

MAT- Is it a Separate/Complete Code or Merely Computational Mechanism?



Finance Act, 2015 has amended the provisions of Section 115JB of the Income-tax Act, 1961¹ (hereinafter referred to as “the Act”) to exclude certain incomes from tax under Section 115JB. Subsequent to the amendment, controversy on taxability of FII/FPI under Section 115JB surfaced. Hence, government appointed a committee under Justice A P Shah and based on recommendation through specific instructions, government instructed assessing officers to keep the proceedings in abeyance till suitable amendment is made in the Act, in all such cases where FII/FPI do not have permanent establishment (PE). However, few questions on the role of the provisions of Chapter XII-B remained unanswered. This article attempts to summarise few of the relevant cases decided by various forums on the provisions of Section 115JB/115JA or 115J on the scope and applicability of provisions of Chapter XII-B. Read on...



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Background

Following incomes have been excluded from tax under Section 115JB by the Finance Act, 2015:

1. Income of foreign company from sale of securities/royalty or FTS (Chapter XII) that is chargeable at a rate lower than MAT rate.

¹ Unless otherwise mentioned, Section or Chapter reference represents Section or Chapter of the Income-tax Act, 1961. “The Act” referred in this article refers to “the Income-tax Act, 1961”.

2. Share of income derived from AOP or BOI to which Section 86 applies.
3. Income/gain referred under Section 47(xvii).

Recently, the Hon'ble Mumbai ITAT in the case of *Shivalik Venture P. Ltd. vs. DCIT [ITA No.2008/Mum./2012]* has held to the effect that for taxability of profit under Section 115JB, it is necessary to satisfy the conditions of "income" under Section 2(24) and taxability under Sections 4, 5 or Section 9. On facts of the case, gain on transfer of asset to the subsidiary was exempt from tax under Section 45 and hence, Hon'ble ITAT held that provisions of Section 115JB do not apply. Further, Hon'ble ITAT, by relying on the decision of Hon'ble Delhi HC in the case of *CIT vs. Sain Processing and Weaving Mills P. Ltd. [325 ITR 565]*, also relied on notes to accounts detailing company's opinion on tax treatment of the said gain.

In the said decision of the Hon'ble Delhi High Court, the taxpayer had not provided depreciation in profit and loss account but mentioned the same fact in notes in compliance with Section 211(3B) of the Companies Act, 1956 ("Co. Act"). Considering the said fact, the Hon'ble Delhi High Court allowed deduction of depreciation for MAT purpose as notes to accounts is extension of profit and loss account.

Hence, it is relevant to examine the scope and relevance of note of accounts for computation of book profit under Section 115JB.

Further, the Hon'ble Cochin ITAT in case of *ACIT vs. Nilgiri Tea Estate Ltd. (ITA No.37 of 2014)* while holding that sale of agriculture land is not liable to tax under Section 115JB, held to the effect that Chapter XII-B do not extend the scope of 'total income' as per Section 5, but is only towards providing an alternative basis for computing the income.

The Hon'ble Jaipur ITAT in the case of *Shree Cements Ltd. in ITA No.: 504/JP/2012 [31 ITR(T) 513]*, wherein ITAT has relied upon its decision in the assessee's own case for earlier years for AY 2004-05 to AY 2006-07 [ITA No.:614,615&635/JP/2010] has held to the effect that sales tax subsidy credited to profit and loss account is not liable to tax under Section 115JB by holding that the sales tax incentives are capital receipts and not an income under Section 2(24) and hence, is outside the purview of "book profit" for taxability under Section 115JB.

From a perusal of the above referred decisions, it can be observed that the Hon'ble ITATs are of the view that Section 115JB is subject to income definition under Section 2(24) and taxability under normal provisions of the Act and hence, effectively

provides for mere computational mechanism alternate to provisions of Chapter IV and does not prescribe or provide for separate code.

To appreciate captioned topic in a proper perspective and rightly analyse the above referred ITAT decisions, analysis is bifurcated into two parts:

1. Appreciation of statutory/legislative provisions and judicial precedents.
2. Potential of restrictive applicability of Section 115JB as alternate to Chapter IV only.

1. Appreciation of Statutory/Legislative Provisions and Judicial Precedents

For appreciation of various statutory/legislative provisions and judicial precedents, this has been further taken up in following sub-topics:

- 1.1 Legislative intent
- 1.2 Relevance to decision of Hon'ble Supreme Court
- 1.3 Effect of *non-obstante* clause
- 1.4 Relevance of provisions of Schedule VI to the Companies Act, 1956

1.1 Legislative Intent:

To understand the rationale for levy of any tax and to interpret newly inserted provisions, it is important to look at the history behind introduction of such provisions. Hence, the history behind introduction of MAT provisions have been summarised hereunder:

- a) Prior to the enactment of the Finance Bill, 1983, there were no restrictions on the quantum of deduction for companies except under Chapter VI-A for deduction to the extent of gross total income. However, due to overall impact of charging, computational and incentive provisions and deductions under Chapter VI-A, total income was found to be insufficient for collecting taxes under normal provisions.
- b) It was observed that few highly profitable companies do not pay any tax in light of the incentive provisions contained under the Act. As a revenue generating measure, through the Finance Act, 1983, Section 80VVA was introduced restricting deduction eligible under certain Sections to 70% of the total income to make otherwise profitable companies to pay at least some tax on balance. However, due to certain other allowances and impact of charging provisions contained in Chapter II, the companies were still successful in reducing the tax to zero.

- c) Hence, *vide* the Finance Act, 1987, through Section 115J, the government proposed an alternate mechanism to tax income to collect at least some tax based on the “declared profits” of such companies. This is evident from the extract of the budget speech of the Finance Minister and memorandum explaining provisions for the Finance Bill, 1987. The relevant extracts from budget speech are reproduced hereunder:

80. *It is only fair and proper that the prosperous should pay at least some tax. 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. ... This measure will yield a revenue gain of approximately ₹75 crores.*

The extracts from the Memorandum explaining provisions relating to the Finance Bill, 1987 are reproduced hereunder:

New provisions to levy minimum tax on “Book Profits” of certain companies

37.

Under the proposed amendment, in the case of any company whose total income as computed under the other provisions of the Income-tax Act in respect of any previous year is less than 30 per cent of its book profit, the total income of such taxpayer chargeable to tax shall be deemed to be the amount equal to 30 per cent of such book profit.

....

Hence, interpreting Chapter XII-B as subject to all other provisions of the Act except to Chapter IV would defeat the intention of the legislature to tax “book profit declared in accounts” instead of “total income” under Chapter XII-B.

On perusal of the provisions of Section 115JB, it can be observed that, provisions of Section 115JB(1) create charge on “taxable subject” i.e. “company” and on “taxable object” i.e. on “book profit”. Akin to normal provisions of the Act, provisions of Section 115JB(2) contain computational mechanism for computing income liable to tax under Section 115JB.

1.2 Relevance to Decision of Hon’ble Supreme Court:

From a tax perspective, we have judicial hierarchy wherein the decision of the ITAT is subject matter of review by the Hon’ble High Court and decisions of the High Court are subject matter of review by the Hon’ble SC, if such decisions of the Hon’ble High Court do involve any substantial question of law.

In case of identical issue is involved, lower authorities are required to give cognisance to the decisions of higher appellate authorities. Supreme Court being the highest adjudication authority, decision of the Hon’ble Supreme Court is considered as law of land and is binding for all lower authorities.

Hence, it is critical to examine decisions of the Hon’ble Supreme Court to see whether it had a chance to deal with interpretation and scope of provisions of Section 115JB. In this regard, two decisions by the Hon’ble SC have been dealt with:

- In the case of *Apollo Tyres Ltd. vs. CIT [255 ITR 273]*, the Hon’ble Supreme Court has held to the effect that the powers of the assessing officers for making adjustments to profit as per profit and loss account prepared in accordance with the Schedule VI to the Companies Act are restricted to only such items which are specifically mentioned in the provisions of Section 115JB.
- The Hon’ble SC has reiterated the same view even in its subsequent decision in the case of *Malayala Manorama Co. Ltd. vs. CIT [300 ITR 251]*.
- In addition to the same, the Hon’ble Rajasthan HC in the case of *Rajasthan Spinning & Weaving Mills vs. DCIT (281 ITR 177)* has held to the effect that the provisions of Section 115J constitute complete code in itself. In this regard, the Hon’ble HC has relied upon the decisions of the Hon’ble SC in the case of *Apollo Tyres Ltd. (supra)*. In absence of further appeal to SC by the department, it can be concluded that the same has achieved finality. This has also been emphasised by the Hon’ble SC in the case of *Malayala Manorama (supra)*.

On perusal of the provisions of Section 115JB, it can be observed that, provisions of Section 115JB(1) create charge on “taxable subject” i.e. “company” and on “taxable object” i.e. on “book profit”. Akin to normal provisions of the Act, provisions of Section 115JB(2) contain computational mechanism for computing income liable to tax under Section 115JB.

Based on above, it can be summarised that provisions of Chapter XII-B are complete/self-contained code in itself.

The Hon'ble SC has held to the effect that AO's powers to make adjustment to profit as per P&L prepared in consonance to Schedule VI to the Co. Act are restricted to as provided under the Explanation to Section 115JB(2). Further, this restriction equally applies to taxpayer as it is required to file its return of income under self assessment. Hence, taxpayer and tax administration are under obligation to follow the provisions of the Section 115JB in its letter and spirit as the provisions of Section 115JB constitute a complete code in itself.

However, one should consider the fact that the restriction in adjustments will apply only in case P&L Account is prepared in consonance with Schedule VI to the Co. Act.

1.3 Effect of Non-Obstante Clause:

Provisions of Section 115J, Section 115JA and Section 115JB start with the *non-obstante* clause which indicates the intention of the legislature. The relevant extract has been reproduced herein below:

“Special provision for payment of tax by certain companies.

115JB. (1) *Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company*

Further, the book profit has been defined under Explanation – 1 to Section 115JB as under:

“Explanation 1.—For the purposes of this Section, “book profit” means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-Section (2), as increased by—”

The Hon'ble Jaipur and Cochin ITAT have held to the effect that provisions of Section 115JB will override only computational provisions and not to Section 4 and Section 5 of the Act. These decisions raise following questions for consideration:

“Whether provisions of Section 115JB are complete code in itself or merely an alternate computational mechanism?”

“Whether the “non-obstante” clause contained in Section 115JB applies only to provisions of Chapter IV or the same has over-riding impact over all other applicable provisions of the Act (i.e. Chapter II)?”

To understand and appreciate the above questions, following points require special consideration:

- In view of the fact that present analysis/article

is not examining the difference between various types of the *non-obstante* clauses, we will not deal with the implications due to different forms of non-obstante clauses.

- Wherever the legislator have intended to make a particular provision of the Act as having overriding effect over one or more specific Sections, the same has been specifically mentioned in the provisions to be given overriding effect. For example, we may refer to Section 40:

“Amounts not deductible.

40. *notwithstanding anything to the contrary in Sections 30 to 38,.....,-”*

- Where a particular Section was intended for having overriding effect over specific category/group of provisions, such intention has also been specifically provided in the statute. For example, we may refer to Section 44:

“Notwithstanding anything to the contrary contained in the provisions of this Act relating to the computation of income chargeable under the head...”

- Wherever a particular Section was intended for having overriding effect a particular Chapter, the same has been expressed differently. For example, we may look into provisions of Section 79:

“Notwithstanding anything contained in this chapter

- On combined reading of the provisions of Section 115JB, scheme of provisions of the Act including type and use of *non-obstante* clause and intention of the legislature for introduction of provisions vide Chapter XII-B, it suggests that the provisions of Section 115JB have overriding effect over all other provisions of the Act which deals with taxation under “normal provisions of the Act and application of Section 115JB is not restricted to only computational provisions contained under Chapter IV.
- Further, in light of the fact that the provisions of Section 115JB contain charging as well as computational mechanism, it will override provisions of Chapter II, III, IV, V, VI and VI-A. In view the fact that scope of Section 115JB is till levy of tax on “deemed total income”, provisions of Section 115JB, procedural aspect of filing of return and assessment mechanism, etc. will be governed by provisions of Chapter XIV.

- It is worthwhile to reiterate the fact that the inefficiency of the then existing charging provisions coupled with the computational mechanism (i.e. combined application of provisions of Chapter II to VI-A) to generate/collect enough taxes from taxpayers due to higher allowances under beneficial computational and charging provisions when compared with the profits as per the Co. Act, the provisions of Section 115J or 115JA or 115JB have been introduced.
- Hence, when we keep the intention of the legislature and scheme of provisions of the Act, as discussed herein above, we can understand the relevance of “*non-obstante* clause” at the beginning of the Section 115JB for giving overriding effect over provisions of Chapter II to VI-A.

1.4 Relevance of Provisions of Schedule VI to the Companies Act:

- Provisions of Section 115JB taxes “book profit” for companies. For the purpose of this Section, “book profit” has been defined as the net profit as shown in the profit and loss account for the relevant previous year subject to certain adjustments as prescribed under the relevant provisions of the said Section 115JB.
- Provisions of sub-Section (2) to Section 115JB specifically require the companies to prepare profit and loss account in accordance with the provisions of Part II of Schedule VI to the Co. Act or as per the provisions of such other governing law and also to adopt same policies, accounting standards and methods as adopted for the purpose of accounts laid before its AGM.
- In summary, “book profit” of the company has to be the profit as per P&L account which has been prepared in accordance with the provisions of the Co. Act or relevant other applicable governing law.
- Hence, in case the P&L is not in accordance with or deficient from compliance with the accounting standards or requirements under Schedule VI to the Companies Act read with provisions of Section 211 of the Co. Act, AO has powers to make adjustments to the net profit as per P&L account in addition to the adjustments specified under Explanation–1 to Section 115JB.

Hence, in case the P&L is not in accordance with or deficient from compliance with the accounting standards or requirements under Schedule VI to the Companies Act read with provisions of Section 211 of the Co. Act, AO has powers to make adjustments to the net profit as per P&L account in addition to the adjustments specified under Explanation – 1 to Section 115JB.

- However, two critical points are involved here, one of them being interpretation of “book profit” and second, being how far and to what extent adjustment can be made under Chapter XII-B to net profit as per the accounts prepared in accordance with the Co. Act.
- On first issue of interpretation of “book profit”, the definition of “book profit” under Section 115JB is quite clear. However, the Hon’ble Jaipur ITAT in case of *Shree Cements Ltd. (Supra)* has held to the effect that as “capital receipt” is not income under Section 2(24), hence such capital receipt would not be taxable even under Section 115JB. In this regard, the relevant paras of the said decision of the Hon’ble ITAT in ITA No. 614, 615 & 635/ JP/2010 have been reproduced hereunder:

“13.2 it has been held by the Apex Court that effect that “capital receipt” is not “income” under Section 2(24) of the Act. Further, it has held that if the receipt is neither “profit” nor “income” and which does not have any element there-of embedded there in, cannot be part of “profit” as per profit & loss account”
- It is evident that the Hon’ble ITAT has applied classification of “sales tax subsidy” under the Act for the purpose of determining its treatment under Section 115JB. Hon’ble ITAT ought to have been appreciated that the profit and loss accounts are required to be compiled in accordance with the provisions of the Co. Act read with accounting standards. Hon’ble ITAT ought to have been appreciated that the definition of “income” under Section 2(24) is not applicable for the purpose of preparation of P&L account in accordance with Schedule VI to the Co. Act and consequently, not relevant for computation of book profit under Section 115JB.

- Further as per AS-12, gain on premature settlement sales tax liability at NPV results in gain which is required to be credited to P&L account and was appropriately credited amount to P&L account by the company. Hence, conclusion of the Hon'ble ITAT that credit of "sales tax subsidy" to profit and loss account is not in compliance with the provisions of Co. Act and is incorrect in my view. With respect to Judiciary, in my view, Hon'ble ITAT ought to have relied upon and examined requirements/classification under the Co. Act and accounting standards and ought to have applied the same classification for the purpose of computation of "book profit" under Section 115JB.
- Now, we will see another limb of interpretation affecting "book profit" wherein the adjustments to the net profit have been permitted but without appreciating scope of notes to accounts and requirements under Section 211 of the Co. Act.
- The Hon'ble Mumbai ITAT in the case of *Shivalik Venture P. Ltd. (supra)* has allowed to reduce net profit as per P&L by the value of gain on transfer of asset to subsidiary relying upon exemption under the Act and the notes to accounts expressing company's view on applicability of MAT on such gain credit to profit and loss account.
- Based on notes to accounts, the Hon'ble ITAT has held to the effect that such amount of surplus on transfer of asset to subsidiary requires exclusion from net profit to arrive at book profit as such surplus is not income under Section 2(24) and the transaction is not taxable under normal provisions of the Act. The Hon'ble ITAT relied upon the decision of the Hon'ble Delhi HC in the case of *Sain Processing and Weaving Mills P. Ltd. (Supra)* for coming to conclusion on permissibility of adjustment based on notes to accounts.
- In the case before the Hon'ble Delhi HC, taxpayer has sought for adjustment of depreciation from net profit to arrive at book profit under Section 115J as the same was not provided in P&L Account but was part of notes to accounts in accordance with Section 211(3B) of the Co. Act and hence, the Hon'ble Delhi HC has approved taxpayer's claim by dismissing the department's appeal.
- Considering Section 211(3B) of the Co. Act, I believe that the decision of the Hon'ble Delhi HC has correctly upheld the order of the Hon'ble ITAT by allowing adjustment of depreciation disclosed in notes to accounts in terms of Section 211(3B) of the Co. Act to net profit to arrive book profit under Section 115JB.
- In the case before the Hon'ble Mumbai ITAT, the note in accounts were more of opinion/view of the company as contrary to the fact before the Hon'ble Delhi HC where the note on depreciation was in terms of Section 211(3B) of the Co. Act. Considering this factual difference and reading Section 211(3B) of the Co. Act, I believe the reliance by the Hon'ble Mumbai ITAT on the decision of the Hon'ble Delhi HC is misplaced.
- To appreciate reason for giving adjustment for note to accounts which is in terms of Section 211 (3B) of the Co. Act, it is worth of referring to the observation of the Hon'ble Cochin ITAT in the case of *Padinjarekara Agencies Pvt. Ltd. vs. ACIT [ITA 375/ Coch./2014]* at Para 21 and 22 wherein it has been observed that provisions of the Income-tax Act do not provide option as provided under Section 211(3B) of the Co. Act and hence, adjustment need to be made for such disclosures to arrive at book profit under Section 115JB.
- Hence, one needs to consider provisions of the Co. Act and requirements under accounting standards on independent basis and without getting it influenced by provisions of the Income-tax Act, 1961 (other than Section 115JB itself) so far as to determine the correct profit as per P&L account in accordance with provision of Section 211 and Schedule VI to the Co. Act.

2. Potential of Restrictive Applicability of Section 115JB as Alternate to Chapter IV Only

The Hon'ble ITATs (Cochin & Jaipur) have ruled that provisions of Section 115JB would override Chapter IV and not Chapter II. Effectively, the Hon'ble ITATs held that Section 115JB is merely computational provision. In that light, there are several connection issues which are yet not answered by the judiciary:

- If Section 115JB is subject to Section 4 and 5, the taxability under Section 115JB needs to be

examined with respect to the tax residency and scope of total income based on source rule, *etc.* of the company.

- If Section 115JB were to override only computational provisions under Chapter IV, then, prior to the amendment *vide* Finance Act 2006, specific exclusion for exempt income under Chapter III *vide* clause (ii) to Explanation-1 to Section 115JB(2) was redundant.
- If Section 115JB would have been alternate to only provisions of Chapter IV then sub-Section (3) to Section 115JB would become redundant. However, existence of sub-Section (3) indicates that taxation of book profit under Section 115JB is independent to brought forward/carry forward of loss under normal provisions of the Act.
- If Section 115JB would have been alternate to only provisions of Chapter IV then sub-Section (6) to Section 115JB would become redundant. However, existence of sub-Section (6) to Section 115JB indicates that taxation of book profit under Section 115JB is independent of exemption under Chapter III.
- In view of above, if we hold that taxability under 115JB is subject to Sections 2(24), 4 and 5 and ratio of the Hon'ble ITAT decisions, discussed above, as correct, will defeat the "appropriateness" or "relevance" of the provisions of Section 115JB and may also defeat purpose of said provisions.
- Hence, I believe that provisions of Chapter XII-B are not merely alternate computational mechanism. Considering the legislative intent, deeming fiction, levy of tax on specific taxable subject (i.e. company) and separate computational mechanism make provisions of Chapter XII-B of the Act as complete code in itself.

3. Other Issues

Overriding Effect Over Provisions Of Section 90:

Even though not directly connected with the captioned discussion on inter-play between taxation under normal provisions *vis-a-vis* taxation under Section 115JB, captioned issue of overriding impact of provisions of Section 90 is worth understanding.

- Provisions of Section 115JB as well as Section 90 of the Act have *non-obstante* clause whereby provisions of both the Sections would override

Provisions of Section 115JB as well as Section 90 of the Act have *non-obstante* clause whereby provisions of both the Sections would override other provisions of the Act. Hence, it would be relevant to examine which provisions would prevail in interplay of both the said Sections.



other provisions of the Act. Hence, it would be relevant to examine which provisions would prevail in interplay of both the said Sections.

- Provisions of Section 115JB deal with taxability of income when provisions of Chapter I are applicable to the facts of the taxpayer. While provisions of Section 90 deal with giving effect to the agreement entered with other country for distribution of taxing rights.
- In my view, the Section 90 deals with applicability of charging provisions (by making Act subject to beneficial provisions of DTAA) and hence, overrides provisions of Section 115JB. Hence, if India do not have right to levy tax when read with DTAA, provisions of Section 115JB will not apply.

4. Summarising

In my view, various judicial forums ought to have interpreted Section 115JB without making it subject to same interpretation and taxability as under normal provisions of the Act. Further, provisions of the Companies Act should be given due cognisance for taxability under Section 115JB. Hence, Section 115JB is neither subject to Chapter II nor merely an alternate to Chapter IV,sssss but a separate and complete code in itself regarding taxability of certain income. ■