IN THE INCOME TAX APPELLATE TRIBUNAL, 'SPECIAL BENCH' MUMBAI

BEFORE: JUSTICE (Retd.) SHRI C.V. BHADANG, PRESIDENT

SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
&
SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No.424/Mum/2020
(**Assessment Year: 2015-16**)

Union Bank of India Union Bank Bhavan 6th Floor, 239 Vidhan Bhavan Marg Nariman Point Mumbai – 400 021	Vs.	DCIT, LTU(2) 6th Floor, 29th Floor World Trade Center Mumbai
PAN/GIR No.AAACU0564G		
(Appellant)	..	**(Respondent)**

ITA No.3740/Mum/2018
(**Assessment Year :2013-14**)

Central Bank of India 4th Floor, Chandermukhi Building Nariman Point Mumbai- 400 021	Vs.	Assistant Commissioner of Income Tax 2(1)(2) Aayakar Bhavan Mumbai – 400 020
PAN/GIR No.AAACC2498P		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Percy Pardiwala, Shri C. Naresh, Shri Nitesh Joshi, Shri R Chaniyari & Shri S. Ananthan
Revenue by	Shri N.V. Mohanty, Special Councel & Shri Ankush Kapoor, CIT DR
Date of Hearing	**10/07/2024**
Date of Pronouncement	**06/09/2024**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

In the aforesaid cases, this Special Bench has been constituted for adjudication of following question of law which is permeating in all the appeals of aforementioned banks.

> ***"Whether clause (b) to sub section (2) of section 115JB of the Income-tax Act inserted by Finance Act, 2012 w.e.f. 1-4-2013 will bring the assessee-banks constituted as 'corresponding new bank' in terms of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 within the scope of section 115JB of the Act from assessment year 2013-14 onwards?"***

2. As a lead case we are taking up the appeal of Union Bank of India in ITA No.424/Mum/2020. For the A.Y.2015-16, Union Bank of India has computed tax payable on book profit u/s.115JB at Rs.604,86,39,540/- and tax payable under the normal provisions at Rs.1153,29,54,493/-. The ld. AO asked the assessee to furnish the computation of book profit and also required the assessee as to why 'provisions and contingency', debited to the profit and loss account, should not be added back for the computation of book profit u/s.115JB.

3. In response assessee submitted that even though in computation assessee has worked out MAT on book profit but the provision of Section 115JB itself is not applicable to the assessee bank. However, the ld. AO rejected the assessee's plea of non-applicability of 115JB on the ground that the amended

provision of Section 115JB brought by the Finance Act, 2012 w.e.f. 01/04/2013 by insertion of clause (b) to sub-section (2) to section 115JB, brings within its ambit even the banking companies. Thus, the ld. AO concluded that now the amended provision provides that not only the companies governed by the Companies Act, but also other companies governed by other regulating act including Banking Regulation Act, 1949 are also covered by the provision of Section 115JB. He also referred to Explanation 3 of Section 115JB and held that, sub-clause (b) of Sub-Section 115JB read with Explanation 3 makes it clear that all such companies, to whom sub-section (2) of Section 211 of the Companies Act 1956 is applicable, then for the purpose of Section 115JB, has to prepare its profit & loss account either in accordance with the Companies act or the act governing the company. The relevant observation of the AO reads as under:-

> *"9.3 Indeed, sub-section (1) of section 115JB provides that the provisions of this section are applicable in case of every company. It does not carve out any exception. The moment it is proved that the assessee is as company it has to consider to apply the provisions of section 115JB, work out book profit and compare it with total Income as computed under normal provisions of the Act. Sub-section (1) also uses the word 'shall'. The meaning of this word cannot be 'may' providing any discretion to either Assessing Officer or the assessee. It is clearly a charging section as it begins with a non obstante clause "Notwithstanding anything contained in any other provision of this Act" In other words, if the condition laid down under this sub- section that total income computed under normal provisions of the Act is less than 18.5 per cent of book profit is satisfied, then consequence as laid down under subsequent part of that sub-section would follow, that is, its*

book profit shall be total income of the assessee. From this, it follows that the meaning of the word 'shall' cannot be 'may' otherwise entire provision will become otiose. Sub-section (2) begins with every assessee, being a company, shall, for the purposes of this section. It mandates that 'every company'. No exception is provided to some or any class of companies on whatsoever basis irrespective of the fact that such company is regulated under other statute, say, Banking Regulation Act or under Electricity Act. It further says 'shall'. It is clearly mandatory for every assessee-company to do what follows in that sub-section. A different meaning to this word cannot be assigned while also interpreting sub-section (2). The use of the expression 'for the purposes of this section' in sub-section (2) can only mean that the purpose of this section cannot be achieved unless every assessee-company does what follows thereafter.

9.4 It may further be pointed out that the assessee has itself computed its income u/s 115JB of the I. T. Act, for A. Y. 2012-13, 2014-15 and 2015-16. In both the assessment years, assessee had duly filed Form No. 29B containing report from Chartered Accountant with computation of Book Profit u/s 115JB of the act.

9.4.1 In view of the above discussion it is held that, the provisions of Section 115JB are applicable to the assessee. Further, the Revenue has filed appeal before the Hon'ble Mumbai High Court, against the order of the Id. Tribunal in assessees' own case for A. Y. 2007-08, which has been admitted by the Hon'ble Court in ITXA (L) No. 1977 of 2013 which is still pending for disposal."

4. Ld. CIT (A) has also endorsed same view after holding as under:-

"9.3 I have considered the AO's order, the submissions made by the appellant and the details filed. I find that there may be merit in the contention of the appellant that it does not fall in

the category of a Banking Company as defined in Section 5 of Banking Companies Act, on the ground that it is a nationalized bank and cannot be wound up under the India Companies Act, but such contention ignores the another set of companies stated in the said proviso i.e "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". Thus, the appellant bank, along with similar banks and financial institutions which are deemed to be a company for the purposes of Income tax Act as per the provisions of Banking Companies (Acquisition and Transfer of Undertakings) Act, would form a class of companies for which a form of profit and loss account has been specified by the Regulator/RBI and proviso to section 211(2) of Companies Act 1956 would be applicable. Therefore, these companies will be covered by section 115JB(2)(b), as amended from 1.4.2013 read with Explanation 3."

5. The decisions relied upon by the assessee in the case of UCO Bank vs. DCIT of ITAT Kolkata Bench in ITA No.585/Kol/2013 order dated 05/07/2016 and another decision of the same Bench in the case of Damodar Valley Corporation vs. Addl. CIT (2016) 66 taxman.com 25 was not accepted on the ground that those appeals pertain to the period prior to the amendment.

6. At the outset, Ld. Sr. Counsel. Mr. P.J. Pardiwala on behalf of the assessee bank submitted that the coordinate bench in assessee's own case for the assessment years 2013-14 and 2014-15 in ITA No.1804-1807/Mum/2018 vide paragraph numbers 32 to 37 of the order dated 27/11/2020 has decided this issue in favour of assessee bank holding that provisions of section 115JB is not applicable to assessee bank following the decision of the

Hon'ble Bombay High Court for AY. 2005-06 in case of the assessee in Income Tax Appeal Number 1196 of 2013, judgment dated 16/4/2019., Thus, the order of the coordinate bench holding that MAT provisions do not apply to the assessee was upheld. The Hon'ble Bombay High Court in paragraph number 21 has also considered the provisions of section 115JB of The Act as it stood prior to amendment by The Finance Act 2012. Further, he pointed out that, this Tribunal again in assessee's own case for the A.Y.2007-08 and 2010-11 has held that the MAT provision do not apply to the assessee bank. In fact, in the appeal for A.Y. 2013-14, the Co-ordinate Bench has considered the amendment to Sub-Section (2) to Section 115JB and followed the earlier order of the Tribunal. Similar view was taken in A.Y.2014-15 also.

7. Contrary to the aforesaid judgments and decisions in the case of the assessee, there was another decision of the Co-ordinate Bench in the case of **Bank of India in ITA No. 167 and 2048/Mum/2019 order dated 11/12/2020,** (standing on the same footing as Union Bank Of India) while deciding the case for the A.Y.2015-16 has discussed this issue in detail and rejected the plea of the Bank about non-applicability of Section 115JB to the banking companies like assessee. In sum and substance, the Tribunal held that Section 11 of The Banking Companies (Acquisition And Transfer Of Undertaking) Act, 1970 provides that for the purpose of The Income Tax Act, every corresponding 'new bank' shall be 'deemed to be Indian company and the company in which public is substantially interested', therefore, is

not open to take a view that it would not be treated as a 'company' for the purpose of provisions of section 115JB of The Act. In paragraph numbers 22-23 of the order, wherein the reliance was made by the assessee on the decision of; i) UCO bank versus DCIT [64 taxmann.com 51]; and the decision of ii) Indian overseas Bank versus DCIT, the Tribunal held that though the decision in the case of Indian overseas Bank pertains to post amendment year i.e. 2014 15, but the Tribunal has mechanically relied upon the decision in the case of UCO bank without even taking note of the fact that the said decision pertains to the pre-amended period, i.e., assessment year 2013-14. Therefore, Tribunal in Bank of India concluded that these decisions of UCO Bank, Union Bank of India, IOB do not hold good for the assessment year post amendment from A.Y. 2013-14. The coordinate bench further, referred to the provisions of section 51 of The Banking Regulation Act wherein certain provisions were made applicable of that Act to the corresponding 'new bank', i.e. like that of assessee. The Tribunal further in paragraph number 27 held that the annual accounts of the assessee is required to be prepared in accordance with the requirement of The Banking Regulation Act, 1949. The Tribunal further referred to the decision of **CIT versus Union Bank of India and others (2019) 105 taxmann.com 253 (Bom)** (which was assessee's own case) and in paragraph number 30 held that this decision in fact was relied upon to support the finding that provisions of section 115JB applies to the banking companies

like the assessee, but took the view that the line of reasoning is 'per incurriam'.

8. Since there were contradicting decisions of Tribunal, therefore, the matter has been referred to the Special Bench on the aforesaid question of law.

9. Before we dwell upon the issue, for the sake of ready reference, the relevant portion of Section 115JB is reproduced hereunder:-

"(1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on 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, 2012, is less than eighteen and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of eighteen and one-half per cent:

Provided *that for the previous year relevant to the assessment year commencing on or after the 1st day of April, 2020, the provisions of this sub-section shall have effect as if for the words "eighteen and one-half per cent" occurring at both the places, the words "fifteen per cent" had been substituted.*

(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 statement of profit and loss for the relevant previous year in accordance with the provisions of Schedule III to the Companies Act, 2013 (18 of 2013); or

(b) being a company, to which the second proviso to sub-section (1) of section 129 of the Companies Act, 2013 (18 of 2013) is applicable, shall, for the purposes of this

section, prepare its statement of profit and loss for the relevant previous year in accordance with the provisions of the Act governing such company:

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

(i) the accounting policies;

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

(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 statement of profit and loss and laid before the company at its annual general meeting in accordance with the provisions of section 129 of the Companies Act, 2013 (18 of 2013):

Provided further *that where the company has adopted or adopts the financial year under the Companies Act, 2013 (18 of 2013), which is different from the previous year under this Act,—*

(i) the accounting policies;

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

(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 statement of profit and loss for such financial year or part of such financial year falling within the relevant previous year.

Explanation 3.—For the removal of doubts, it is hereby clarified that for the purposes of this section, the assessee, being a company to which the second proviso to sub-section (1) of section 129 of the Companies Act, 2013 (18 of 2013) is applicable, has, for an assessment year commencing on or

before the 1st day of April, 2012, an option to prepare its statement of profit and loss for the relevant previous year either in accordance with the provisions of Schedule III to the Companies Act, 2013 (18 of 2013) or in accordance with the provisions of the Act governing such company.

10. Ergo, Sub-section (1) of section 115JB, mandates charge of income-tax based on book profits subject to fulfillment of certain conditions and also provides the rate at which such tax shall be charged. This is a departure from the normal charge of tax on the total income. Sub-section (2) thereof is the computation provision dealing with the manner in which such book profits are to be computed. The issue which arises for our consideration is, whether the requirements of sub-section (2) of section 115JB are fulfilled in the present case. Further, in the absence of fulfillment of the requirements of the computation provision, whether the charge will fail in so far as the present assessees are concerned.

BACKGROUND & FACTS

11. The brief facts and the applicable legal provision which are relevant for adjudicating the aforesaid question, which has been brought on record are that, the assessee bank came into existence on 19/07/1969 as 'corresponding new bank' as per Section 3(1) of the **Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970** (in short referred to as '**Acquisition Act'**). As per this Act, only the undertaking of the existing bank was transferred from **Union Bank of India Ltd**. to **Union Bank of India,** which was a creation by a separate Acquisition Act. The shareholders of Union Bank of India Ltd.

were paid compensation in consideration for acquiring the undertaking. It has been further affirmed and stated before us that the Union Bank of India Ltd. continues to exist as a company as per the website of Registrar of Companies. Assessee, i.e., The Union Bank of India is neither a company incorporated under the Companies Act, 1956 nor under any other previous company law. Ergo, these are two different entities and distinct from each other, one incorporated under old Company Law and other created by an Act of Parliament, that is, Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. Another fact which has been brought on record that the Corporate Identification Number (CIN) is of Union Bank of India Ltd. and not assessee (The Union Bank of India). To substantiate the aforesaid proposition, reference was made to the judgment of the Hon'ble Supreme Court in the case of **Rustom Cavasjee Cooper v. Union of India (1970) 1 SSC 248** to contend that only undertaking was acquired by the Banking Companies acquisition and transfer of undertaking ordinance which was promulgated on 19/06/1969, which culminated into Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 (herein after referred to as "Acquisition Act".) Thus, it has been contended that, at the threshold the assessee bank is not a company and therefore, the provision of Section 115JB of the Act cannot be made applicable to the assessee.

ARGUMENTS ON BEHLAF OF THE ASSESSEE BANK

12. Before us ld. Sr. Counsel, Mr. Percy Pardiwala referred to the various provisions of the Acquisition Act which are summarized hereunder:-

i. Section 3(1) provides that on the commencement of the Acquisition Act, there shall be constituted such corresponding new banks as are specified in the First Schedule. The First Schedule thereof, wherein, the Existing Bank is referred to as "The Union Bank of India Limited' and the corresponding new bank as 'Union Bank of India'. Section 2(d) defines the expression 'corresponding new bank' in relation to an existing bank, as meaning the body corporate specified against such bank in column 2 of the First Schedule;

ii. Section 4 of the Acquisition Act provides that on the commencement of the Acquisition Act, the undertaking of every existing bank shall be transferred to, and shall vest in, the corresponding new bank. Pursuant thereto, the undertaking of The Union Bank of India Ltd. constituting the banking business stood transferred to and vested in the Union Bank of India being the Appellant herein,

iii. Section 5 thereof makes provision for the effect of such vesting and deals with the various circumstances which would arise upon such vesting.

iv. Further, section 6 thereof, makes a reference to the Second Schedule of the said Act and provides that the Central Government shall give compensation to every existing bank in respect of such transfer as specified in the said Schedule.

Accordingly, he submitted that as per the Acquisition Act, the 'undertaking' of the existing bank which carried on the banking business had to be transferred and vested in the corresponding new bank.

v. Further, he referred to Section 10 of the Acquisition Act which states that every corresponding new bank shall cause its books of account to be closed and balanced in accordance with the said provision. It also lays down the procedure for qualification of an auditor, his scope of work and manner of determination of his remuneration.

vi. Section 10A thereof, provides for the procedure to be followed by every corresponding new bank for the purposes of holding its annual general meeting.

Thus, the said Act deals with various other procedural aspects which will apply only to a corresponding new bank. Reference has been made to these provisions to show that the aspects relating to maintenance of books of account, their closure, audit and placing of the audited financial statements in the annual general meeting for discussion, approval and adoption are independently provided for in the Acquisition Act itself.

13. Mr. Pardiwala submitted that the **Banking Regulation Act, 1949 (hereinafter referred to as 'BR Act')** defines the expression banking company' and 'corresponding new bank' separately and clearly draws a distinction between the two. Also, not all the provisions of the BR Act are applicable to the corresponding new banks. Apart there from, specific reference

was invited to section 51 of the BR Act making certain provisions of the BR Act being applicable to inter-alia a corresponding new bank. Therefore, only such provisions in the BR Act which specifically make reference to a corresponding new bank or the provisions in respect of which reference is made in section 51 will apply to a corresponding new bank. The other provisions in the BR Act have no application to a corresponding new bank like the assessee bank. This reference was made by him to highlight that in the legal framework applicable to a bank, a banking company and corresponding new bank are different and are subject to different regulatory provisions.

14. Mr. Pardiwala then referred to earlier provision containing sub-Section (2) of Section 115JB prior to the amendment w.e.f. 01/04/2013 which was applicable up to A.Y.2012-13 and provision w.e.f. A.Y.2013-14. Both the provisions for the sake of ready reference are reproduced here under:-

"(2) 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):
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"

15. The Finance Act, 2012, with effect from assessment year 2013-14, substituted the erstwhile sub-section (2) of section 115JB and the substituted sub-section (2) along with its provisos reads as under:-

"(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 statement of profit and loss for the relevant previous year in accordance with the provisions of Schedule III to the Companies Act, 2013 (18 of 2013), or

(b) being a company, to which the second proviso to sub- section (1) of section 129 of the Companies Act, 2013 (18 of 2013) is applicable, shall, for the purposes of this section, prepare its statement of profit and loss for the relevant previous year in accordance with the provisions of the Act governing such company:

Provided that while preparing the annual accounts including statement of profit and loss,-
(i) the accounting policies,
(ii) the accounting standards adopted for preparing such accounts including statement of profit and loss,
(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 statement of profit and loss and laid before the company at its annual general meeting in accordance with the provisions of section 129 of the Companies Act, 2013"

16. He submitted that before its amendment, sub-section (2) applied only to such companies which were required to prepare its profit and loss account in accordance with Parts II and III of Schedule VI to the Companies Act, 1956 (the Companies Act).

The Assessee Bank is required to prepare its profit and loss account in accordance section 51 read with section 29 of the BR Act. Therefore, the said provision had no application to its case. This position stands accepted by the jurisdictional High Court in the Assessee's own case [as reported in (2019) 105 taxmann.com 253]. After the amendment, the sub-section (2) applies to two different categories, that is, (i) one to which the second proviso to section 129(1) of the Companies Act, 2013 is applicable and who have to prepare their profit and loss account in accordance with the provisions of the Act governing them (see section 115JB(2)(b)); and (ii) being a company other than to whom clause (b) is applicable, i.e., those who have to prepare their profit and loss account in accordance with Schedule III of the Companies Act [see section 115 JB(2)(a)). Ld. AR submitted that, the pre-amended sub- section (2) is in *pari materia* with clause(a) of section 115JB(2) after its amendment.

17. He further submitted that in the case of the assessee bank neither Clause (a) nor Clause (b) of sub-section (2) of Section 115JB are applicable for the following reasons:-

Clause (a)

a. Clause (a) of section 115JB (2) applies to a case of a company other than that referred to in clause (b). According to the said clause, such company shall, for the purposes of section 115JB prepare its profit and loss account for the relevant previous year in accordance with Schedule III to the Companies Act, 2013. The first proviso to sub- section (2) requires that, while preparing the annual accounts including the profit and loss account the

accounting policies, the accounting standards and 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 the profit and loss account and laid before the company at its annual general meeting in accordance with section 129 of the Companies Act. Since, a bank like the Assessee has to prepare its accounts in accordance with the provisions contained in section 51 read with section 29 of the BR Act and not as per Schedule III of the Companies Act and also referring to the fact that the first proviso below section 115 JB (2) is not applicable to its case, that is why it has been held by the jurisdictional High Court in assessee's own case that the machinery provision would fail. In the absence of fulfillment of the said condition, principle laid down in the judgment of the Hon'ble Apex Court in the case of CIT v. B. C. Srinivasa Setty (1981) 128 ITR 294 (SC) is applicable, wherein it has been held that a charging provision and a computation provision together constitute an integrated code. If the computation provision cannot apply it would be evident that such a case was not intended to fall within the charging section. Thus, he submitted that, in so far as application of clause (a) of section 115JB (2) is concerned, the same would fail as held by the High Court. The said judgment, though rendered in the context of a period pre-amendment, it is submitted, would hold good in so far as clause (a) is concerned, as both the provisions stand on the same footing.

Clause (b)

b. With respect to application of clause (b) of section 115JB (2) of the Act, the following conditions need to be satisfied:

i. It applies to a company to which the second proviso to sub-section (1) of section 129 of the Companies Act, 2013 is applicable;

ii. Once this condition is fulfilled, it requires such assessee for the purpose of this section to prepare its profit and loss account in accordance with the provisions of the Act governing such company.

18. Mr. Pardiwala then referred to Section 129(1) of the Companies Act read with second proviso and submitted that given in the conditions provided therein in Clause (b) is not applicable. He further referred to Section 2(9) of the Companies Act, 2013 and submitted that "banking company" has been defined to mean "a banking company as defined in Section 5(c) in the BR Act" and under that Act "banking company" means any company which transacts the business of banking in India. **Therefore, for an entity to qualify as a banking company it should first of all, be a company' and secondly the said company should transact the business of banking in India.**

19. In case of the assessee bank there can be no doubt that it is neither formed and/or registered under the Companies Act, 1956, nor is it an "existing company" as per the above definition. Hence, in the absence of fulfillment of the requirement of either of the two limbs, the first condition referred to above in clause (b)

of section 115JB(2) is not fulfilled, as in its case, the second proviso below section 129(1) of the Companies Act, 2013 is not applicable.

20. Mr. Pardiwala further submitted that deeming an entity to be an Indian Company or a company in which public is substantially interested for the purposes of the Income-tax Act would not ipso facto make such entity as a 'company' for the purposes of the Companies Act, 2013, unless the conditions specified in section 3 thereof are fulfilled. There is no provision to deem a nationalised bank (i.e., the present assessee) to be a company for the purposes of section 3 of the Companies Act, 1956. In view thereof, clause (b) of sub-section (2) of section 115JB is not applicable to its case.

21. Further, section 11 of the Acquisition Act mandates that ***"For the purposes of Income-tax Act, 1961 (43 of 1961), every corresponding new bank shall be deemed to be an Indian company and a company in which the public are substantially interested"***. Therefore, the said deeming fiction is created only for the purposes of the Income-tax Act. Further, for the purposes of the said Act, it deems every corresponding new bank to be an Indian company and also a company in which the public are substantially interested. At the relevant point of time, when the Acquisition Act was passed by the Parliament, a differential rate of tax was applicable on different categories of companies, with a concessional rate being applied in the case of an Indian company in which the public are substantially interested.

22. Thus, he submitted that the said deeming fiction by way of section 11 in the Acquisition Act was provided with a view to give such concessional tax treatment to the nationalised banks. Apart there from, it also requires consideration that the expression company has been defined in section 2(17) of the IT Act as under:-

"company" means-

*(i) **any Indian company,** or*

(ii) any body corporate incorporated by or under the laws of a country outside India, or

(iii) any institution, association or body which is or was assessable or was assessed as a company for any assessment year under the Indian Income-tax Act, 1922 (11 of 1922) or which is or was assessable or was assessed under this Act as a company for any assessment year commencing on or before the 1st day of April, 1970, or

(iv) any institution, association body, whether incorporated or not and whether Indian or non-Indian, which is declared by general or special order of the Board to be a company

Provided that such institution, association or body shall be deemed to be a company only for such assessment year or assessment years (whether commencing before the 1st day of April, 1971 or on or after that date) as may be specified in the declaration.

23. Further, section 2(26) of the IT Act defines an **Indian company** to mean:

"Indian company" means a company formed and registered under the Companies Act, 1956 (1 of 1956), and includes-

(1) a company formed and registered under any law relating to companies formerly in force in any part of India (other than the State of Jammu and Kashmir and the Union territories specified in sub-clause (u) of this clause);

(ia) a corporation established by or under a Central, State or Provincial Act;

(ib) any institution, association or body which is declared by the Board to be a company under clause (17);

(ii) in the case of the State of Jammu and Kashmir, a company formed and registered under any law for the time being in force in that State;

iii) in the case of any of the Union territories of Dadra and Nagar Haveli, Goat, Daman and Diu, and Pondicherry, a company formed and registered under any law for the time being in force in that Union territory:

Provided that the registered or, as the case may be, principal office of the company, corporation, institution, association or body in all cases is in India.

24. The aforesaid Section requires that Indian company has to be formed and registered under the Companies Act and simply because Section 11 of the Acquisition Act treats assessee bank as a company for the purpose of Income Tax Act that does not mean the requirement of Companies Act has to be foregone.

25. Ld. Sr. Counsel submitted that the definition clause in the Acquisition Act is prefixed by the phrase 'unless the context otherwise requires' and the BR Act by the phrase 'unless there is anything repugnant in the subject or context'. Though, in view of section 11 of the Acquisition Act a corresponding new bank can be treated as a company for the purposes of the Income-tax Act, the context of clause (b) in sub-section (2) to section 115JB does not permit treatment of such bank as a company for the said clause. This is because it should be a company to which the second proviso to sub-section (1) of section 129 of the Companies

Act, 2013 is applicable. He explained that the said proviso has no application to a corresponding new bank as it is not a banking company for the purposes of the said provision. Therefore, the context in which the said expression 'company is used in section 115JB (2)(b), it requires that the said provision will not apply to an entity which is deemed by a fiction to be a company for the purposes of the Income-tax Act. For application of the clause it should be a company as per the Companies Act. It is submitted that, the deeming fiction created for the purposes of the Income-tax Act, cannot be extended to the Companies Act.

26. Mr. Pardiwala also referred to the judgment of Hon'ble Apex Court in the case of **Vanguard Fire case and General Insurance Co. Ltd., Madras v. Fraser and Ross and Ors. AIR 1960 SC 971**, where, the Hon'ble Court held as under:-

"7. The main basis of this contention is the definition of the word "insurer" in the s. 2(9) of the Act. It is pointed out that that definition begins with the words "insurer means" and is therefore exhaustive. It may be accepted that generally the word "insurer" has been defined for the purposes of the Act to mean a person or body corporate, etc., which is actually carrying on the business of insurance, Le, the business of effecting contracts of insurance of whatever kind they might be. But s. 2 begins with the words "in this Act, unless there is anything repugnant in the subject or context" and then come the various definition clauses of which (9) is one. It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statues generally begin with the qualifying words

similar to the words used in the present case, namely, unless there is anything repugnant in the subject or context. Therefore in finding out the meaning to the word "insurer" in various sections of the Act, the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening sentence in the definition section, namely, unless there is anything repugnant in the subject or context. In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances.

Therefore, though ordinarily the word "insurer" as used in the Act would mean a person or body corporate actually carrying on the business of insurance it may be that in certain sections the word may have a somewhat different meaning"

27. Thereafter, he also relied upon the decision of Hon'ble Apex Court in the case of **CIT v. B. C. Srinvasa Setty (1981) 128 ITR 294,** where the Court was concerned with whether self generated goodwill can be described as a capital asset for the purposes of the Act. Though, goodwill will be regarded as a property and, hence, as an asset in normal parlance, the Court has referred to the expression 'unless the context otherwise 'requires' to come to the conclusion that such goodwill cannot be described as a capital asset for the purposes of section 45 which is the charging provision for capital gains tax. Our attention was drawn to the following observations:

"The section operates if there is a transfer of a capital asset giving rise to a profit or gain. The expression "capital asset" is defined in section 2 (14) to mean "property of any kind held by an assessee". It is of the widest amplitude, and apparently covers all kinds of

property except the property expressly excluded by clauses (i) to (iv)of the sub-section which, it will be seen, does not include good will. But the definitions in section 2 are subject to an overall restrictive clause. That is expressed in the opening words of the section: unless the context otherwise requires". We must, therefore, enquire whether contextually section 45, in which the expression "capital asset" is used, excludes goodwill...."

28. Thus, in sum and substance the contention of the ld. Sr Counsel is that assessee is not a company as defined in the Income Tax Act, therefore, Section 115JB (2)(b) does not apply. To buttress his point he also made reference to the decision of the Tribunal in the case of Dy. CIT v. Damodar Valley Corporation being Order dated 21.08.2018 in ITA No. 438/KOL/2017, the said case was concerned with assessment year 2013- 14 which is after the amendment of sub-section (2) of section 115JB. The said assessee was formed and established under the Damodar Valley Corporation Act, 1948. Section 47 thereof provided the necessary guidelines for preparation of financial statements. Further, section 43 of the said Act specifically treated the said corporation as a company for the purposes of paying taxes on Income under the Income-tax Act. However, referring to the proviso below section 211(2) of the Companies Act, 1956 (corresponding to the second proviso below section 129 (1) of the Companies Act. 2013), the Tribunal has concluded that the said corporation was not a company for the purposes of the Companies Act and, hence, clause (b) of section 2 of section 115JB shall not apply to the same. A similar view has also been taken by the Jaipur Bench of the Tribunal in Dy.

CIT v. Rajasthan Financial Corporation (2023) 199 ITD 570 which was concerned with assessment year 2019-20.

29. Mr. Pardiwala submitted that even if it is assumed that the view is taken that the assessee's case would fall within clause (b) of sub-section (2) of section 115JB, then, attention is invited to first proviso below the said sub-section (2). According to the said proviso while preparing the annual accounts including the statement of profit and loss account the accounting policies, the accounting standards adopted for preparing such accounts including statement of profit and loss accounts, 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 statement of profit and loss and laid before the company at its annual general meeting in accordance with the provisions of section 129 of the Companies Act, 2013. In the present case, as explained hereinabove, the annual general meeting is held and the balance sheet and the profit and loss account of the corresponding new bank is discussed, approved and adopted by the shareholders as per section 10A of the Acquisition Act. Section 129 of the Companies Act, 2013 has no application to its case. This is because the assessee being nationalised bank is not a company for the purposes of the Companies Act. In view thereof, it is submitted that since the requirement in the said proviso cannot be fulfilled in the present case, the taxability of book profit as per section 115JB of the Act, would fail.

30. Further, he also invited our attention to the judgment of the Hon'ble Apex Court in the case of **CIT v. Elphinstone Spinning and Weaving Mills Co. Ltd. (1961) 40 ITR 142**, where, the Court has held that where the word of taxing statute fails, then so must the tax. The Courts cannot help the draftsman by a favourable construction where the legislature failed to fit in the law in the scheme of the Act. In that case, the court was concerned with whether the assessee was liable to pay additional income-tax when it incurred losses but declared dividend which was treated as 'excess dividend' and additional tax was levied for the purposes of the Income-tax Act.

31. Our attention was also drawn to the judgment of the Hon'ble Apex Court in the case of **Greater Bombay Co-operative Bank Limited v. United Yarn Tex Private Limited (2007) AIR 1994**. In that case, the Court was concerned with whether the provisions of recovery of debts due to Banks and Financial Institutions Act, 1993 will apply to a bank(s) formed and established under the Maharashtra Co- operative Societies Act. The said Act would apply to a banking company as per the Banking Regulation Act. In this regard, the following observations would be relevant "*44. The RDB Act was passed in 1993 when Parliament had before it the provisions of the BR Act as amended by Act No. 23 of 1965 by addition of some more clauses in Section 56 of the Act. The Parliament was fully aware that the provisions of the BR Act apply to co-operative societies as they apply to banking companies. The Parliament was also aware that the definition of 'banking company' in Section 5(c) had not*

been altered by Act No. 23 of 1965 and it was kept intact, and in fact additional definitions were added by Section 56(c). "Co-operative bank" was separately defined by the newly inserted Clause (cci) and "primary co-operative bank" was similarly separately defined by Clause (ccv). The Parliament was simply assigning a meaning to words; it was not incorporating or even referring to the substantive provisions of the BR Act. The meaning of 'banking company' must, therefore, necessarily be strictly confined to the words used in Section 5(c) of the BR Act. It would have been the easiest thing for Parliament to say that 'banking company' shall mean 'banking company' as defined in Section 5(c) and shall include 'co-operative bank' as defined in Section 5(cci) and 'primary co-operative bank' as defined in Section 5(ccv). However, the Parliament did not do so. There was thus a conscious exclusion and deliberate commission of co-operative banks from the purview of the RDB Act."

32. Based on the above, he submitted that the expression banking company must mean only such entities as are defined in section 5(c) of the BR Act. An entity like the present one, being the corresponding new bank which has been separately treated under the BR Act cannot be regarded as a banking company for the purposes of the BR Act or the Companies Act.

33. Lastly, he also made various references from the Income Tax Act itself wherein corresponding new bank and the banking company have been treated as separate and independent from each other. For instance, he made reference to the following provisions:-

i. As per section 36(1)(viii) deduction is allowed in respect of any special reserve created and maintained by a specified entity. The expression 'specified entity' has been defined in clause (a) of the Explanation thereto to inter-alia include a banking company clause (c) to the said Explanation defines the expression 'banking company' as meaning a company to which the BR Act applies and includes any bank or banking institution referred to in section 51 of the said Act. As explained hereinabove, section 51 of the BR Act makes certain specific provisions in the BR Act being applicable to a corresponding new bank. If the Revenue's submission is accepted that a banking company will include a corresponding new bank, then, this latter part of clause (c) was not required.

ii. Section 72A of the Act, provides for carry forward of accumulated loss and unabsorbed depreciation allowance in cases of amalgamation and demerger Clause(b) of sub-section (1) thereof, applies to an amalgamation of a banking company refer to section 5(c) of the BR Act with a specified bank. The expression 'specified bank' is defined in clause (c) of sub-section (7) thereof, as inter-alia meaning a corresponding new bank constituted under section 3 of the Acquisition Act. Therefore, amalgamation of a banking company with inter-alia a corresponding new bank would entitle the amalgamated entity for claiming the benefit of carry forward and set-off of such loss/unabsorbed depreciation of the amalgamating entity. This would expressly not cover a situation where a corresponding new bank amalgamates with another corresponding new bank. To cover such scenario, section 72AA was inserted. If a corresponding new bank is to be treated as a banking company, then, the said section 72AA was not necessary.

34. Thus, according to him some of the provisions of the Act itself recognised the distinction between banking company and the corresponding new bank and making specific provisions for the same.

ARGUMENTS ON BEHALF OF DEPARTMENT

35. Before us ld. Special Counsel Mr. Mohanty appearing on behalf of the Revenue first of all submitted that, Section 2(17) defines company as any Indian company and Section 11 of Acquisition Act clearly states that for the purpose of Income Tax Act, 1961 every corresponding new bank shall be deemed to be Indian company and a company in which public are substantially interested. The Indian company has been defined under Section 2(26) which means a company formed and registered under the Companies Act, 1956. Thus, the provision of Section 115JB(2) is clearly applicable because as per the Income Tax Act, it is deemed to be Indian company under the Companies Act and consequently Section 115JB(2) applies to the company which are under the Companies Act. He further referred to Section 3(2B) to (2D) of the Acquisition Act dealing with paid up share capital and transferability of shares, section 3(2E) dealing with voting rights of a shareholder of such corresponding new bank, section 3(2F) dealing with maintenance of a shareholders register by such bank to urge that a corresponding new bank has share capital and, hence, the characteristics of a company are satisfied in its case In this regard, he has also invited our attention to section 10 of the said Act which deals with maintenance and closure of accounts as well as section 10A which deals with holding of annual general meeting. Based thereon, it was urged that the corresponding new bank has the features of a company.

36. He further referred to Section 5(c) of BR Act which requires that for an entity to be regarded as a banking company it should be company which transacts the business of banking in India. Again, after referring to section 11 of the Acquisition Act, he submitted that it provides that a corresponding new bank shall be a company and section 3(5) of the said Act provides that every corresponding new bank shall carry on and transact the business of banking as defined in section 5(b) of the BR Act. Thus, the conjoint reading of Section 11 of the Acquisition Act of section 5(c) of the BR Act, and the definition of a company defined in section 3 of the Companies Act goes to prove that these banks are nothing but a banking company and once a banking company will fall within the ambit and not only the Companies Act but also for the purpose of Section 115JB. Once the amendment has been brought and Sub-section (2) has been made applicable to those companies to which second proviso to sub-section (1) of Section 129 of the Companies Act is applicable and therefore, for the purpose of this Section they have to prepare a statement of profit and loss account in accordance with the proviso of Act governed by this company and these companies are governed not only by the Companies Act but under the provision of Section 11 of the Acquisition Act.

37. Mr. Mohanty further submitted that sub-section (1) of Section 115JB starts with non-obstante clause and therefore, it overrides the other provisions of the Act and once a company which is carrying out the banking business, they are liable for MAT provision u/s.115JB. He also placed strong reliance on the

decision of the Tribunal in the case of **Bank of India in ITA No. 1767 and 2048/Mum/2019 dated 11/12/2020** to urge that said provision has to be applied notwithstanding anything contained in any other provision of the Act. In his counter submissions of Mr. Pardiwala that the computation machinery does not fail as clause (b) of Sub-Section (2) of Section 115JB enables the determination of book profit based on profit and loss account prepared in accordance with the legislation as applicable to the assessee, he placed reliance on the judgment of the Hon'ble Supreme Court in the case of K. P. Varghese v. ITO (1981) 131 ITR 597 for the proposition that where a plain literal interpretation of a statutory provisions produces a manifestly absurd and unjust result which could never be intended by the Legislature then, the Court can modify the language or even do some violence to it so as to achieve the obvious intention. Thus his strong reliance was on the judgment of this Tribunal in the case **Bank of India (supra).**

Rejoinder

38. In rejoinder Mr. Pardiwala submitted that the decision of the Tribunal in the case of Bank of India (supra) does not lay down the correct position of law for the following reasons:-

a. In the said order, the Tribunal has not considered the implication of non-fulfillment of the conditions and consequently, the machinery provisions in section 115JB(2) of the Act. Consequently, there is also no finding with respect to applicability of clause (a) or (b) of section 115JB(2). It is submitted that for the machinery provisions to apply it is

essential that either clause (a) or (b) of sub-section (2) of section 115JB is applicable to its case.

b. The entire order is based on section 11 of the Acquisition Act which for the purposes of the Income-tax Act deems every corresponding new bank to be an Indian company and a company in which public is substantially interested. The said deeming provision was required because in the 1970's, the rate of tax under the Act was to be determined based on the status of a company as a domestic company and a company in which public is substantially interested. A bare perusal of the said section 11 also shows that the said deeming fiction is only for the purposes of the Income-tax Act. In clause (b) of section 115JB(2), after its amendment, one has to be consider whether the second proviso below section 129(1) of the Companies Act, 2013 is applicable to the assessee's case. As detailed hereinabove, the said condition is not fulfilled. The deeming fiction in section 11 referred to above, for the purpose of the Income-tax Act cannot be extended to section 129 of the Companies Act. Non-application of the proviso below section 129 of the Companies Act would necessarily mean that though the Appellant may be regarded as a company for the purposes of the Act, the essential condition in section 115JB(2) (b) is not fulfilled. It is submitted, with respect, that this aspect of the matter has been completely overlooked by the Tribunal in the case of Bank of India.

c. In paragraph 23 of the said Order, the Tribunal has referred to section 5 of the Banking Regulation Act, as starting with the rider unless the context requires otherwise..... It is respectfully

submitted that based thereon, a corresponding new bank which is a distinct and a separate entity duly recognised by the said BR Act itself cannot be regarded as a banking company for the purposes of the said Act or the Companies Act. In any event, there is nothing in the context of second proviso below section 129(1) of the Companies Act which can even remotely suggest that the Appellant is a company or a banking company for the purpose of the said section.

DECISION

39. We have heard both the parties and also perused the relevant material referred to before us and the various provisions of the relevant Acts cited which are relevant for adjudication of the issue before us.

40. The question which has been referred to the Special Bench is whether the requirement of sub-section (2) of 115JB is fulfilled in the present case of the assessees. Sub-section (1) of Section 115JB mandates charge of income tax based on book profits subject to fulfillment of certain conditions and also provides the rate on which such tax shall be charged. The Section starts with non-obstante clause and therefore, it is a departure from normal charge of tax on the total income of the company. Sub-section (2) is the computation provision dealing with the manner in which such book profits are to be computed. Upto A.Y.2012-13, sub-section (2) of Section 115JB applied only to such companies which were required to prepare its profit and loss account in accordance with part II & III of Schedule VI to the Companies Act

1956. The assessee bank is required to prepare its profit and loss account in accordance with Section 52 r.w.s. 29 of the Banking Regulation Act and not as per the Companies Act. Earlier in the case of the assessee it has been settled by the Hon'ble Jurisdictional High Court that provision of Section 115JB has no application to its case. Now after the amendment w.e.f. A.Y.2013-14, Sub-section (2) has been amended to bring into the ambit of Section 115JB, those companies to which *second proviso* to sub-section (1) of Section 129 of the Companies Act is applicable, who are required to prepare its statement of profit and loss account in accordance with provisions of the Act governing such company. For the sake of ready reference the amended sub-section (2) of Section 115JB is again reproduced hereunder:-

(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 statement of profit and loss for the relevant previous year in accordance with the provisions of Schedule III to the Companies Act, 2013 (18 of 2013); or

(b) being a company, to which the second proviso to sub-section (1) of section 129 of the Companies Act, 2013 (18 of 2013) is applicable, shall, for the purposes of this section, prepare its statement of profit and loss for the relevant previous year in accordance with the provisions of the Act governing such company:

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

(i) the accounting policies;

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

(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 statement of profit and loss and laid before the company at its annual general meeting in accordance with the provisions of section 129 of the Companies Act, 2013 (18 of 2013):

***Provided further** that where the company has adopted or adopts the financial year under the Companies Act, 2013 (18 of 2013), which is different from the previous year under this Act,—*

(i) the accounting policies;

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

(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 statement of profit and loss for such financial year or part of such financial year falling within the relevant previous year.

41. In so far as Clause (a), the same applies to a case of a company other than referred to in Clause (b). According to clause (a), for the purpose of Section 115JB the company has to prepare its profit and loss account for the relevant previous year in accordance with the Companies Act, 2013 and the *First proviso* to sub-section (2) requires that while preparing the accounts including the profit and loss account, the accounting policies, the accounting standards and the method and rates adopted for the purpose of preparing such accounts

including the profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of Section 129 of the Companies Act, 2013. Since assessee bank has to prepare its accounts in accordance with the provisions contained in Section 51 r.w.s. 29 of the BR Act, therefore, Schedule III of the Companies Act is not applicable. Thus, Clause (a) of Section 115JB (2), the computation provision, will not apply and this matter has attained finality in the case of the assessee by the Hon'ble Jurisdictional High Court in the case of the assessee (cited supra).

42. Now for Clause (b), following conditions need to be satisfied for applying section 115JB in the case of a company:-

i. it applies to a company to which the second proviso to sub-section (1) of section 129 of the Companies Act, 2013 is applicable;
ii. once this condition is fulfilled, it requires such assessee for the purpose of this section to prepare its profit and loss account in accordance with the provisions of the Act governing such company.

43. Since 115JB is applicable to the company to which second proviso to Section 129(1) applies, therefore, it would be relevant to quote Section 129 of the Companies Act which reads as under:-

> *"129. Financial statement-(1) The financial statements shall give a true and fair view of the state of affairs of the company or companies, comply with the accounting standards notified under section 133 and shall be in the form or forms as may be*

provided for different class or classes of companies in Schedule III:

Provided that the items contained in such financial statements shall be in accordance with the accounting standards.

Provided further 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 financial statement has been specified in or under the Act governing such class of company

Provided also that the financial statements shall not be treated as not disclosing a true and fair view of the state of affairs of the company, merely by reason of the fact that they do not disclose (a) in the case of an insurance company, any matters which are not required to be disclosed by the Insurance Act, 1938 (4 of 1938), or the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999),

(b) in the case of a banking company, any matters which are not required to be disclosed by the Banking Regulation Act, 1949 (10 of 1949),

(c) in the case of a company engaged in the generation or supply of electricity, any matters which are not required to be disclosed by the Electricity Act, 2003 (36 of 2003),

(d) in the case of a company governed by any other law for the time being in force, any matters which are not required to be disclosed by that law."

44. The second proviso applies to any insurance company, 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 financial statement has been specified in or under the Act governing such class of company. **In so far as the present**

case is concerned, one has to consider whether the assessee could be regarded as a 'banking company' for the purposes of section 129 of the Companies Act, 2013).

45. Now whether the assessee bank can be termed as a company within the meaning of the Companies Act, 2013, first of all, Section 115JB(2) is applicable to every assessee 'being a company'. The company has been defined in Section 2(17) of the Income Tax Act which we have already reproduced in para 22 above. Thus, the company means any Indian company. Indian company has been defined in Section 2(26) (incorporated in para 23 of the order) which defines 'Indian company' means company formed and registered under the Companies Act. Thus, the company for the purpose of the Income Tax Act is a company which is formed and registered under the Companies Act. **Section 2(9)** of the Companies Act, 2013, a banking company has been defined *to mean* ***a banking company as defined in section 5(c) of the BR Act).*** Section 5(c) of the BR Act defines a 'banking company' as under:

> *"(c) "banking company" means any company which transacts the business of banking in India"*

Therefore, for an entity to qualify as a banking company it should first of all, be a company' and secondly the said company should transact the business of banking in India.

46. The expression "company" has been defined in section 5(d) of the BR Act as under:

"(d) "company" means any company as defined in section 3 of the Companies Act, 1956 (1 of 1956); and includes a foreign company within the meaning of section 591 of that Act;"

47. Therefore, in so far as is relevant, the entity has to be a company as defined in section 3 of the Companies Act, 1956 (Now 2013) to be regarded as a banking company. Section 3(1)(i) of the Companies Act, defines a 'company' as under:

"(i) ***"company" means a company formed and registered under this Act or an existing company as defined in clause (ii)"***

48. Therefore, it is *sine-qua-non* that for an entity to qualify as a company it must either be a company formed and registered under the Companies Act or it should be an existing company as defined in sub-clause (ii) thereof. Since the Assessee is not formed and registered under the Companies Act, 1956, albeit came into existence by a separate Act of Parliament, that is, 'Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970', therefore, it does not fall in the first part of the said section.

49. Further, the expression "existing company has been defined in Section 3(1)(ii) to mean as under:

"(ii) "existing company" means a company formed and registered under any of the previous companies laws specified below :-

(a) any Act or Acts relating to companies in force before the Indian Companies Act, 1866 (10 of 1866), and repealed by that Act;

(b) the Indian Companies Act, 1866 (10 of 1866);
(c) the Indian Companies Act, 1882 (6 of 1882);
(d) the Indian Companies Act, 1913 (7 of 1913);
(e) the Registration of Transferred Companies Ordinance, 1942 (54 of 1942); and
(f) any law corresponding to any of the Acts or the Ordinance aforesaid and in force -

(1) in the merged territories or in a Part B States (other than the State of Jammu and Kashmir), or any part thereof, before the extension thereto of the Indian Companies Act, 1913 (7 of 1913);
or
(2) in the State of Jammu and Kashmir, or any part thereof, before the commencement of the Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956), insofar as banking, insurance and financial corporations are concerned, and before the commencement of the Central Laws (Extension to Jammu & Kashmir) Act, 1968 (25 of 1968), insofar as other corporations are concemed; and

(3) the Portuguese Commercial Code, insofar as it relates to sociedades anonimas";"

50. The assessee bank was neither formed or registered under the Companies Act, 1956; nor it is in existing company as per the above definition. Once it is not a company under the Companies Act, then the first condition referred to in clause (b) of Section 115JB(2) is not fulfilled, and consequently *second proviso* below Section 129(1) of the Companies Act is also not applicable.

51. The main crux of the department is that since assessee bank has come into existence by the 'Acquisition Act' and Section 11 thereof states that for the purpose of Income Tax Act,

every corresponding new bank shall be deemed to be an 'Indian company' and the company in which the public are 'substantially interested' and since in Section 2(17) of the Income Tax Act, the 'company' has been defined as any Indian company therefore, the provisions of the Income Tax Act would apply because Section 2(26) of the Act defines 'Indian company' means the company formed and registered under the Companies Act and therefore, it is deemed to be a company under the Companies Act.

52. Section 11 of the Acquisition Act states that ***"For the purposes of Income-tax Act, 1961 (43 of 1961), every corresponding new bank shall be deemed to be an Indian company and a company in which the public are substantially interested"***. Therefore, the said deeming fiction is created only for the purposes of the Income-tax Act. Further, for the purposes of the said Act, it treats every corresponding new bank to be an Indian company and also a company in which the public are substantially interested.

53. First of all, deeming an entity to be an Indian Company or a company in which public are substantially interested for the purposes of the Income-tax Act would not ipso facto make such entity as a 'company' for the purposes of the Companies Act, 2013, unless the conditions specified in Section 3 thereof are fulfilled. There is no provision to deem a nationalised bank to be

a company for the purposes of Section 3 of the Companies Act, 1956.

54. As explained in the foregoing paragraphs, Section 2(17) of the income Tax Act r.w.s. 2(26) which defines 'company' to mean a company formed and registered under the Companies Act, 1956, does not meet the requirement of being a company in the case of assessee bank, because the Indian company has to be formed and registered under the Companies Act. Notwithstanding that Section 11 of the Acquisition Act deems assessee bank to be a company for the purpose of Income Tax Act, but that does not lead to an inference that merely regarded as a company for the purpose of the Income Tax Act it is also Company registered under the Companies Act. The fiction created by Section 11 of the Acquisition Act, does not imply that the assessee bank would also become a company for the purpose of the Companies Act for which Clause (b) of Sub-Section 2 of Section 115JB is applicable.

55. In the earlier part of the order, we have already noted that by the Acquisition Act, the banking business of the existing bank was transferred from Union Bank of India Ltd to The Union Bank of India. The earlier entity, i.e., Union Bank of India Ltd. was a company under the earlier Companies Act, however, that company as a whole was not taken over or acquired but only banking business was acquired by the Acquisition Act. That is the reason why Union Bank of India Ltd. still existed at the point of acquisition and continues till now and the shareholders of

Union Bank of India Ltd. were paid compensation as a consideration for acquiring the banking business. It was by the Acquisition Act that these banks were nationalized and the banking business was acquired from the erstwhile banking companies. These new acquiring banks including Union Bank of India is neither registered under the Companies Act, 2013 nor under any other previous company law. Already the Hon'ble Supreme Court in the case of Rustom Cavasjee Cooper v. Union of India (supra) as noted above, the Hon'ble Supreme Court had held that only undertaking was acquired for the banking companies acquisition and transfer of invoking ordinance which was promulgated on 19/06/1969, which culminated into the Act of Banking Companies (Acquisition and Transfer of Undertaking) Act,1970. Thus, assessee cannot be treated as a company under the Companies Act, because it was never registered under the Companies Act. Ergo, the deeming fiction by way of Section 11 of the Acquisition Act has to be read purely in the context for the purpose of Income Tax Act where the corresponding new bank have been deemed to be an Indian Company and a company in which public are substantially interested. This deeming section cannot be extended to a company registered under the Companies Act to which alone Section 115JB is applicable.

56. Thus, we hold that Section 11 of the Acquisition Act which deals a corresponding new bank treated as Indian company for the purpose of Income Tax, however, Clause (b) in Sub-Section 2 to Section 115JB does not permit treatment of such bank as a company for the purpose of the said clause, because it should be

company to which second proviso to sub-section (1) to Section 129 of the Companies Act is applicable. The said proviso has no application to the corresponding new bank as it is not a banking company for the purpose of the said provision. The expression "company" used in section 115JB(2)(b) is to be inferred to be company under the Companies Act and not to an entity which is deemed by a fiction to be a company for the purpose of the Income Tax Act.

57. Before us, ld. Counsel has given various references under the Income Tax Act itself where the corresponding new bank and a banking company have been treated separate and independent from each other for which our reference was also drawn to Section 36(1)(viii) & 72A. Apart from that, it is noticed that, Section 194A(1) of the Act which provides that if any specified person is responsible for paying to a resident any income by way of interest is obliged to deduct tax at source, however, Section 194A(3) provides that Section 194A(1) shall not apply if the payment has been made to certain entities. Clause (iii) of sub-section (3) of section 194A, deals with such entities. The said clause reads as under:-

iii) to such income credited or paid to-

(a) any banking company to which the Banking Regulation Act, 1949 (10 of 1949), applies, or any co-operative society engaged in carrying on the business of banking (including a co-operative land mortgage bank), or

(b) any financial corporation established by or under a Central, State or Provincial Act, or

(c) the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956 (31 of 1956), or

(d) the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963), or

(e) any company or co-operative society carrying on the business of insurance, or

(f) such other institution, association or body [or class of institutions, associations or bodies] which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette:

[Provided that no notification under this sub-clause shall be issued on or after the 1st day of April, 2020;]

58. The aforesaid clause (f) provides that if Central Government notifies any such entity then TDS is not to be deducted. It is very relevant to note that at the time of Acquisition Act was enacted, Central Government had issued a **Notification No. SO 710 dated 16/02/1970 [1970] [Reported in 75 ITR (Stat) 106]** which reads as under:-

Income-tax Act, 1961: Notification under sec. 194A(3)(iii)(f)

Notification No. S. O. 710, dated February 16, 1970. (1)

In pursuance of sub-clause (f) of clause (iii) of sub-section (3) of section 194A of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notify with effect from the 19th July, 1969, the following banks for the purposes of the said sub-clause:-

1. *Indian Overseas Bank, 151, Mount Road, Madras-*
2. *Indian Bank, Indian Chamber Building, Madras-1.*

3. Allahabad Bank, 14, India Exchange Place, Calcutta-1.

4. Dena Bank, Devkaran Nanjee Building, 17, Horniman Circle, Fort, Bombay-1.

5. Canara Bank, 112, Jayachamarajendra Road, Bangalore-1.

*6. **Union Bank of India,** 66/80, Apollo Street, Fort, Bombay-1.*

7. United Commercial Bank, 10, Brabourne Road, Calcutta-1.

8. Bank of Baroda, 3, Walchand Hirachand Marg, Bombay-1.

9. Punjab National Bank, Parliament Street, New Delhi-1.

10. Bank of India, 70/80 Mahatma Gandhi Road, Bombay-1.

*11. **Central Bank of India**, Mahatma Gandhi Road, Bombay-1.*

12. United Bank of India, 4, Narendra Chandra Datta Srani (Clive Ghat Street), Calcutta-1.

13. Bank of Maharashtra, 1177 Peth, Poona-2.

14. Syndicate Bank, Manipal, Mysore State, Mysore

59. Thus, the aforesaid notification read with provision of Section 194A(3), makes it clear that even Government of India considers the above entities separate and distinct from banking companies. Once under the Income Tax Act, Legislature itself has made a distinction for the aforesaid banks including the assessee are not covered as banking company, then, this further buttresses the point that these banks are separate and distinct from other banking companies.

60. Accordingly, the question referred to Special Bench is decided in favour of the assessee banks that *clause (b)* to sub section (2) of section 115JB of the Income-tax Act inserted by Finance Act, 2012 w.e.f. 1-4-2013, that is, from assessment year

2013-14 onwards, are not applicable to the banks constituted as 'corresponding new bank' in terms of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and therefore, the provision of Section 115JB cannot be applied and consequently, the tax on book profits (MAT) are not applicable to such banks.

Order pronounced on 6th September, 2024.

Sd/-	**Sd/-**	**Sd/-**
(C.V. BHADANG)	**(B.R. BASKARAN)**	**(AMIT SHUKLA)**
PRESIDENT	**ACCOUNTANT MEMBER**	**JUDICIAL MEMBER**

Mumbai; Dated 06/09/2024
KARUNA, *sr.ps*

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai