court in the case of B.C.Srinivasa Setty (supra), the Tribunal has held that the provisions of Sec. 115J are not attracted on the facts of the present case.*

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*29. As discussed above, the assessee is following the accounting policies under the Electricity Supply act and prepared its accounts in view of those very policies. Following those very policies, the accounts in accordance with part II & III of Schedule VI of the Companies Act are not applicable at all. Once there is no possibility for preparing the accounts in accordance with the part II & II of Schedule VI of Companies Act then the provisions of sec. 115JB cannot be forced. Therefore, in view of the above facts and circumstances and respectfully following the above decisions of the Hon'ble Supreme Court and the decision of the Tribunal for AY 88-89, we hold that provisions of sec. 115JB are not applicable on the facts of the present case."*

4.7. Respectfully following the aforesaid judicial precedents, we allow the ground no. 3 of the assessee.

5. The last issue raised by the assessee is as to whether the disallowance u/s 14A of the Act could be added to the book profits computed u/s 115JB of the Act.

5.1. We have already held that the provisions of section 115JB of the Act are not applicable to the assessee company. Hence the issue of adding back to book profit the disallowance u/s 14A of the Act does not arise on the same. Hence the ground no. 4 raised by the assessee is allowed.

6. In the result, the appeal of the assessee is partly allowed.

**Order pronounced in the court on \_\_\_\_\_**

[Mahavir Singh]  
Judicial Member

[M.Balaganesh]  
Accountant Member

Date:  
R.G.(.P.S.)

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Copy of the order forwarded to:

1. DPSC Limited, Plot No.X-1,2 & 3, Block EP, Sector-V, Salt lake, Kolkata-91.
2. The D.C.I.T., Circle-VI, Kolkata.
3. CIT(A)-VI, Kolkata      4. CIT-II, Kolkata.
5. DR, Kolkata Benches, Kolkata.

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches