IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated this the 30th day of September, 2009

PRESENT

THE HON'BLE MR JUSTICE D V SHYLENDRA KUMAR

AND

THE HON'BLE MR JUSTICE ARAVIND KUMAR

Income Tax Appeal No. 320 of 2004,
Income Tax Appeal No. 597 of 2004
C/w
Income Tax Appeal No. 325 of 2004
And
Income Tax Appeal No. 2971 of 2005

In ITA No. 320 of 2004

Between:

1. THE COMMISSIONER OF INCOME TAX
C.R. BUILDING,
QUEENS ROAD,
BANGALORE.

2. THE DEPUTY COMMISSIONER
OF INCOME TAX,
CIRCLE-11(1),
C.R. BUILDING,
QUEENS ROAD,
BANGALORE. ... APPELLANTS

[By Sri M.V. Seshachala, Adv.]

And:

M/S. BRINDAVAN BEVERAGES LTD.,
NO. 214/33, 7TH CROSS,

CUNNINGHAM ROAD,
VASANTHNAGAR,
BANGALORE – 52. ... RESPONDENT

[By Sri. A. Shankar, Adv.]

THIS APPEAL IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961, PRAYING TO SET ASIDE THE ORDER DATED 08.01.2004 PASSED IN ITA NO. 1577/BANG/2002 FOR THE ASSESSMENT YEAR 1999-2000 AND ETC.,

In ITA No. 597 of 2004

Between:

BRINDAVAN BEVERAGES LIMITED,
REP. BY ITS MANAGING DIRECTOR,
S.N. LADHANI,
214/33, 7TH CROSS,
CUNNINGHAM ROAD,
VASANTANAGAR,
BANGALORE – 52. ... APPELLANT

[By Sri A. Shankar, Adv.]

And:

THE DEPUTY COMMISSIONER
OF INCOME TAX,
CIRCLE-11(1),
NRUPATUNGA ROAD,
BANGALORE. ... RESPONDENT

[By Sri. M.V. Seshachala, Adv.]

THIS APPEAL IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961, PRAYING TO SET ASIDE ORDER DATED 28.06.2004 PASSED IN ITA NO. 1577/BANG/2002 FOR THE ASSESSMENT YEAR 1999-2000 AND ETC.,

In ITA No. 325 of 2004

Between:

BRINDAVAN BEVERAGES LIMITED,
214/33, 7TH CROSS,
CUNNINGHAM ROAD,
VASANTANAGAR,
BANGALORE – 52. ... APPELLANT

[By Sri A. Shankar, Adv.]

And:

THE DEPUTY COMMISSIONER
OF INCOME TAX,
CIRCLE-11(1), NRUPATUNGA ROAD,
BANGALORE. ... RESPONDENT

[By Sri. M.V. Seshachala, Adv.]

THIS APPEAL IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961, PRAYING TO SET ASIDE ORDER DATED 08.01.2004 PASSED IN ITA NO. 1577/BANG/2002 FOR THE ASSESSMENT YEAR 1999-2000 AND ETC.,

In ITA No. 2971 of 2005

Between:

1. THE COMMISSIONER OF INCOME TAX
C.R. BUILDING,
QUEENS ROAD,
BANGALORE.

2. THE JOINT COMMISSIONER
OF INCOME TAX,
SPECIAL RANGE-1, C.R. BUILDING,
QUEENS ROAD, BANGALORE ... APPELLANTS

[By Sri M.V. Seshachala, Adv.]

And:

HAWLETT PACKARD INDIA SOFTWARE
OPERATION LTD.,
NO.29, CUNNINGHAM ROAD,
BANGALORE – 52. ... RESPONDENT

[By Sri. G. Sarangan, Sr. Counsel for
Miss Vani. H., Adv.]

THIS APPEAL IS FILED UNDER SECTION 260A OF THE INCOME TAX ACT, 1961, PRAYING TO SET ASIDE ORDER DATED 31.03.2005 PASSED IN ITA NO. 863/BANG/2002 AND ETC.,

THESE APPEALS, HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 23-7-2009, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, ***SHYLENDRA KUMAR J.,*** DELIVERED THE FOLLOWING:

JUDGMENT

RE: ITA 2971 OF 2005

This is an appeal of the revenue under section 260-A of the Income Tax Act, 1961 [for short 'the Act'] directed against the order dated 31.03.2005 passed by the Income Tax Appellate Tribunal, Bangalore in ITA No.863/Bang/2002 on the premise that the following two substantial questions of law which arises out of the order of the Tribunal has been wrongly decided by the Tribunal.

"Whether the Tribunal was correct in holding that interest under section 234B of the Act cannot be levied against the assessee as the computation of income has been made under Section 115JA of the Act.

Whether the Tribunal was correct in taking into consideration irrelevant circumstances like 'bonafides of the assessee', 'whether the default was committed deliberately', in failing to pay advance tax under Section 208 of the Act when Section 234B interest is levied automatically as there is no discretion."

2. The assessee is a company, assessment year is 1997-98 and the only dispute between the assessee and the revenue is the levy of interest under sections 234B and 234C of the Act on the premise that the levy of interest under these two provisions was not justified in the case of the assessee for the assessment year in question as the tax liability of the assessee for the assessment year in question had been artificially boosted in view of the special deeming provisions of section 115JA of the Act; that even as per the assessee's return filed for the assessment year in question the actual tax liability on

normal computation was only Rs.39,955/-, but in the wake of the provisions of sub-section [1] of section 115JA of the Act, this tax liability got itself converted to Rs.87,44,357.45/- and this liability in terms of the provisions of section 115JA of the Act is directly linked to the ascertainment of book profits of the assessee, more so in terms of the computation provided under section 115JA[1] of the Act and when that was possible only at the end of the accounting period, the assessee was not even aware of this liability in terms of section 115JA[1] of the Act till the closing of the accounts for the year and that there cannot be any requirement in law for either payment of advance tax installments or even on filing of the return as the liability for payment of tax in terms of section 115JA[1] of the Act would arise only after the passing of the assessment order by the assessing officer and after the expiry of the period for payment of tax as assessed by the assessing officer and therefore when there was no possibility of the assessee being called upon

to pay advance tax as contemplated under section 208 of the Act, the question of levy of interest either under section 234B or under section 234C of the Act also did not arise as the levy of interest under these two provisions of law is only on the failure of the assessee to conform to the requirements of sections 208 and 210 of the Act and as in the case of the assessee there being no requirement under sections 208 and 210 of the Act the liability for interest under sections 234B and 234C of the Act also is not attracted and therefore any levy of interest is illegal and not warranted.

3. In the case of the assessee in this appeal, though the assessee itself has conceded the liability for payment of advance tax and for short payment of installments of advance tax or balance tax liability to be paid along with the return and on the basis of self assessment in terms of section 210 of the Act and had actually calculated interest in terms of sections 234B and 234C of the Act on surcharge payments for the delayed period even in terms

of its own return, but the assessee has, nevertheless, made this an issue before the first appellate authority as the assessing officer had determined the tax liability of the assessee on the computation of income under section 115JA[1] of the Act to be an amount higher than what the assessee itself had declared and had consequently called upon the assessee not only to pay the balance tax amount but also had levied interest under sections 234B and 234C of the Act in respect of the difference and therefore the assessee contrary to its own understanding had filed an appeal before the appellate authority and had made the question of justification for levy of interest under sections 234B and 234C of the Act as ground and issue before the appellate authority.

4. The first appellate authority allowed the appeal on this aspect of the matter purporting to follow the decision of this court in the case of ***'KWALITY BISCUITS LIMITED vs. COMMISSIONER OF INCOME TAX' [243 ITR 519]*** and with the Income Tax Appellate Tribunal having

dismissed the appeal of the revenue being of the view that the decision of this court in ***KWALITY BISCUITS'*** case *[supra]* covered the issue, the revenue is in appeal as against the order of the Appellate Tribunal only on this question.

5. In this appeal, Sri. G Sarangan, learned senior counsel has appeared for the assessee while Sri. Seshachala, learned standing counsel has appeared for the appellant – revenue.

6. The very question arises even in another appeal ITA No.320 of 2004 filed by the revenue though the assessee is different and the order of the tribunal is also different, nevertheless, the arguments addressed by Sri. Shankar, learned counsel appearing for the assessee in ITA No.320 of 2004 is also examined while answering the question in this appeal as ultimately the questions though posed in different forms in two appeals, ultimately, boils down to the aspect of tenability or justification for levy of interest

under sections 234B and 234C of the Act and short payment or delayed payment of advance tax and self assessment tax in situation where the assessee's liability for payment of tax is determined in terms of the taxable income of the assessee having been artificially assessed under the provisions of section 115JA of the Act.

7. It is therefore on this question we have heard Sri. Seshachala, learned senior standing counsel appearing for the revenue, Sri. G Sarangan, learned senior counsel appearing for the assessee in ITA No.2971 of 2005 and Sri. Shankar, learned counsel appearing for the assessee in ITA No.320 of 2004 and we have examined the submissions and have opined as per the discussion below.

8. Submission of Sri. Seshachala, learned counsel appearing for the revenue is that levy of interest in terms of sections 234B and 234C of the Act is automatic when once there is short payment or delayed payment of

advance tax installments and self assessment tax; that the assessing officer has no choice for not levying interest when once it is noticed that there is a delay or short payment in paying the installments of advance tax or the self assessment tax; that in terms of section 115JA[1] of the Act it starts with a *non- obstante* clause when once the total income of the assessee for the relevant previous year is by fiction deemed to be an amount equal to 30% of the book profits of the assessee which again is required to be computed in terms of section 115JA[2] of the Act, there is no escape from the consequence of the operation of the provisions of sections 234B and 234C of the Act; that the extent of operation of *non-obstante* clause of section 115JA[1] of the Act being limited to the artificial manner of computation of total income of the assessee for the assessment year in question and in respect of all other aspects all other provisions of the Act being made applicable and operational is made explicitly clear by sub-section [4] of section 115JA of the Act; that the provisions

of sections 115J and 115JA of the Act are, in fact, not in *pari materia;* that the legislature has advisedly enacted section 115JA of the Act in the wake of the earlier Judgments of Supreme Court and this court in ***KWALITY BISCUITS'*** case *[supra]* and therefore the Judgments rendered by this court and not taken up for examination by the Supreme Court in the case of ***'COMMISSIONER OF INCOME TAX vs. KWALITY BISCUITS LIMITED'*** reported in ***[2006] 284 ITR 434 [SC]*** cannot govern or conclude the present appeal for answering the questions raised by the revenue and submits that on the correct understanding and application of the provisions of section 115JA[1] of the Act, levy of interest under sections 234B and 234C of the Act is fully justified; that the tribunal is in error in deciding the appeal taking the other view and merely by purporting to follow the law declared in ***KWALITY BISCUITS'*** case *[supra]*, allowing and applying the ratio of the Judgment in ***KWALITY BISCUITS'*** case *[supra]* is an

error in law and therefore the appeal is required to be allowed and the questions answered in favour of the appellant – revenue and in the negative.

9. In support of the submission that in the wake of changes brought about by the legislature by the introduction of section 115JA of the Act by the Finance [No.2] Act, 1996 with effect from 01.04.1997, dismissal of the appeal of the revenue in the case of ***'COMMISSIONER OF INCOME TAX vs. KWALITY BISCUITS LIMITED'*** reported in ***[2006] 284 ITR 434 [SC]*** cannot govern the present situation, Sri. Seshachala, learned standing counsel for the revenue has placed strong reliance on the Judgment of the Madras High Court in the case of ***'COMMISSIONER OF INCOME TAX vs. GEETHA RAMAKRISHNA MILLS [P] LIMITED*** reported in ***[2007] 288 ITR 489 [Mad]*** as also the Judgment of the High Court of Punjab & Haryana in the case of ***'COMMISSIONER OF INCOME TAX vs. UPPER INDIA***

STEEL MFG. & ENGG. CO. LTD., reported in ***[2005] 279 ITR 123 [P & H].***

10. Sri. Seshachala, learned standing counsel appearing for the revenue has also placed reliance on the single Bench decision of this court in the case of ***'UNION HOME PRODUCTS LTD., & OTHERS vs. UNION OF INDIA AND OTHERS'*** reported in ***[1995] 215 ITR 758 [Kar]*** to substantiate his submission that levy of interest under sections 234A, 234B and 234C of the Act is automatic and there is no scope for the assessing authority to relent from the same.

11. Sri. Sarangan, learned senior counsel appearing for the assessee, on the other hand, would submit that the mere fact that the assessee had in its return of income shown liability for payment of the installments of advance tax, self assessment tax and on the difference had computed the interest leviable under sections 234B and 234C of the Act is by itself not the concluding factor; that

the liability can only be in terms of the statutory provisions and not merely because the assessee had so indicated in its return; that the charging provisions in terms of sections 115JA[1] and 115JA of the Act are in *pari materia*, there is no difference in computing the tax liability and therefore the Judgment of the Supreme Court affirming the Judgment of the Karnataka High Court in ***KWALITY BISCUITS'*** case *[supra]* in the appeal of the revenue reported in the case of ***'COMMISSIONER OF INCOME TAX vs. KWALITY BISCUITS LIMITED'*** reported in ***284 ITR 434*** concludes the issue and therefore the question should be answered in the affirmative.

12. Sri. Sarangan, learned senior counsel appearing for the assessee would also draw our attention to the view taken by the Bombay High Court in the case of ***'SNOWCEM INDIA LIMITED vs. DEPUTY COMMISSIONER OF INCOME TAX'*** reported in ***[2009] 313 ITR 170 [Bom];*** that though the Bombay High Court

had differed from the view taken by the Karnataka High Court in ***KWALITY BISCUITS'*** case *[supra]*, prior to the Judgment of the Karnataka High Court was made subject matter of appeal before the Supreme Court and with the Supreme Court having dismissed the appeal, the Bombay High Court having later chosen to apply the view taken by the Karnataka High Court in ***KWALITY BISCUITS'*** case *[supra]* and as affirmed by the Supreme Court in the appeal of the revenue even in a situation governed by the provisions of section 115JA of the Act, that line of reasoning should be followed here also and the questions answered against the revenue and the appeal should be dismissed.

13. Sri. Shankar, learned counsel appearing for the assessee in ITA No.320 of 2004 submitting on the very question of levy of interest under sections 234A, 234B and 234C of the Act in a situation where the tax liability is computed in terms of section 115JA of the Act has very vehemently urged that no interest is leviable under any

one of these provisions, mainly for the reason that the determination of the total income and section 115JA of the Act being in an artificial manner and only because of the deeming provision of sub-section [1] of section 115JA of the Act and even such determination being possible only on ascertainment of the book profits as per section 115JA of the Act and only after closing of the accounts for the year, there is no way of the requirements of sections 207, 208 or 209 of the Act being attracted in such a situation nor payment of advance tax in terms of sections 210 and 211 of the Act and therefore there is no question of payment of interest under section 215 of the Act and if the provisions for levy of interest and payment of interest are not even attracted, the assessing officer cannot traverse to levy of interest under sections 234A, 234B and 234C of the Act.

14. Sri. Shankar, learned counsel appearing for the assessee would place strong reliance on the decision of this court in ***KWALITY BISCUITS'*** case *[supra]* against

which Judgment, the Supreme Court dismissed the revenue's appeal and in a subsequent case involving levy of interest under sections 234A, 234B and 234C of the Act where the assessment was under the provisions of section 115JA of the Act, the division Bench of the Bombay High Court in ***SNOWCEM's*** case *[supra]* having applied the ruling of the Supreme Court in the case of ***'COMMISSIONER OF INCOME TAX vs. KWALITY BISCUITS LIMITED'*** reported in ***284 ITR 434***, that should be necessarily followed in the present case also; that no distinction can be made for understanding the question of levy of interest under sections 234B and 234C of the Act whether it is a case of determination of total income under section 115J or under section 115JA of the Act.

15. Even on the question of the legislative development of section 115JA of the Act having come in place of section 115J of the Act by Finance [No.2] Act, 1996 with effect from 01.04.1997 and section 115JA[4],

notwithstanding the provisions of sub-section [4] of section 115JA of the Act being at variance with the earlier provisions of section 115J of the Act, submission is that sub-section [4] of section 115JA of the Act can be understood to make a difference only in respect of procedural aspects governing the question of determination of tax liability under section 115JA[1] of the Act and cannot or does not cover the situation where a substantive provision like sections 234A, 234B, 234C which are virtually in the nature of charging sections can be said to be contemplated within the scope of sub-section [4] of section 115JA of the Act as including even substantive provisions like levy of interest under sections 234B and 234C of the Act to be within the realm of section 115JA[4] of the Act would be not only doing violence to the provisions of section 115JA[1] of the Act but virtually amounts to enlarging the deeming provision in section 115JA[1] of the Act to other charging sections/provisions of the Act also.

16. Mr. Shankar has elaborated his submission in several hues and shades and has in this regard drawn sustenance from the following Judgments:

[a] Unreported Judgment of this court rendered on 31.01.2006 in ITA No.2416 of 2005 in the case of ***'COMMISSIONER OF INCOME TAX AND ANOTHER vs. M/S. SKS REFINERIES PVT. LTD.,'***.

[b] ***'SNOWCEM INDIA LIMITED vs. DEPUTY COMMISSIONER OF INCOME TAX'*** reported in ***[2009] 313 ITR 170 [Bom];***

[c] ***'COMMISSIONER OF INCOME TAX AND ANOTHER vs. SEDCO FOREX INTERNATIONAL DRILLING CO. LTD.,'*** reported in ***264 ITR 320.***

[holding that the assessee was not liable to pay interest under section 234B of the Act as the assessee was unable to estimate its correct income as required under section 209[1][a] of the Act in view of the bonafide dispute as to whether certain

payment was in the nature of salary or otherwise and therefore the estimation was not possible consequently no interest under section 234B can be levied].

17. Mr. Shankar has also submitted that the levy of interest under section 234B of the Act or 234C of the Act being compensatory in nature, this could arise only when an amount payable to the State has not reached the State, but in the case of payment of tax on computation in terms of section 115JA of the Act, the liability for payment arises only after the determination of the tax liability by the assessing officer and the scheme of payment of tax in terms of section 115JA of the Act not contemplating payment of either installments of advance or tax on self estimation along with the actual return, nothing was due to the State before the assessment order is passed by the assessing officer and therefore no

question of levy of interest if at all to be levied the State is deprived of amount which it was otherwise entitled to.

18. Even on the aspect of changes brought about by the legislature by introducing section 115JA of the Act with effect from 01.04.1997 by Finance [No.2] Act of 1996, Sri. Shankar, learned counsel for the assessee has drawn our attention to the Finance Acts of the years 1996, 1997, 1998 and 1999 and would submit that in reference to the provisions of section 115JA of the Act is conspicuously absent in Part-III of the Finance Act providing for computing advance tax though mention is made of sections 115A, 115B, 115BB, 115C of the Act etc., and even of the provisions of section 161[1-A], 164, 164A of the Act there also the total income is computed in an artificial manner and this coupled with the development brought about in the wake of introduction of section 115JB of the Act with effect from 01.04.2001 by Finance Act of the year 2000 which alone for the first time mention is made in section 115JB of the Act for the

purpose of computing advance tax and the rate is provided in part-III of Finance Act, 2000 is a clear indication of the scheme of legislature not to compel an assessee to do an impossible thing, in the sense, not to compel an assessee liable for payment of tax under section 115J of the Act or 115JA of the Act to pay advance tax and also subjecting the assessee to the consequence of non-payment of advance tax within the stipulated time as legislature itself was aware that it was not possible for a company to estimate its possible income for the year when the liability is to be ascertained under section 115JA[1] of the Act and such distinction consciously made by legislature cannot be and should not be lost sight of for the purpose of understanding the scope of sub-section [4] of section 115JA of the Act.

19. The circumstance that payment of advance tax by estimation and the rate of advance tax having been mentioned for the first time in section 2 of the Finance Act 2000 read with part-III of the I Schedule to the

Finance Act providing for the rate of payment of advance tax only after the minimum alternative tax scheme had provided for positive ascertainment of tax liability under section 115JB of the Act by indicating that it is at 7½% of book profits if it is found that the tax payable on the total income as assessed in the normal course is less than 7½% of the book profits and the minimum tax payable having been provided for in section 115JB of the Act itself. It is this logic which is employed to support the submission that there is no requirement of payment of advance tax or on self estimation in terms of section 115JA of the Act also as was the case in section 115J of the Act and therefore the question of levy of interest under sections 234B and 234C of the Act does not arise at all.

20. In this regard, Sri. Shankar, learned counsel appearing for the assessee has brought to our notice the Board Circular No.13 of 2001 dated 09.11.2001 issued in the wake of introduction of section 115JB of the Act with

the caption 'liability for payment of advance tax under new MAT provisions of section 115JB of the Income Tax Act" and the absence of any such instructions for the earlier years in respect of the provisions of section 115JA of the Act is submitted to be a circumstance to lend support to the argument that the scheme of minimum alternative tax under section 115JA of the Act did not contemplate payment of any advance tax and if so sub-section [4] of section 115JA of the Act should be understood and interpreted accordingly.

21. On the question of understanding and interpreting the provisions of section 115J[1] of the Act, particularly, it containing a deeming provision, Sri. Sarangan, learned senior counsel appearing for the assessee in ITA No.2971 of 2005 and also Sri. Shankar, learned counsel appearing for the assessee in ITA No.320 of 2004, would submit that intention of the legislature in understanding a statutory provision has to be gathered by not only the language used in the statute but attention should also be paid to

what has not been said and it is for this reason it is submitted that what is said in Finance Act, 2000 and which had not been said in the course of Finance Acts of the years 1996, 1997, 1998 and 1999 assumes significance and importance in understanding and interpreting sub-section [4] of section 115JA of the Act and for this proposition reliance is placed on the decision of the Supreme Court in the case of ***'COMMISSIONER OF INCOME TAX vs. TARA AGENCIES'*** reported in ***[2007] 292 ITR 444 [SC] [Paras-64 & 67].***

22. We have perused the provisions of section 115JA of the Act as also the provisions of section 115J of the Act and examined the submissions made by Sri. Sarangan, learned senior counsel appearing for the assessee in ITA No.2971 of 2005 and Sri. Shankar, learned counsel appearing for the assessee in ITA No.320 of 2004 in the wake of the statutory provision and in the background of the legislative changes brought about prior and subsequent to the introduction of section 115JA to the

Income Tax Act and examined the same in the light of the various authorities relied upon by the learned counsel for the assessees.

23. There are no two opinions that but for the addition of sub-section [4] in section 115JA of the Act and which was conspicuously absent in section 115J of the Act, the ruling of this court and the reasoning and ratio mentioned in ***KWALITY BISCUITS'*** case *[supra]* would conclusively govern the question as the Judgment of this court had come to be affirmed by the Supreme Court in an appeal preferred by the revenue, though by simply dismissing the appeal without any reasons but granting leave and converting the special leave petition into an appeal.

24. The legislature having consciously brought about a change by introducing sub-section [4] in section 115JA of the Act while replacing the provisions of section 115J of the Act by the provisions of section 115JA of the

Act, there is no escape from effectuating the provisions of sub-section [4] of section 115JA of the Act and it is only because learned counsel for the assessee are also aware of this change brought about by this legislation, vehement submissions are urged only in the wake of understanding and interpreting the provisions of sub-section[4] of section 115JA of the Act and that it should be so understood and interpreted as not to involve a liability for payment of advance tax and self estimation tax as these two requirements are impossible of compliance.

25. In so far as reliance placed on the Judgment of this court rendered on 31.01.2006 in ITA No.2416 of 2005 in ***SKS REFINERIES PVT. LTD.,s*** case *[supra]* is concerned, while we notice that the assessment year in question in that case was assessment year 1998-99. The Judgment cannot be taken to be a precedent involving laying of any ratio as it was firstly rendered based only on the Judgment of this court in ***KWALITY BISCUITS'*** case *[supra]* which involved the interpretation of the provisions

of section 115J of the Act only and there is no discussion of the legislative changes brought about in section 115JA of the Act in comparison to the provision of section 115J of the Act and in the absence of examination of the question of the consequence or the effect of sub-section [4] of section 115JA of the Act which the legislature has advisedly inserted in section 115JA of the Act and which has been pressed into service by Sri. Seshachala, learned standing counsel appearing for the revenue and this has not been made an issue earlier, the Judgment in the case of ***SKS REFINERIES PVT. LTD.,s*** case *[supra]* does not constitute a binding authority on us and therefore we are required to examine the question and proceed with the matter.

Arguments/submissions of Sri A Shankar, learned counsel for the assessee in ITA No 320 of 2004 vis-à-vis two questions relating to the liability of the assessee for payment of interest under Section 234A & B of the Act

26. Sri Shankar, learned counsel for the assessee, for the purpose of contending that there is no scope for levy

of interest in terms of section 234B and C of the Act, in so far as the quantum of tax liability arising out of the application of the provisions of Section 115JA of the Act is concerned, has drawn our attention to the realities of the matter to submit that when the assessee cannot possibly compute the book profits before the end of the accounting period, there is no way of ascertaining the book profits and offer 30% of the amount as tax and therefore it is also not possible to precisely compute the instalments of advance payment of tax and in such a situation, it is not at all reasonable to levy interest under Section 234B & C, for the reason that the payment of advance tax in any view of the matter, falls short of the requisite amount as contemplated in Sections 207, 208 and 209 of the Act and in support of the submission, seeks to rely upon the ruling of the Uttaranchal High Court in the case of ***CIT vs SEDCO FOREX INTERNATIONAL [(2003) 264 ITR 320].*** In that said case, the Uttaranchal High Court had opined that the levy of interest in terms of Section

234B of the Act was not reasonable and therefore the tribunal was justified in deleting the interest levied on the assessee under the provisions of Section 234B of the Act and the same logic will hold good for relieving the assessee from the liability of payment of interest under the very provisions i.e. Section 234B, even in a situation where the advance payment of tax falls short of the requisite quantum of payment and the tax liability computed under the provisions of Section 115JA of the Act. In that case, the Uttaranchal high court had while agreed with the conclusion reached by the tribunal to delete interest under Section 234B, chosen to give its own reason in place of the reasons assigned by the tribunal indicating that the assessee – an employee – had been receiving salary from the employer inclusive of certain amount received by way of perquisites for supply of food, beverage, etc., while working offshore on the rigs and if the value of the perquisites had been added as part of his salary and on which premise, the assessing officer had

computed the income and the estimation that was required to be made by the assessee and finding that the advance payment of tax, which in fact had been deducted at source and remitted by his employer, was falling short of and for that reason had also levied interest under Section 234B, was not justified, for the reason that the value of food, beverage etc., supplied to the assessee by the employer while he was working on the offshore rigs cannot be construed as perquisites, but a necessity provided by the employer to the employee and therefore was not necessarily part of his income and further even in the hands of the employer, for the purpose of deduction of tax at source, the uncertainty as to such value of so-called perquisites constitutes part of the salary or otherwise being the actual position in view of the conflicting views taken by the tribunal itself on this question and ultimately, the High Court virtually chose to accept the argument that the advance payment of tax even in terms of the tax deducted at source and remitted

by the employer in itself was good enough if the estimation of the income of the assessee was to be on the premise that the value of food and other things supplied did not constitute income of the assessee and in this view of the matter, having concurred with the finding of the tribunal for deleting interest, we find that the judgment in any way advance the case of the assessee in the present case, for the reason that the uncertainty as a ground for avoiding levy of interest under Section 234 of the Act cannot be accepted for more than one reason.

27. Firstly, the aspect of uncertainty is very much present in any estimation. Advance payment of tax *de hors* the provisions of Section 115JA of the Act i.e. on the normal income of the assessee, it cannot be different only because such liability for tax is on the basis of the total income being at 30% of the book profit of the assessee. Even the book profit also can be ascertained on estimation basis. But more importantly, if we look into the provisions of Section 115JA of the Act, it starts with a

non-absentee clause that *'notwithstanding anything contained in any other provision of this Act ...'*, the total income of the assessee, which is a company, being deemed to be an amount equal to 30% of the book profit, it is well within the knowledge of the assessee that the liability of the assessee may be either it is only tax liability when the total income computed in the normal course is more than 30% of the book profit, attracting of other provisions, and if so, in a situation, where that total income as offered to tax by the assessee is less than 30% of the book profit, then the minimum total income that has to be subjected to tax should be 30%, is also a possibility which can be arrived in the same manner as computing the normal total income of the assessee and a difficulty or impossibility as pleaded by the learned counsel for the assessee cannot be accepted only because it is only a liability under the provisions of Section 115JA of the Act.

28. These aspects apart, we also notice that accepting the argument on behalf of the assessee that in a situation where the Section 115JA liability is attracted, the assessee should be relieved of further liability of payment of interest in case of short payment of instalments of advance tax, will lead to an incongruous situation, where, if in the case of a fresh assessee, if the total income offered to tax exceeding 30% of the book profit, the assessee is bound to pay interest under Section 234B, whereas if the total income should be a little less than 30% of the book profit, then, even if the assessee has made short payment of instalment of advance tax, there is no liability under Section 234B. If this logic is to be accepted, when the assessee even otherwise liable for payment of interest under Section 234B can easily manage his accounts in such a manner that the provisions of Section 115JA of the Act are attracted and where no advance tax is paid at all even then he will not

be liable to pay interest under Section 234B or C of the Act.

29. This apart, the estimation cannot be an impossibility, because, in respect of companies, which is recognized business practice in commercial parlance that even quarterly results of the performance of the company is published for the benefit of the shareholders and other members of the public and if this is a possibility, it cannot be said that it is impossible for the purpose of computation of liability in terms of the provisions of Section 115JA of the Act. For these reasons, while we hold that the judgment of the Uttaranchal high court in the case of ***SEDCO FOREX INTERNATIONAL*** [supra] is not one applicable to the case of the present assessee with the logic that the provisions of Section 234B & 234C of the Act i.e. levy of interest under these provisions, should fail or the assessee should be relieved from this liability for the reason that it is impossible to arrive at the

book profit in advance and therefore it is an impossibility to pay instalments of advance payment of tax.

30. Though in this regard, Sri Shankar, learned counsel for the assessee, has drawn our attention to the Board circular No 13/2001 dated 9-11-2001, which had been issued in the context of introduction of provisions of Section 115JB of the Act with effect from 1-4-2001 by the Central Act No 10 of 2000, and would submit that the circular having made a reference to rate of tax, whereas in terms of the provisions of Section 115JA of the Act, as it prevailed earlier, the rate at which the tax is to be paid being in turn linked to the liability to rate of tax as provided for in the Finance Act 2000, and also having linked to the rate of tax at which the company had offered its total income to tax, the computation of instalment of advance tax was almost an impossibility earlier, even in the wake of the circular having clarified this position, it should be taken that in the absence of any such earlier period, there is no way of the assessee to know the

probable income and in turn probable tax liability and also the possible advance payment of tax.

31. This argument does not help the assessee, for the simple reason that the circular had been issued in the context of introduction of the provisions of Section 115JB of the Act by Finance Act 2000 [Central Act No 10 of 2000] with effect from 1-4-2001, that circular cannot have any bearing on the earlier statutory provision in terms of Section 115JA of the Act and at any rate cannot regulate or even use for understanding the scope of the provision.

32. Secondly, the estimation of total income for the purpose of payment of advance tax in any situation being an estimation and even earlier the rate of tax being provided by the Finance Act, whether for advance instalment of tax for the current year or for the assessment year, the situation cannot be said to be different for the purpose of estimation of the total income

at 30% of the book profits of the assessee. The only difference in a situation under Section 115JA of the Act is minimum total income is taken at 30% of the book profit, which has again is not an impossibility on the basis of the estimation, as discussed above. Therefore, the argument fails for the purpose of holding that the provisions of Section 234B or C of the Act are not attracted to a situation where the tax liability of the assessee is determined in terms of the provisions of Section 115JA of the Act.

33. We may, at the outset, clarify with utmost respect that we are not inclined to agree with the view taken by the division Bench of the Bombay High Court in ***SNOWCEM's*** case *[supra]* for the simple reason that holding section 115J of the Act and section 115JA of the Act are all one and the same in *pari materia* and therefore the decision of the Supreme Court rendered while dismissing the appeal of the revenue against the Judgment of this court in ***KWALITY BISCUITS'*** case

[supra] equally governs the issue which only amounts to totally ignoring the provisions of sub-section [4] of section 115JA of the Act. Even on a reading of the provisions of sub-section [1] of section 115JA of the Act, it is quite clear that the fiction is called in aid to indicate as to what is the total income of an assessee that can be brought to tax which is a total income artificially arrived at as provided under sub-section [1] of section 115JA of the Act though even otherwise total income is ascertained in the normal course and that is not an impossibility. In fact, it is only after ascertaining the total income in the normal course and after ascertaining the consequential tax liability one has to examine as to whether the provisions of section 115JA[1] of the Act are attracted. The situation is quite simple, in the sense, if the total income as arrived in the normal course happens to be less than 30% of the book profits as arrived at in terms of section 115JA[1] & [2] of the Act, then 30% of the book profits is artificially deemed to be the total income of the assessee for the year

in question. All other things remain the same. When once the total income is known, the tax liability also can very well be computed and it cannot be lost sight of that for the payment of installments of advance tax which is well within the completion of the year during which an assessee earns profits and which in turn becomes income and assessable to tax there is an element of estimation and projection of income and it is not as though such elements of estimation or projection is brought about only by the provisions of sub-section [1] of section 115JA of the Act. If it is a question of ascertaining the possible total income of the year either by projection or on an estimation even in respect of cases not covered by section 115JA of the Act, it is not logical to say that such projection or estimation fails only for the purpose of computation under section 115JA of the Act. In either situations, it is only guess work and projection and not based on actuals.

34. We find one another reason as to why submissions made by learned counsel for the assessees does not commend our acceptance and that is the acceptance of the logic and arguments on behalf of the assessees as made by learned counsel would lead to an incongruous situation of even assessees who otherwise have though complied with the requirements of payment of installments of advance tax and self estimation tax so long as their total income should exceed the total income computed under section 115JA of the Act being absolved of all such requirements the moment it is found that the total income computed artificially in terms of section 115JA of the Act is higher than the total income of the assessee otherwise computed in the normal course. We say this for the reason that if the logic and arguments advanced on behalf of the assessees should be accepted, the assessees can claim a relief from the operation of the provisions of payment of installments of advance tax and self estimation tax and paying it within due dates even in

respect of the normal tax liability computed in the usual course only because the total income as computed in terms of section 115JA[1] of the Act happens to be slightly higher. This can be illustrated by an example such as, in a case where the total income of a company as computed and indicated by the assessee itself is say Rs.100 crores, but 30% of the book profits of the assessee as computed in terms of section 115JA of the Act is Rs.105 crores, the assessee can claim exemption from the operation of the statutory provisions requiring payment of installments of advance tax and self estimation tax even in respect of Rs.100 crores total income which otherwise would definitely attract all these provisions and the post facto ascertainment of book profits and computation of 30% of book profits being found higher than the total income arrived at in the normal course, operating retrospectively to relieve the assessee from the consequence of non-adherence to the requirements of other statutory provision which would operate on the usual total income

of the assessee being Rs.100 crores and not adhering to the requirement of payment of installments of advance tax and self estimation tax.

35. Such an understanding not only brings about an incongruity but also leads to a situation where it brings about a discrimination between the assessees who are compelled to conform to the requirements of payment of installments of advance tax and self estimation tax and facing the consequence for not complying the requirement vis-à-vis the assessees who pay taxes in terms of section 115JA of the Act, who nevertheless escape from the consequence of non-adherence to the very requirements which they would have to otherwise conform in respect of their liability assessed in the normal course. It is a well settled cannon of interpretation that any interpretation of a provision which can lead to rendering the provision unconstitutional by attributing an element of discrimination should be avoided and it is for this reason that we reject the submissions of the learned counsel for

the assessees to interpret the provisions of sub-section [4] of section 115JA of the Act so as to understand that it can operate only in situations where regulatory procedures are provided for under the Act and not in respect of other provisions of the Act which may have an effect of creating a burden or liability or in the sense can be described as a charging section.

36. When once sub-section [4] to section 115JA of the Act cannot be ignored and has to be interpreted as discussed above, there is no escape from understanding that sub-section [4] of section 115JA of the Act does make a difference in comparison to the provisions of section 115J of the Act and definitely ensures that except to the extent of the artificial calculation of total income as provided in sub-sections [1] and [2] of section 115JA of the Act, all other provisions of the Act including sections 234B or 234C of the Act applies to every assessee envisaged within the scheme of section 115JA of the Act.

37. It is for this reason, we hold that the respondents – assessees are liable to pay interest in terms of sections 234B or 234C of the Act and the assessing officer as well as the first appellate authority were right in holding so whereas the tribunal was in error in thinking that interest was not leviable in terms of the Judgment rendered in the case of ***'KWALITY BISCUITS LIMITED vs. COMMISSIONER OF INCOME TAX'*** reported in ***243 ITR 519.***

38. The arguments on the premise that the provisions of sections 234B and 234C of the Act is in the nature of compensatory payment for loss suffered by the revenue and therefore in a situation where there is no loss to the revenue, the provisions of sections 234B and 234C of the Act are not attracted is an argument not acceptable in the present situation and the authority supporting this proposition of law are of no relevance for two reasons. Firstly, as to the nature of levy is taken into question for understanding a statutory provision and while examining

the validity of the levy of the provision is challenged as not a valid provision and in the present case, what is examined is not either the validity of provisions of sections 234B or 234C of the Act or even the scope and ambit of this provision but only the scope and ambit of provisions of sub-section [4] of section 115JA of the Act and as to how Section 115JA should be understood, interpreted and applied. In the present cases, court is not examining the validity of the provisions of section 115JA of the Act leave alone the validity of sections 234B or 234C of the Act but only the manner and understanding the extent of applicability of section 115JA of the Act. The argument also fails for the reason that the assumption there is no loss to the revenue if the provisions of sections 234B and 234C of the Act are kept out of purview of section 115JA of the Act.

39. This again proceeds on precarious assumption that non-payment of advance installment tax or self estimation tax within the stipulated date does not result loss to the

revenue. While interpreting the scope of provisions of sections 234B, 234C and 115JA of the Act, we have to look into and interpret the background of section 115J of the Act and if at all the legislative history behind the provisions of section 115JA of the Act. The object of introducing section 115JA or Section 115J of the Act was to ensure that minimum tax liability is created on the company assessed for the year in question even when the company was not liable to pay any tax or tax upto the amount as computed on the deemed total income of the assessee and the entire exercise is to augment the revenue to the State. As long as the tax amount as envisaged under the provisions of section 115JA of the Act does not reach the coffers of the State, there is loss to the revenue.

40. While interpreting or understanding the provisions which solely seeks to increase and enhance the revenue to the State even by employing the fiction and by deeming the minimum amount of 30% of book profit of the

company as the total income of the company on which the company is liable to pay tax, no part of the very provision including sub-section [4] of section 115JA of the Act can be interpreted and understood in such a manner as to detract from the object of the provisions of section 115JA of the Act which is only to augment the revenue to the State.

RE: ITA Nos 320, 597 & 325 OF 2004

41. The above three appeals arise out of the single order dated 8-1-2004 passed by the income tax appellate tribunal, Bangalore Bench in ITA No 1577/BANG/2002. The assessee is a company and the assessment year in question is 1999-2000.

42. While ITA No 320 of 2004 is an appeal by the revenue arising the following substantial questions of law for examination:

a) Whether the tribunal was correct in holding that interest under Section 234B of the Act cannot be levied against the

assessee as the computation of income has been made under Section 115JA of the Act?

b) *Whether the tribunal was correct in taking into consideration irrelevant circumstances like 'bona fides of the assessee', 'whether the default was committed deliberately' in falling to pay advance tax under Section 208 of the Act when Section 234B interest is levied automatically as there is no discretion?*

The appellant in this case by way of an application dated 08-09-2008 has raised the following two additional substantial questions of law :

c) *Whether the Tribunal was correct in holding that the transfer of soft drink unit of the assessee was a slum (sic) sale, when the individual valuation of the assets has been made by the expert valuer before arriving at the total sale consideration for transfer of the unit?*

d) *Whether the Tribunal was correct in holding that there was no default u/s. 208 of the Act in not paying the advance tax on the ground that entire transaction of sale was a slum (sic) sale and no capital gains are chargeable, when the levy of interest u/s. 234 B of the Act was mandatory?*

ITA Nos 325 and 597 of 2004 are by the assessee. While ITA No 325 of 2004 by the assessee is also against the very order dated 8-1-2004 passed by the tribunal, which, in turn had allowed the appeal in part and against that part of the appeal which had not been allowed by the tribunal. It appears the assessee had preferred a miscellaneous petition subsequent to the order passed by the tribunal seeking for modification of the order and to allow this appeal in full and that having cane to be rejected in terms of the order dated 28-6-2004 and that order is made subject matter of appeal in ITA No 597 of 2004. In these two appeals by the assessee, the following further substantial questions of law are raised for examination:

In ITA No 597 of 2004:

a) *Whether the tribunal was justified in law in holding that there are no mistake apparent from the face of records on the facts and circumstance of the case and application made by the appellant would amount to a review?*

b) *Whether the tribunal was justified in taking that non-applying of the decision of the Hon'ble Supreme Court in Apollo Tyres in 255 ITR 273 would not constitute apparent mistake liable for rectification under Section 254(2) of the Income Tax Act?*

c) *Whether the tribunal is justified in holding that the surplus on the sale of the undertaking as a whole requires to be credited to the profit and loss account in accordance with part-II and II of Schedule-VI of the Companies Act, when the case is not part and parcel of the working results and consequently whether such finding constitutes apparent mistake on the facts of the case?*

d) *Whether the finding of the tribunal that the transaction of slump sale is taxable for the assessment year 1999-2000 when the provisions of Section 50B of the Act was introduced from 1-4-2000 and consequently constitute an apparent mistake rectifiable under Section 254(2) of the Income Tax Act?*

In ITA No 325 of 2004:

a) *Whether the tribunal is justified in holding that the transaction of slump sale is taxable when the provisions of Section 50B of the Act was introduced from 1-4-2000 and thus not applicable to the assessment year 1999-2000?*

b) *Whether the tribunal, on facts of the case, is correct in law, in holding that the capital gain on the transfer of entire undertaking as a whole has to be computed?*

c) *Whether the slump sale amount received on the facts and circumstance of the appellant case constitute capital receipt?*

d) *Whether, on facts and circumstance of the case, is the tribunal, justified in law, in holding that recomputation by the assessing officer for the purpose of determining book profit under Section 115JB of the Act, is in accordance with law?*

e) *Whether the surplus on the sale of the undertaking as a whole requires to be credited to the profit and loss account in accordance with part-II and III of Schedule-VI of the Companies Act?*

f) *Whether the tribunal is justified in law in holding that the decision of the Supreme Court in case of Apollo Tyres Ltd VS CIT in 255 ITR 273 is not applicable to the appellant's case?*

43. Brief minimum background to appreciate the circumstance and the manner in which the questions arose for our consideration in these three appeals are as under:

44. During the accounting period relevant for the assessment year i.e. during the year between 1-4-1998 and 31-3-1999, the assessee claimed to have sold its soft drinks bottling unit to M/s Hindustan Coco-cola Bottling (Southwest) Private Limited for a total consideration of Rs 55,44,90,899/-. This had been preceded by an agreement for sale with the buyer entered into on 4-6-1998, agreeing to sell the soft drink beverage business undertaking of the assessee for a consideration of Rs 48,00,00,000/-. On assessee's own admission, the consideration was later enhanced to Rs 55,44,90,899/- The assessee claimed that the sale of the asset was in the nature of 'slump sale' and the surplus receipt for transfer of this asset which was in a sum of Rs 43,16,59,811.69, which was in the nature of capital receipt, had been credited to its capital reserve account as surplus of sale of soft drink undertaking and had not offered any part of the amount for tax, in the return filed by it for the assessment year in question.

45. The income tax department took up the case of the assessee as a scrutiny case and therefore notice under Section 143(2) of the Act was issued on 22-12-2000. The assessee came forward with material information and the income tax department as a follow-up measure, collected information from the buyer M/s Hindustan Coco-cola Bottling Southwest Private Limited to ascertain as to whether the sale price represented one slump amount or as to whether it represented the value of individual items and noticed that the transfer had been effected in favour of M/s Hindustan Coco-cola Bottling Southwest Private Limited only after a valuer by name John Foord (Asia) Pvt Ltd., of Singapore had at the instance of the buyer, examined different assets of the assessee company and had valued it after elaborate discussion by valuer with the officials of the assessee-company and based upon information so gathered from the management of the seller i.e. M/s Bridavan Beverages Ltd, the assessee-company had forwarded the report of valuation to the

officials of the buyer, wherein some of the individual assets of the company had been valued as under:

Asset category	Description	Value per section rupees	Existing VSE value open market basis Rs
Land (market value)	Hebbal plant Ulsoor Depot K R Puram depot	144,011,250 33,999,980 15,778,165	193,789,395
Buildings	Hebbal plant Ulsoor Depot K R Puram depot	65,317,912 3,485,101 25,050,293	93,853,306
Plant & equipment			62,377,550
Office equipment	Main bottling plant Ulsoor & K R Puram	487,500 687,500	1,75,000
SGA'S	Refrigerators Visi-coolers Bottle coolers Ice boxes Fountain equipment Miscellaneous	5,806,688 7,188,175 10,125,975 3,246,750 2,738,266 867,188	29,973,042
Bottles & Shells	Bottles Wooden shells	56,153,649 8,836,808	64,990,457
Advertising material			33,946,250
Motor vehicles			20,795,000
Grand total			500,700,000

46. In the wake of such information gathered by the department, a further notice was issued to the assessee as to why the transaction should not be treated as a transfer of assets as reported earlier in the report of the valuer and not as a single transaction but characterized it as a slump sale, which in turn would disentitle the assessee the benefits that could arise to the assessee if the transaction was to be treated as slump sale. The assessing officer was also of the view that the assessee should have offered the surplus amount as capital gain. The assessing officer found that the assessee elsewhere had valued the land and building for the purpose of transfer of land and building and while obtaining the permission for effecting the transfer of land and building etc., from the appropriate authority at Bangalore. On such premise, the assessing officer did not agree with the claim of the assessee that the transfer of the bottling unit of the assessee is a transaction in the nature of slump sale, but was of the view that the book profits of the

assessee was required to be ascertained for the purpose of computing the tax payable by the assessee in terms of the provisions of Section 115JA of the Act and for such purpose, made necessary additions to the value as indicated by the assessee to be the assessee's book profits in terms of the provisions of Section 115-JA(2) of the Act and finalized the assessment on the premise that the total income of the assessee, as being 30% of the book profit and quantified the tax liability at the relevant rates on such amount. The computation included the interest levied under Section 234B of the Act for the period April and May 1999 at 2% [Rs 13,05,436], interest for the period from June 1999 to May 2001 at 1.5% [Rs 1,17,89,236] and a further interest of Rs 40,79,487/- for the period from June 2001 to March 2002 at 1.25%. The total tax liability was thus arrived at Rs 4,98,10,058/- in terms of the assessment order dated 28-3-2002.

47. The assessee being aggrieved by this computation and the demand for payment of tax liability of Rs

4,98,10,058/- appealed to the commissioner of income tax [appeals]. The assessee had contended that not only the computation of total income of the assessee at Rs 55,44,90,899/- was incorrect, but also the computation of total income of the assessee under the provisions of Section 115-JA of the Act computed at a sum of Rs 14,35,83,002/- is wrong, by not treating the sale as a slump sale and further contended that the levy of interest under Section 234B of the Act was incorrect.

48. All the contentions of the assessee failed before the appellate commissioner and the appeal was dismissed in toto as per the order dated 28-11-2002. It is thereafter, the assessee, being aggrieved by the orders passed by the assessing officer and the affirming appellate order, preferred an appeal before the income tax appellate tribunal.

49. The tribunal, under the impugned order while agreeing with the view of the assessing officer and the

appellate commissioner to the extent that the sale was not a slump sale and for taking this view relied upon the ratio in the decision of the Supreme Court in the case of ***COMMISSIONER OF INCOME TAX vs ELECTRIC CONTROL GEAR MANUFACTURING COMPANY [(1997) 141 ITR (SC) 302]***, as this decision was attracted to the facts and circumstance of the case, was also of the view that the ratio of the decision of the Supreme Court in the case of ***COMMISSIONER OF INCOME TAX vs ARTEX MANUFACTURING CO [227 ITR 260],*** was not attracted to the facts and circumstance of the present case. The tribunal further opined that the fact situation prevailing in the case of the assessee attracted the ratio of the decision rendered by the Bombay High Court in the case of ***COMMISSIONER OF INCOME TAX vs PREMIER AUTOMOBILIES LTD [2006 ITR 1 (BOM),*** the decision of this court in ***SYNDICATE BANK LTD vs ADDITIONAL COMMISSIONER OF INCOME TAX [155 ITR 681]*** and the decision of the Delhi high court in the case of

PUNJAB NATIONAL BANK FINANCE LTD vs COMISSIONER OF INCOME [252 ITR 491 (DEL), and for such reasons, even selling the business undertaking as a going concern also amounts to transfer of the capital asset within the meaning of Section 2(14) of the Act, in which event, the capital gain has to be ascertained and offered to tax with reference to the value of the business undertaking as a whole and for determining the tax liability of the assessee after going through the process, the matter was remanded to the assessing officer. In so far as the question of levy of interest under Section 234B of the Act was concerned, following the decision of this court in the case of ***COMMISSIONER OF INCOME TAX vs KWALITY BISCUITS LTD [(2000) 243 ITR 519],*** directed deletion of interest charged under Section 234B of the Act.

50. It is as against this order of the tribunal, both the revenue and the assessee are in appeal. Even against the order passed on the miscellaneous petition filed by

the assessee for rectification of the earlier order on the premise that the tribunal had committed a mistake in not following and applying ratio in the decision of the Supreme Court in the case of ***APOLLO TYRES LTD vs COMMISSIONER [(2002) 255 ITR 273],*** the tribunal has examined this question and noticing that the assessee though had cited this decision of the Supreme Court even earlier and the tribunal had in fact examined the applicability of the same, and on noticing that the judgment of the Bombay High Court in the case of ***COMMISSIONER OF INCOME TAX vs VEEKAYLAL INVESTMENT CO (P) LTD [(2001) 166 CTR (BOM) 96]*** was more apt to the facts of the case, having expressly rejected the claim of the assessee, it is not as though the judgment suffers from any mistake apparent on the face of record amenable for correction under Section 254(2) of the Act, but may be an error of opinion and that cannot be corrected in rectification jurisdiction and therefore dismissed the miscellaneous petition. It is against this

order also, the assessee has come up with an appeal raising the questions as referred to above.

51. In the appeal of the assessee against the order of the tribunal in only partly allowing the appeal and partly accepting the contentions of the assessee, it is contended that the tribunal has committed an error in holding that the capital gain can be computed even on slump sale and for such computation of capital gain, remanding the matter to the assessing officer and also that the tribunal has committed a grave error in law in upholding the computation of total income by the assessing officer and affirmed by the first appellate authority for the purpose of quantifying the total income of the assessee in terms of Section 115JA of the Act to be corrected for the reason that the tribunal has not only totally misunderstood the ratio of the decision of the Supreme Court in the case of ***APOLLO TYRES LTD*** [supra] but also thinking that the decision of the Bombay High Court in the case of

VEEKAYLAL INVESTMENT CO (P) LTD [supra] covers the case of the assessee.

52. It is also contended that the tribunal has failed to notice that the possibility of computation of capital gains arising out of the slump sale is a possibility only on and after 1-4-2000, whereafter the provisions of Section 50B of the Act has become operative by Finance Act of 1999 and the provisions having no application for the assessment year 1999-2000, the tribunal could not have directed the assessing officer to compute the capital gain of the assessee for the assessment year 1990-2000 even after taking the view that the transaction of transfer of the bottling unit of the assessee is a going concern, amounted to slump sale and not an item-wise sale of individual assets and for this reason also the order of the tribunal is bad.

53. The assessee also contended that it was not open to the assessing officer to recompute or redetermine the

book profit of the assessee on the premise that the computation was not fully in consonance with the requirement of Part-II & III of Schedule-VI to the Companies Act, 1956, in the wake of the authoritative pronouncement of the Supreme Court in the case of ***APOLLO TYRES LTD*** [supra] etc., it is on such premise the substantial questions as indicated above have been raised for our answer in this appeal [ITA 325 of 2004].

54. The other question relating to the levy of interest under Section 234B or C of the Act to a situation of computation of tax liability in terms of the provision of Section 115JA of the Act, which arises in the present appeals also at the instance of the revenue, has already been discussed by us in the appeal of the revenue [in ITA No 2971 of 2005] and it has been answered in the negative in favour of the revenue and against the assessee, holding that the interest under Section 234B of the Act and for that matter any other analogous provision is attracted to a situation of computation of tax under

Section 115JA of the Act also and that the circumstance which can be explained justifying the delay in payment of instalment of advance tax or payment of self-assessment tax are of no consideration and the interest is levied statutorily and is automatic on the non-compliance of the requirement of the relevant provision of the Act and therefore answered so in the present appeals also, holding that the tribunal could not have directed deletion of interest levied under Section 234B of the Act on the premise that the assessee had a legitimate explanation and justification for not having paid the installments of advance tax in time or short payment. It is held in this regard that the question is not one of offering explanation or justification for either short payment of the amount or delayed payment of amount, but one of applicability or non-applicability of the provision of Section 234B and 234C of the Act etc., to a situation where the assessee's tax liability is computed in terms of the provisions of Section 115JA of the Act and once it is answered that levy

of interest under Section 234B or 234C or any other analogous provisions, are attracted as being within the scope sub-section (4) of Section 115JA of the Act. Levy of interest is by operation of statute, which the assessing officer is bound to compute and add irrespective of the explanation or circumstance pointed out by the assessee.

55. We have heard Sri M V Seshachala, learned senior standing counsel for the revenue and Sri A Shankar, learned counsel for the assessee in all these three appeals.

56. A few more facts that may be relevant and useful in appreciating the contentions of the learned counsel for the parties and the background in which the appeals arose are as under:

Date	*Event*
03-06-1997	*The assessee entered into a memorandum of understanding with M/s Hindustan Coco-cola Bottling Southwest Private Limited for transfer of its bottling unit to the buyer as a going concern.*

11-6-1997 12	M/s Hindustan Coco-cola Bottling Southwest Private Limited appointed M/s John Foord (Asia) Pvt Ltd., of Singapore as valuer to visit the plant and other business places of the assessee to evaluate various assets of the assessee and to submit a report.
01-08-1997	A supplementary memorandum of understanding was entered into between the parties.
18-02-1998	An agreement of sale was entered between the parties, where under the assessee received an advance amount of Rs 48.00 crore
04-06-1998	A sale deed executed by the assessee in favour of M/s Hindustan Coco-cola Bottling Southwest Private Limited by handing over the possession of the unit for a consideration of Rs 54,44,19,899/-.
06-06-1998	Assessee filed return for the assessment year 1998-99, disclosing a surplus of Rs 43,16,50,8111.69 attributable to the transaction of transfer of the bottling unit of the assessee to the buyer M/s Hindustan Coco-cola Bottling Southwest Private Limited for a price of Rs 54,44,19,899/-.

57. Appearing on behalf of the revenue, Sri M V Seshachala has very vehemently urged that the exercise undertaken by the assessing officer is not to re-determine or re-compute the book profits of the assessee, as had been determined in terms of the provisions of Parts-II & III of Schedule-VI to the Companies Act, 1956, but is only an exercise for determining the book profits in terms of the explanation occurring after the second proviso to sub-section (2) of Section 115JA of the Act; that it is only adding back the amount carried to the reserve amount that had been disclosed by the assessee itself even in terms of its own profit and loss account and balance sheet and as was required to be added under sub-clause-(b) of the explanation; that it was not an exercise for computing the book profits, as had been done by the assessee to conform to the requirement of sub-section (2) of Section 115JA of the Act; that mere fact that the assessing officer and the appellate authorities had characterized the computation of book profits by the

assessee in terms of the provision of sub-section (2) of Section 115JA of the Act was not strictly in conformity with the requirement mentioned therein, does not in any way detract from the applicability of the provisions of various sub-clauses of the explanation and it is therefore submitted that the tribunal has rightly affirmed the view taken by the assessing officer and as affirmed by the appellate authority, but has committed an error in thinking that the transaction amounted to a slump sale and that on the facts and circumstance of the case, there is no scope for holding the transaction as a slump sale.

58. We having permitted the revenue to raise additional grounds and additional questions in its appeal [ITA 320 of 2004], the revenue has raised an additional question as to whether the tribunal was right in reversing the finding of the assessing officer and the appellate authority that the transaction was not in the nature of slump sale nor was it a transaction of the entire assets and liabilities of the unit as a going concern, but a transaction whether only some

of the assets of the unit on transfer though the unit itself has transferred as nothing concerned and not all liabilities of the unit are also transferred, but many substantive liabilities having been retained by the assessee, the tribunal was not right in reversing this finding to hold that the transaction was a slump sale, without appreciating the full facts and circumstances that prevailed in the case of the assessee.

59. On this aspect, Sri M V Seshachala has submitted that the question as to whether the transfer of capital asset by the assessee is not a pure question of law, but a mixed question of fact and law and has to be necessarily inferred on appreciation of facts and circumstances in each case, particularly as to the manner in which the transaction has gone through and what development took place prior to the actual transfer.

60. In so far as the question of slump sale is concerned, we noticed that the question necessarily arises in the

context of transfer of a capital asset resulting in capital gains and even as submitted by the learned counsel for the revenue as well as the assessee, we find statutory definition of slump sale in sub-section 42-C of Section 2 of the Act only with effect from 1-4-2000, as inserted by the Finance Act 1999 and which reads as under:

> ***2(42-C)*** *'Slump sale' means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.*
>
> ***Explanation: 1:*** *For he purpose of this clause, 'undertaking' shall have the meaning assigned to it in explanation 1 in clause 19-AA:*
>
> ***Explanation 2:*** *For the removal of doubts, it is hereby declared that the determination of the value of an asset or liability for the sole purpose of payment of stamp duty registration fees or other similar taxes or fees shall not be regarded as assignment of year commencing on the 1st day of April 1965 and any subsequent assessment year means income for chargeable under the provisions of this Act and in relation to any other assessment year income tax and super tax chargeable under the provisions of this Act to the aforesaid date.*

61. For the assessment in question, we do not find any statutory definition of slump sale and even after going through a good number of judgments rendered by high courts and the supreme court on the question of what constitutes 'slump sale', referred to above and relied upon by the learned counsel for the revenue as well as the assesse, no clear, emphatic, precise meaning or definition of 'slump sale' emerges.

62. The picture is rather hazy and nebulous. The only inference that can be arrived at is that the question as to whether the transaction is in the nature of slump sale or otherwise has to be inferred in each case by looking into the facts and circumstance of the case, circumstances that have preceded before the transaction in question and even the transfer of a unit as a going concern is not necessarily a conclusive case to hold that the transaction is a slump sale.

63. In some cases, on examination of such facts and circumstance, courts have concluded that it is either a slump sale or not a slump sale. In the following cases while the courts have concluded that the transaction was in the nature of a slump sale:

- ***COMMISSIONER OF INCOME-TAX v. NARKESHARI PRAKASHAN LTD. [196 ITR 438 (BOM)]***
- ***COMMISSIONER OF INCOME-TAX v. ELECTRIC CONTROL GEAR MFG. CO. [227 ITR 278 (SC)]***
- ***COMMISSIONER OF INCOME-TAX v. MUGNEERAM BANGUR & CO. [57 ITR 299 (SC)]***
- ***PREMIER AUTOMOBILES LTD. v. INCOME-TAX OFFICER AND ANOTHER [264 ITR 193 (BOM)]***
- ***PNB FINANCE LTD. v. COMMISSIONER OF INCOME-TAX [252 ITR 491 (DEL)]***

and in other cases such as:

- ***PREMIER AUTOMOBILES LTD. v. INCOME-TAX OFFICER AND ANOTHER [264 ITR 193 (BOM)]***
- ***CIT vs SEDCO FOREX INTERNATIONAL [(2003) 264 ITR 320]***

COMMISSIONER OF INCOME-TAX v. ARTEX MANUFACTURING CO. [227 ITR 260 (SC)]

COMMISSIONER OF INCOME-TAX v. ELECTRIC CONTROL GEAR MFG. CO. [227 ITR 278 (SC)]

some courts held that it is not a slump sale.

64. Even on a transaction being characterized and concluded in the nature of slump sale, it is not as though there is no liability for payment of tax on computation of capital gains and there is no generalization that in all situations of slump sale, computation provision for ascertainment of capital gains in terms of Section 48 of the Act is not workable, for the reason that one of the two amounts viz., full value of the consideration for which the asset was transferred or the cost of acquisition of the asset and the cost of any component of the asset that the expenditure incurred for effecting the transfer is not ascertainable and thereby the charging section i.e. Section 45 of the Act failing due to impossibility of

computing the capital gains in terms of Section 48 of the Act.

65. The inclination and fondness on the part of the assessee to characterize a transaction as a slump sale, we notice on a perusal of various cases cited before us at the Bar, is only with an eye to get out of the clutches of Section 45 of the Act and contending that under Section 48 computation is not possible.

66. In this regard, we have to observe that it is merely a charging section like Section 45 of the Act providing for levy of tax on capital gains, that fails if the machinery of section for computing the capital gains is inadequate and even a situation where it is impossible to compute the capital gains in terms of Section 48 of the Act, but any other charging section also meets the same fate if the subject matter of the charge is either not precise or is unascertainable, may be due to a variety of reasons, in the instance case, both the assessing officer and the first

appellate authority, on examination of the facts and circumstances, have opined that the transaction is not in the nature of slump sale. The tribunal has reversed this finding not based on an examination of the facts and circumstance and on appreciation of the evidence available from the records, but more based on the discussion of various judgments holding as to what constitute slump sale and even the finding of the tribunal that in its view the ratio of the decision of the Supreme Court in the case of ***ELECTRIC CONTROL GEAR MANUFACTURING COMPANY*** [supra] will be more appropriate rather than the ratio laid down by the Supreme Court in the case of ***ARTEX MANUFACTURING COMPANY*** [supra] and on such premise, holding that it was a slump sale, is virtually digging the question. The tribunal has also expressed the view that in view of the ratio emerged from the decision of the Bombay high court in the case of ***PREMIER AUTOMOBILES LTD*** as well as this decision of court in the case of ***SYNDICATE BANK***

LTD [supra] and the decision of the Delhi High court in the case of ***PUNJAB NATIONAL BANK FINANCE LTD*** [supra], the facts and circumstance of the present case being akin to the facts and circumstance of those cases and the ratio being made applicable, it was necessary to ascertain the capital gains and for such purpose it has remanded to the assessing officer for computation of capital gains.

67. We also notice that the Supreme Court allowed assessees in appeal in the case of ***PUNJAB NATIONAL BANK FINANCE LTD*** [supra] and reversed the judgment of the Delhi High Court [as per its judgment in the case of ***PNB FINANCE LTD vs COMMISSIONER OF INCOME TAX [(2008) 307 ITR 260 (SC)]*** being of the view that the sale price including the value of intangible assets like goodwill, tenancy rights, manpower and value of banking licence are all fact finding and that it was not possible to earmark separate price or value in respect of such intangible assets, machinery section of 48 fails due to

inability for computing the capital gain in respect of value of each such item and in turn the charging section 45 also fails.

68. What is of significance to be noticed in this decision is that in all the situations, the question as to whether the sale is a slump sale and if so, a further question as to whether the charging is effective and operates or it fails also depends on the facts and circumstance of each case, such questions are to be answered in each case on examination of facts and circumstances of the case and on appreciation of evidence from the record, having regard to the nature of the transaction, conduct of the parties, the events preceding the transaction, and all such incidental aspects and therefore there cannot be a generalization of test or a readymade formula which can be applied to a given case to arrive at an answer.

69. It is in this background, we have to answer the questions raised in the appeals of the revenue and the assessee as to whether the transaction in question is a

slump sale and even assuming that it is a slump sale as to whether the tribunal is still in error in directing the assessing officer to compute the capital gains and remanding the matter to the assessing officer for such purpose.

70. The related question is as to whether the tribunal has committed any error in affirming the manner of determination of book profits of the assessee-company in terms of section 115JA of the Act. The answers to these issues would comprehensively cover all the questions raised for our answer in these appeals on the aspect of the assessee's liability under Section 115JA of the Act.

71. The revenue's appeal – ITA No 320 of 2004 – though initially the revenue had raised two substantial questions of law, relating to the question of justifiability of the levy of interest in terms of Section 234B of the Act in a situation where the liability arises in terms of the provisions of Section 115JA of the Act and we have

already answered that question, as indicated above, two further questions were raised by the revenue, viz.,

> a) *Whether the tribunal was correct in holding that the transfer of soft drink unit of the assessee was a slump [sic] sale, when the individual valuation of the assets has been made by the expert valuer before arriving at the total sale consideration for transfer of the unit?*
>
> b) *Whether the tribunal was correct in holding that there was no default u/s 208 of the Act in not paying the advance tax on the ground that entire transaction of sale was a slum [sic] sale and no capital gains are chargeable when the levy of interest u/s 234B of the Act mandatory?*

and between these two additional substantial questions of law, one has already been considered and the other question is relating to the finding of the tribunal as to whether the tribunal was right in holding the transaction was in the nature of a 'slump sale'.

72. It is on this question, the assessee has filed ITA No 325 of 2004, raising a further question that the tribunal was not right in concluding that the transaction though was in the nature of a slump sale, was nevertheless

taxable even by identifying the value of the individual assets and remanding the matter to the assessing officer for such purpose.

73. However, in the assessee's appeal [ITA No 325 of 2004], the assessee has presented the question in a slightly modified form for our examination as substantial question of law, pointing out that the transaction is in the nature of slump sale, reducing the taxable income has become a reality only with effect from 1-4-2000 on the introduction of Section 50B of the Act and as such the relevant provision was not applicable to the assessee's case, as slump sale transaction was during the previous year relevant for the assessment year 1999-2000 and for this reason, the finding of the tribunal that the slump sale was also liable to tax is wrong and the related question as to whether the capital gain could be computed even when the entire undertaking was sold as one unit and whether it can be taken with the entire value of the slump sale which itself constitutes capital

receipt and whether there was justification for remanding the matter to the assessing officer for determination of the book profit and as to whether the surplus in the sale of the undertaking as a whole was first required to be credited to the profit and loss account, even in terms of Part-II & II of Schedule-VI to the Companies Act and as to whether the tribunal was correct in holding that the decision of the Supreme Court in the case of ***ARTEX MANUFACTURING CO*** [supra] was not applicable to the case of the appellant.

74. We notice that the controversy itself arises in the context of the provisions of Section 115JA of the Act, because the assessing officer has not accepted the computation of taxable amount for the purpose of Section 115JA of the Act, as offered by the assessee and as determined by the assessing officer.

75. The assessee being conscious of the requirement of the provisions of Section 115JA of the Act did compute

his taxable income in terms of the said provisions and had indicated that to be at a sum of Rs 4,69,69,196/-, the assessing officer, on the other hand had computed the taxable income for the very purpose i.e. for the purpose of Section 115JA, at a sum of Rs 47,86,10,008/- and had worked out the income tax liability at 30% of this amount.

76. The considerable difference between the two amounts as offered by the assessee and as arrived at by the assessing officer was due to the addition of a sum of Rs 43,16,50,812/-, which, though figured as the amount attributable to surplus on account of the sale of unit, even in terms of the return and the books of account of the assessee, this amount had directly reached the reserve and surplus account of the company, even as indicated in Schedule-II to the balance sheet for the year ended 31-3-1999 and in the computation of profit and loss account for the very period, and therefore the assessee thought that it was not necessary for the

company to offer any part of this amount as constituted capital gain.

77. While the assessing officer has taken the entire amount shown as surplus as a result of the sale of the unit to be capital gain and has added it to the income of the assessee, even while computing the book profit for the purpose of Section 115JA, the tribunal has remanded the matter to the assessing officer to recompute the capital gain and then on such premise re-determine the tax liability of the assessee for the year, even assuming that the transaction is in the nature of slump sale, but nevertheless, resulting in capital gains, the actual amount of capital gain is required to be determined. It is this finding of the tribunal which has given rise to filing of appeals both by the revenue and the assessee, with the revenue contending that the tribunal is not correct in holding that it was a slump sale and the assessee contending that when once the tribunal records a finding that the transaction is in the nature of slump sale, the

further question of determining the capital gain does not arise and further that redetermination of the book profits in terms of the order passed by the assessing officer is wrong in law, on the authorities of the Supreme Court in the case of ***SYNDICATE BANK*** and ***PREMIER AUTOMOBILES LTD*** [supra].

78. It is therefore obvious that even when the assessee itself is aware that there are some gains attributable to the sale of the unit and further that the assessee cannot avoid offering or paying the tax on the amount representing 30% of the book profit as determined in terms of Section 115JA of the Act, the endeavour on the part of the assessee is to obviously avoid any tax liability by demonstrating that the charging section i.e. Section 45 of the Act, for bringing it to tax for capital gain, fails in the present case, for the reason that the computation section i.e. section 48 of the Act, is not workable for the reason that the sale price for the unit said to have been sold as a going concern, is inclusive of that part of the

price attributable to the improved business potential of the unit i.e. the assessee being put in an effort over a period of years to develop a sustained profit making soft drink production unit by its managerial skills and the value attributable to such value addition to the overall unit being unascertainable and it being not possible to apportion as a definite percentage or fraction of the sale price to value of individual ascertained assets, land and building, plant and machinery etc., the machinery section 48 fails, for the reason of unascertainability of the precise value/price attributable to the value addition to the unit by expansion and having a good networking system for the unit, which in turn results in inability for ascertain the sale price of individual definite capital assets and though the cost of acquisition of such individual capital assets is assuming, the precise cost of sale of the very capital assets being not available. The computation section fails, resulting in failure of the charging section also. The efforts on the part of the learned counsel for

the assessee is to sustain this argument and for such purpose, has called in aid the various authorities referred to above, not only of our high court and other high courts but also of the Supreme Court. On the other hand, the learned standing counsel for the revenue has made a valiant effort to impress upon us on this aspect that having regard to the facts and circumstances, particularly, having regard to the developments leading to the sale of the unit indicating that the parties had even before the transaction took place ascertained the value of the individual assets and that factor having gone into the fixing the final price of the unit, the sale cannot be taken to be a slump sale in the sense of the phrase, particularly for the purpose of holding that it is a sale in which the value of the individual assets cannot be ascertained and secondly to contend that the correction carried out by the assessing officer for arriving at the proper value of the book profit for the purse of Section 115JA of the Act was warranted and is in fact in terms of the provisions of

Section 115JA of the Act and not at variance of the statutory provisions; that the authorities that have come into existence in the context of the interpretation of the provisions of Section 115J of the Act cannot be *ipso facto* accepted to be an authority or as a law declared by the Supreme Court for the purpose of Section 115JA of the Act; that in so far as the declaration of law in terms of Article 141 of the Constitution of India is concerned, the provisions of Section 115JA of the Act has to be taken to be an uncharted area and therefore it is open to this court to examine the implications of the provisions of Section 115JA of the Act, untrammelled by any binding authority and further that the judgment of the Bombay High Court in the case of ***SNOWCEM INDIA LTD*** [supra] cannot make any difference to the legal position and at any rate being not a binding authority on this court, this court can independently examine the impact of the provisions of Section 115JA of the Act and can always arrive at a correct conclusion without being inhibited by

the judgment of the Bombay High Court in the case of ***SNOWCEM INDIA LTD*** [supra] and to examine the case on hand on the touchstone of the residuary provision of Section 115JA of the Act and for such purpose by locking into the legislative intend in enacting the law, the object and reasons for enacting the law as indicated in the notes on clauses and what is obvious is that the legislature has consciously introduced Section 115JA to make a difference with the existing Section 115J and this definite purpose and intention on the part of the legislature cannot be lost sight of by treating Section 115JA on part with the provisions of Section 115J.

79. In this background, when we examine the authorities relied upon by the learned counsel for the revenue as well as the assessee, we find as under.

80. 'Slump sale' is not a phrase which at all has figured under the provisions of the Act in the definition section, but found a place for the first time in the year 2000 i.e.,

with effect from 1.4.2000 in terms of the Central Act No.27 of 1999. The definition of 'slump sale' as such reads as under:

> *"**Section 2[42C]:** 'Slump sale' means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales."*

81. Simultaneously was introduced sub-section 19-AA of section 2 of the Act and explanation-1 to the definition of 'demerger' made mention of undertaking or business activity taken as a whole but does not include individual assets or liabilities or any combination thereof not constituting a business activity.

82. It does not mean that there was no concept of 'slump sale' earlier and the concept of 'slump sale' has found recognition in the Judgments of the courts only led to the statutory definition as per the Central Act No.27 of 1999. The concept of 'slump sale' even earlier was a compendious sale of a business or industrial undertaking and normally an undertaking which is a going concern

being sold or transferred for a price fixed for the entire unit and not necessarily with reference to the individual or component assets of the transferred unit.

83. Further significance is only in the context of transfer of capital asset if it can give rise to profits and gains. It becomes chargeable to tax as income in terms of section 45 of the Act. The computation of capital gains is as provided under section 48 of the Act and is arrived at by deducting from the full value of consideration received or accruing as a result of the transfer of the capital asset the expenditure incurred wholly and exclusively in connection with such transfer and the cost of acquisition of the asset and the cost of any improvement thereto.

84. The purpose of the Income Tax Act is to levy tax on income and to raise revenue to the State and the categories of receipts which come within the scope and meaning of income have been increased and capital gain raised is taken to be income and therefore chargeable to

tax. The charge created under section 45 of the Act is to be effectuated by computation in terms of section 48 of the Act. Therefore, unless the basic data of the cost of acquisition of the assets with cost of improvement if any and the sale price of the assets is available, the gains cannot be determined. As in the case of any transfer, the sale price is definitely ascertainable. The purchase price is also ascertainable but if the asset has not remained the same and an asset which was acquired by paying a price gets transformed into a bigger asset which is a business undertaking or industrial undertaking sold as a going concern and also includes consideration for many imponderables as goodwill or a networking business system etc.,. It may become not possible to ascertain the precise price at which an asset which had been acquired initially has now been sold. Section 48 of the Act computation mechanism if fails and therefore gains are not ascertainable, the charge under section 45 of the Act cannot be effectuated. Over a period of time, it has been

found to be a very profitable exercise for the assessees to call in aid the failure mode in terms of section 48 of the Act to get out of the net of tax on capital gains as cast under section 45 of the Act.

85. The possibility of the computation section failing in the case of 'slump sale' or transfer of a capital asset as a whole or as a going concern would therefore become an attractive proposition while effecting transfer of capital assets. While a compendious sale, also known as 'slump sale' can result in a possibility of the computation provisions failing, leading to the charging section also becoming ineffective, it is not necessarily the case always when even there is a slump sale. If an undertaking is sold as a whole and comprises of several assets along with some imponderables and even then if the transfer comprises of many ascertained capital assets with reference to which the classification and sale price can be ascertained with any degree of certainty, to that extent, the provisions of section 48 of the Act can definitely work

and charge also can take effect to. It is only the possibility of ascertaining the cost of acquisition and sale price which is the determinative factor with reference to any smaller capital asset or individual capital asset comprised in a compendious sale which is a determinative factor for the charge under section 45 of the Act being effectuated or failing.

86. If there is such a possibility with reference to any transfer of capital asset including the slump sale, to that extent it can definitely be worked.

87. It is on such principle that the assessing officer was of the view that the value of several capital assets was ascertainable with reference to the transaction between the parties and with reference to the developments that had taken place between the seller and buyer which material has thrown light on the possible value of the individual assets though the price fixed for the whole unit did not make a reference to the individual assets the

basis on which the assessing officer had brought to tax capital gains resulting from the transfer of the unit as a going concern.

88. In so far as this finding is concerned, all the authorities below have taken the view that such is the possibility for ascertaining the capital gains resulting from the sale of unit as a whole but with reference to definite component capital assets of the entire unit.

89. The assessing officer was of the view that on the facts of the present case, the transaction in question cannot even be termed as a 'slump sale' as it was possible to ascertain the value of the assets both for the purpose of cost of acquisition and for the purpose of sale price and therefore the gains attributable to the transfer of that particular asset though as part of the compendious sale was nevertheless ascertainable and if so it has to be brought to tax. The assessing officer was himself of the view that the facts of the present case were totally

different from the facts as were available in the case of ***'COMMISSIONER OF INCOME TAX vs. MUGNEERAM BANGUR & CO.,*** reported in ***57 ITR 299*** and that the value of individual assets was very much ascertainable in the present case whereas it was not possible in ***MUGNEERAM BANGUR'S*** case [supra] and even in terms of the ratio in ***MUGNEERAM BANGUR'S*** case [supra] the present transaction cannot be termed as a 'slump sale' as even on the available facts it was possible to ascertain the sale price and individual assets such as land, building, office equipment etc., though the source of information was the valuation report given by the valuers whose services had been availed by the purchaser and who were internationally renowned valuers and such particulars per se did not enter the sale deed evidencing the sale transaction of the entire undertaking as one unit and the price was a lump price. The assessing officer also recorded the finding that if the unit or undertaking should have been transferred as one unit and all the

assets and liabilities of the entire unit as such was taken over by the purchaser, perhaps it could have constituted a slump sale, but in the present case, the purchaser having not acquired or taken over all assets and liabilities of the running concern and as noticed by the assessing officer the purchaser not getting any cash balance of the seller which was available in the bank accounts nor the seller getting the assets such as the outstanding dues to the transferor company from its sister concern and the buyer company not taking over all the liabilities but restricting it to mere two types of liabilities such as crates deposits of Rs.2,07,00,000/- and provision for gratuity of Rs.15,00,000/- and having conveniently left behind such other liabilities running into crores of rupees with the transferor company itself, the transaction cannot be envisaged as a 'slump sale' transaction and the capital gains should necessarily come to tax based on the facts and figures of individual assets as was otherwise available from the records though the assessee as such did not

make it available. On such premise, the assessing officer concluded that the capital gains can be ascertained and brought to tax. The assessing officer based on such premise had for the purpose of computation of total income in terms of section 115JA of the Act added to the book profits of the assessee the entire amount of Rs. 43,16,50,812/- which the assessee itself had shown as surplus on account of sale of the unit computed income under section 115JA of the Act and brought to tax 30% thereof and interest under section 234B of the Act and arrived at the total tax liability after payment of advance tax.

90. The first appellate authority for the very reasons and agreeing with the view taken by the assessing officer felt that the transaction is not a 'slump sale' as it did not envisage the sale of all assets and liabilities of the undertaking of the unit. The computation of capital gains was determined on such premise and therefore agreeing with the assessing officer opined that the benefit of the

ratio of the Judgment by the Supreme Court in ***MUGNEERAM BANGUR'S*** case [supra] was not available to the assessee.

91. On this aspect of the matter, the Tribunal in further appeal by the assessee examined this question and being of the view that the facts of the present case being more proximate to the facts as prevailed in ***ELECTRIC CONTROL GEAR MANUFACTURING COMPANY's*** case [supra], decided by the Supreme Court rather than the ratio of the Supreme Court in ***ARTEX MANUFACTURING CO's*** case [supra] and further being of the opinion that on the present facts of this case, the ratio of the Judgment of the Bombay High Court in ***PREMIER AUTOMOBILIES LTD's*** case [supra] as well as the Judgment of the Karnataka High Court in ***SYNDICATE BANK LTD's*** case [supra] and the Judgment of the Delhi High Court in ***PUNJAB NATIONAL BANK FINANCE LTD's*** case [supra] being attracted and there being possibility of computing the capital gain as a result of the transfer with reference

to the cost of the business undertaking as a whole as that also constitute an asset within the meaning of sub-section [14] of section 2 of the Act and for such determination remanded the matter to the assessing officer.

92. The Tribunal in the process also rejected the claim of the assessee that the transaction is in the nature of a 'slump sale'.

93. In the light of the discussion above, what emerges is that while as to whether a transaction is in the nature of 'slump sale' or not though dependent on facts can also become a question of law as to whether the computation of capital gains for the purpose of section 45 of the Act and in the manner provided under section 48 of the Act does not get automatically defeated even if the sale is characterized as a 'slump sale' if on the other hand it is not even a 'slump sale' the question of failure of the provisions of sections 45 and 48 of the Act on the premise

that the transaction is a 'slump sale' does not even arise. Such question being essentially a question of law and all the three authorities having recorded a finding that there is no 'slump sale' and with the possibility of ascertaining individual value of different assets while the question as to whether the transaction was 'slump sale' or otherwise if partakes the character of question of fact cannot be examined by this court in an appeal under section 260-A of the Act and even it should be considered as a question of law, it goes against the assessee for the reason that on facts all the three authorities have recorded probability of ascertaining gains attributable to transfer of individual assets though comprised in the compendious sale of selling the entire unit as one unit and without necessarily indicating the price at which the individual assets have been sold.

94. Accordingly, this question has to be necessarily answered in favour of the revenue and against the assessee and in the positive manner.

95. The next question to be examined is the correctness or otherwise of the ascertainment of the book profits of the assessee for the purpose of section 115JA of the Act and as to whether the assessing officer should have accepted the book profits as computed by the assessee and indicated in the return or as to whether the assessing officer was justified in not only rejecting this ascertainment of book profits by the assessee itself but also in arriving at the book profits of the assessee at a different figure for the purpose of section 115JA of the Act.

96. On this question the disputed area is the surplus amount as a result of the sale which is at a figure of Rs. 43,16,50,812/- whether can form part of the book profits of the assessee in terms of the computation of the book profits of the assessee for the year as per the provisions of parts-II & III of Schedule-VI to the Companies Act, 1956 or even that the amount could be added to the book

profits as ascertained under the provisions of the Companies Act, 1956 in terms of any one of clauses [a] to [f] of explanation under section 115JA of the Act. To put it in other words, whether this surplus amount was an amount which could have been added back to the book profits of the assessee for the purpose of determining the deemed income of the assessee for the year under consideration in terms of the provisions of section 115JA of the Act.

97. It is in the context of such examination, Sri. Shankar, learned counsel for the assessee has put in best efforts to educate us on the procedures of accountancy, book keeping etc., and has placed before us a wealth of material touching on these aspects.

98. We have been taken even to foreign judgments for understanding as to what exactly can constitute book profit of a company, particularly, in the context of the assessee having indicated in its books of accounts and

also as part of its return this precise amount had been transferred to its capital reserve account.

99. While transaction resulting to this extent of surplus and the entire amount having been transferred to the capital reserve account of the assessee company is not disputed, the argument is that, nevertheless, the amount cannot be added back in terms of clause[b] of explanation to section 115JA of the Act for the reason that the said amount is not debited to the profit and loss account of the assessee. It is for making us understand as to what is meant by the profit and loss account, we have been educated on the practices of book keeping, preparation of profit and loss account, the practices prevailing in ascertaining the assets and liabilities and the manner in which they are depicted etc.,.

100. In so far as the question of computation of the book profits of the assessee for the purpose of section 115JA of the Act is concerned, while both learned counsel for the

revenue and the assessee would not dispute that the book profits for the purpose of section 115JA of the Act may not be necessarily the same as book profits as ascertained or computed in the normal course of the practice of book keeping and accountancy and the manner in which the profits of the company is computed, particularly, in the wake of the provisions of the explanation to sub-section [2] of section 115JA of the Act and in the present case what is relevant being if at all clauses [a] to [f] of the explanation providing for addition of the amount covered under clauses [a] to [f] to the book profits as already ascertained in terms of sub-section [2] which in turn only says that the assessee should first prepare its profit and loss account for the relevant previous year in accordance with the provisions of parts-II & III of Schedule-VI to the Companies Act, 1956 and even in respect of the book profits as ascertained under the main provisions of section 115JA[2], further modifications as envisaged under the explanation being required to be applied to the

actual book profit for arriving at the figure of amount equal to 30% of such book profits, the question will be the book profit as otherwise computed by the assessee even as per the provisions of the Companies Act if is required to be re-modified by either increase or decrease as envisaged under the explanation.

101. It is in this background Sri. Shankar, learned counsel for the assessee has vehemently urged that there is absolutely no scope for the assessing officer to tinker with or alter the book profits as determined by the assessee and as has been accepted by the authorities under the Companies Act and in which event it is presumed to have been so computed only in terms of the provisions of parts II & III of schedule-VI to the Companies Act, 1956 and on the authority of good number of Judgments of the Supreme Court and the High Courts, it is not open to the assessing officer to sit in judgment over the ascertainment of book profits by the assessee and as recognized/approved by the

corresponding authorities under the provisions of the Companies Act, 1956 and on facts the present situation being not one covered under any one of the clauses [a] to [f] of the explanation to sub-section [2] of section 115JA of the Act, there was no way of the assessing officer re-determining the book profits for the purpose of section 115JA of the Act by adding the so called surplus as a result of the slump sale representing a sum of Rs. 43,16,50,811.69/- which had been directly taken to the capital reserve account without having been debited to the profit and loss account of the assessee in terms of clauses [a] & [b] of the explanation, the assessing officer should have simply accepted the return filed by the assessee indicating the book profit as computed and recognized by the authorities under the Companies Act and such book profit to the tune of Rs.4,69,69,196/- and the liability of the assessee for the assessment year in question having computed only on such basis and not by

the modifications as had been carried out by the authorities.

102. It is only in the wake of such contentions and authorities cited against the view taken by the assessing authority and the appellate authority, Sri. Seshachala, learned senior standing counsel for the revenue has contended that the ascertainment of book profits as indicated by the assessing officer and rejecting the return filed by the assessee is only for the reason that there was scope to operate the provisions of clauses [a] to [f] of explanation to sub-section [2] of section 115JA of the Act, particularly, clause [b] which indicates that the amount carried to any reserve by whatever name called and admitted case of the assessee also being this surplus amount of Rs.43,16,50,811.69/- being the result of the transfer of the soft drink unit of the assessee as a going concern and on a lumpsum price and even the assessee itself having indicated to its shareholders in terms of the twentieth annual report for the assessment year 1998-99

that the net profit for the year was a sum of Rs.4,20,34,196/- etc., and there also being a clear admission that there was surplus of Rs. 43,16,50,811.69/- which is nothing but the gains attributable to the disposal of the soft drink undertaking as a going concern for a slump price and in fact such a revelation in the annual report and also virtually an admission in Annexure-B to the report filed by the assessee in terms of the note at the bottom of the sheet of computation of total income which read as,

> *"surplus of Rs.43,16,50,811.69/- and on disposal of softdrink undertaking as a going concern for a slump price has been treated as capital receipt and not taken into account in the above computation."*

the correction applied by the assessing officer for arriving at the book profits of the assessee for the year in question in terms of section 115JA of the Act was fully justified and therefore the questions on this aspect should be answered in favour of the revenue.

103. The emphatic submission of Sri. Seshachala, learned senior standing counsel appearing for the revenue is that the re-computation of the book profits of the assessee for the purpose of section 115JA of the Act by the assessing officer is not by way of any modification or alteration of the book profits of the assessee as computed or determined in terms of the provisions of parts – II and III of schedule-VI to the Companies Act, 1956 but only by the working of the explanation on the amount of book profit even as otherwise by the assessee in terms of these provisions.

104. While Sri. Shankar, learned counsel for the assessee is very right that on the strength of the authority placed before us, on behalf of the assessee, there cannot be two opinions that the book profits as ascertained by the assessee and as certified by its auditors statutory or otherwise as had been accepted by the authorities under the Companies Act, 1956 cannot be in any way found

fault with by the assessing officer or the authorities under the Income Tax Act, 1961 and the authorities under the Income Tax Act have to necessarily proceed on such premise, it is equally correct on the part of Sri. Seshachala, learned counsel for the revenue to submit that the very authorities do not in any way control or are responsible in the manner of computation of book profits for the purpose of section 115JA of the Act if the book profits as computed under section 115JA[2] of the Act is required to be further modified or altered by working the explanation.

105. It is in this background, Sri. Seshachala, learned senior standing counsel appearing for the revenue has placed reliance on the Judgment of the Supreme Court in ***ARTEX's*** case [supra], to contend that even in a case where the surplus as a result of transfer of plant, machinery and deadstock is taxable under section 41[2] of the Act to the extent of the difference between the actual cost and written down value of the assets when

surplus is in excess of the written down value and actual cost, the amount which is over and above the difference between the actual cost and the written down value has to be brought to capital gain and in the instant case, the assessee having not claimed any deduction in respect of section 41[2] of the Act, but having treated the entire capital receipt by showing it in the profit and loss account by carrying the surplus amount as a result of slump sale to the capital reserve account, the capital gain amount was very much ascertainable and at any rate it is the amount forming part of the transfer of the unit as a slump sale and therefore would contend that when the authorities under the Act, particularly, the assessing authority was able to reasonably ascertain the capital gain attributable to the identified assets forming part of the slump sale and with reference to the cost of initial acquisition or the written down value of the asset and the sale price attributable to that particular asset with reference to the report of the valuer who had been

appointed by the buyer which can form a very firm basis for arriving at the capital gain in respect of such assets the tribunal could not have allowed the appeal of the assessee purporting to follow the ratio of the decision of the Supreme Court.

106. If the examination is not in the context of the main provisions of section 115JA[2] of the Act which reads as under,

> ***"115-JA. Deemed income relating to certain companies*** –
>
> *(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 profit and loss account, the depreciation shall be calculated on the same method and rates which have been adopted for calculating the depreciation for the purpose of preparing the profit and loss account laid before the company at its annual general meeting in accordance*

with the provisions of Section 210 of the Companies Act, 1956 (1 of 1956):

Provided further that where a company has adopted or adopts the financial year under the Companies Act, 1956 (1 of 1956), which is different from the previous year under the Act, the method and rates for calculation of depreciation shall correspond to the method and rates which have been adopted for calculating the depreciation for such financial year or part of such financial year falling within the relevant previous year.

Explanation – For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by –

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

(b) the amounts carried to any reserves by whatever name called; or

(c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities; or

(d) the amount by way of provision for losses of subsidiary companies; or

(e) the amount or amounts of dividends paid or proposed; or

(f) the amount or amounts of expenditure relatable to any income to which any of the provisions of Chapter III applies;

if any amount referred to in clauses (a) to (f) is debited to the profit and loss account, and as reduced by -

(i) the amount withdrawn from any reserves or provisions if any such amount is credited to the profit and loss account:

Provided that, where this section is applicable to an assessee in any previous year (including the relevant previous year), the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 but ending before the 1st day of April, 2001 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this Explanation; or

(ii) the amount of income to which any of the provisions of Chapter III applies, if any such amount is

credited to the profit and loss account; or

(iii) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account.

Explanation – For the purposes of this clause –

(a) the loss shall not include depreciation;

(b) the provisions of this clause shall not apply if the amount of loss brought forward or unabsorbed depreciation, is nil; or

(iv) the amount of profits derived by an industrial undertaking from the business of generation or generation and distribution of power; or

(v) the amount of profits derived by an industrial undertaking located in an industrially backward State or district as referred to in sub-section (4) and sub-section (5) of Section 80-IB, for the assessment years such industrial undertaking is eligible to claim a deduction of hundred per cent of the profits and gains under sub-section (4) or sub-section (5) of Section 80-IB; or

(vi) *the amount of profits derived by an industrial undertaking from the business of developing, maintaining and operating any infrastructure facility as defined as defined in the Explanation to sub-section (4) of Section 80-IA and subject to fulfilling the conditions laid down in that sub-section; or*

(vii) *the amount of profits of sick industrial company for the assessment year commencing from the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of Section 17 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year during which the entire net worth of such company becomes equal to or exceeds the accumulated losses; or*

Explanation – For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (ga) of sub-section (1) of Section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986).

(viii) *the amount of profits eligible for deduction under Section 80-HHC, computed under clause (a), (b) or (c) of sub-section (3) or sub-section (3-*

A), as the case may be, of that section, and subject to the conditions specified in sub-sections (4) and (4-A) of that section;

(ix) the amount of profits eligible for deduction under Section 80-HHE, computed under sub-section (3) of that section."

various authorities referred to and relied upon by Sri. Shankar, learned counsel for the assessee would be of no significance.

107. Even in the matter of ascertaining the capital gains as a result of transfer of a capital asset and through the mechanism of section 48 of the Act - the computation provision, the whole exercise is to ascertain what possible surplus has resulted in favour of the assessee as a result of the transfer and after allowing such other deductions such as cost of improvement etc., as factually found to have been incurred etc.,.

108. A transaction of the slump sale which is patronized by many corporate assessees and very popular is only for

the reason that if the transaction is to be characterized as a slump sale it can result in avoiding charge under section 45 of the Act by demonstrating the non workability of the computation provision, namely, section 48 of the Act in the facts and circumstances of a given case. While it is no doubt that the exercise on the part of the assessee is to avoid the liability as a result of capital gains and the assessee may claim such possibility by claiming that it is impossible to work the provisions of section 48 of the Act to ascertain the capital gain, when the provisions are examined cannot be from such background, but from the angle of as to whether the provision can be made workable or otherwise or if it is possible to ascertain the gains even otherwise also.

109. In the present case, we find that the assessee on its own computation has made a clear admission even in terms of the note appended to the return that the transaction of slump sale has resulted in a surplus of Rs 43,16,59,811.69/-. It is also the undisputed position that

the amount has been carried to the capital reserve account. In the wake of such admitted position, it is very clear that the provisions of section 48 of the Act can be worked by accepting the assessee's own version that the surplus is the gain to the assessee as a result of the transaction of slump sale of the entire soft drink unit as a going concern and the total income of the assessee computed on such premise.

110. However, we make it clear that the ascertainment of capital gain by this process being on the premise that the assessee itself had indicated that the transfer of bottling unit as a going concern had resulted in a surplus realization of Rs 43,16,59,811.69 and for such arrival of the surplus amount, the assessee would have quite naturally given deduction to the cost of the acquisition of various components, which ultimately constituted the cost of the bottling plant and that amount having been reduced from the sale price of the bottling plant as a whole i.e. from out of Rs 55,44,90,899/- and therefore

the difference of Rs 43,16,59,811.69 constitutes the capital gain even in terms of the provision of Section 48 of the Act, if the assessee should claim that any part of the cost of acquisition, in respect of various components of the bottling unit, which was sold, had not figured at the time of the computation of the surplus and if such amount is in fact forming part of the actual cost of acquisition in respect of any component of the bottling unit, we reserve liberty to the assessee to put forth such a claim before the assessing officer, even now, after the remand and to make good this claim with supporting material and proof before the assessing officer. If the assessing officer should find that any such claim now put forth by the assessee for claiming further deduction from out of the total surplus amount of Rs 43,16,59,811.69 is justified in law and on facts, such claim can be entertained and a further deduction allowed from out of the amount of Rs. 43,16,59,811.69 to arive at the actual gains. If on the other hand, the assessing officer is not

convinced of the genuineness of the claim for the further deduction on the tenability of such claim to be allowed and as a deduction forming part of the cost of acquisition of the asset for computation under Section 48 of the Act or even if it is found that the claim is not substantiated by the assessee by adequate supporting material, being not placed by the assessee before the assessing officer, then the assessing officer should proceed on the premise that the surplus amount itself is the gain attributable to the transaction of transfer of bottling plant as a going concern even in terms of Section 48 of the Act and to proceed to compute the overall taxable income of the assessee and thereafter to ascertain as to whether the taxable income of the assessee computed on such premise is still found to be less than 30% of the book profits of the assessee, in which event, to apply the provisions of Section 115JA of the Act to arrive at the taxable income of the assessee in terms of the provisions of Section 115JA and to determine the precise tax liability

of the assessee for the assessment year in question. This direction holds good at all places where we have made reference to the capital gain of the assessee being the surplus amount of Rs 43,16,59,811.69, even as indicated by the assessee in its books of account and also in the return as had been filed by the assessee.

111. When such is the possibility on the strength of the authority of the judgment of the Supreme Court in ***ARTEX's*** case [supra], respect of the entire transaction of a slump sale, it is afortiari possible in cases where individual assets forming part of the entire unit sold as a slump sale, are identifiable with certainty or on a firm basis, the gains attributable to the individual assets can also be ascertained and that gain brought to tax. As to which of these two possibilities are attracted to a particular case is dependent on the facts and circumstances of the case.

112. While this can be the legal consequence on the admitted factual position, we find that in the instant case, the examination has been only in the limited context of identifying the individual assets such as land etc., and computing the capital gains vis-à-vis such limited assets and in turn ascertaining the total income and on the assessing officer finding that such total income was in fact less than 30% of the book profits as computed by making additions as per explanation to section 115JA[2][b] of the Act and such 30% being higher than the actual total income even otherwise as computed by the assessing officer, the provisions of section 115JA of the Act was required to be worked. It is on the working of the provisions of section 115JA of the Act by applying clause [b] of the explanation, in so arriving at the book profits for the purpose of section 115JA of the Act, Sri. Shankar, learned counsel for the assessee has made elaborate submissions and also referred to the principles of accountancy etc.,.

113. We find in the present set of facts and circumstances, the entire exercise would have become relevant only if the assessing officer should have found that on a proper computation of the total income of the assessee, i.e., by accepting the surplus as indicated in the note to the return filed by the assessee to be the capital gain and on such premise the total income should have been ascertained and if it was in fact found that it was less than 30% of the amount as computed by applying the provisions of section 115JA of the Act then alone further questions would have arisen. But, unfortunately, the assessing officer having proceeded on the premise that the transaction was a slump sale, the surplus attributable to the entire transaction was not ascertainable and surplus attributable to a few individual assets on the premise of the report of the valuer appointed by the buyer should be taken as the basis for computation of gains for transfer of these assets which is an exercise though cannot be totally characterized as an

erroneous or an illegal exercise but nevertheless the question being as to whether it was necessary at all if the capital gain is the amount of surplus as admitted by the assessee itself and as a result of the transfer of the unit as a going concern and if the total income on such premise if should have fallen short of 30% of the book profits in terms of the provisions of section 115JA of the Act, then alone the requirement of section 115JA of the Act arising, we are of the view that examining the various contentions put forth on behalf of the assessee in the context of the principles of accountancy and book keeping, to ascertain as to whether there was a debit to the profit and loss account or not, is an exercise wholly unnecessary, but in the circumstances the matter is required to be remanded to the assessing officer for re-determining the tax liability of the assessee, particularly, on the basis of the surplus as indicated in the note to the return filed by the assessee to be the capital gain for the relevant accounting period and to find out as to whether

such total income is still short of 30% of the book profits of the assessee and then alone to apply the provisions of section 115JA of the Act would have arisen.

114. In such circumstances, we are of the view that the matter warrants remand to the assessing authority to compute a fresh the total income of the assessee even in terms of the provisions of section 115JA of the Act, if the situation warrants the determination of the taxable income as provided under section 115JA of the Act and the corresponding tax liability of the assessee on the premise that the surplus amount as indicated in the note to the return filed by the assessee in itself constituted capital gain and that capital gain being part of the total income, arrived at the total income afresh and then computer the tax liability in terms of the provisions of section 115JA of the Act and to decide the cases on such premise.

115. It is therefore, we are of the view that it is wholly unnecessary to answer all the questions raised in these appeals.

116. Accordingly, the substantial questions of law raised in these appeals are answered as follows:

In ITA No. 320 of 2004

Q. No.	Question	Answer
a	*Whether the tribunal was correct in holding that interest under Section 234B of the Act cannot be levied against the assessee as the computation of income has been made under Section 115JA of the Act?*	Not correct. Wrong. Under Section 234B, interest can be and has to be levied. Question answered in the negative, in favour of the revenue and against the assessee.
b	*Whether the tribunal was correct in taking into consideration irrelevant circumstances like 'bona fides of the assessee', 'whether the default was committed deliberately' in falling to pay advance tax under Section 208 of the Act when Section 234B interest is levied automatically as there is no discretion?*	Not correct. Bona fides cannot absolve an assessee of a statutory provision like Section 234B of the Act, with no discretion being left to the statutory authority to apply or not to apply the provisions of Section 234B of the Act. Therefore, the question is answered in the

		negative, in favour of the revenue and against the assessee.
c	*Whether the Tribunal was correct in holding that the transfer of soft drink unit of the assessee was a slum (sic) sale, when the individual valuation of the assets has been made by the expert valuer before arriving at the total sale consideration for transfer of the unit?*	While the question whether a sale is a slump sale or otherwise is essentially a question of fact, in the present case the transaction being a slump sale does not make much difference to the tax liability of the assessee having regard to our opinion that even a transaction in the nature of a slump sale can attract tax liability, for statistical purpose this question is answered in the affirmative, as we are not inclined to disturb the finding recorded by the tribunal for the reason indicated hereinbefore.
d	*Whether the Tribunal was correct in holding that there was no default u/s. 208 of the Act in not paying the advance tax on the ground that entire transaction of sale was a slum (sic) sale and no capital gains are chargeable, when the levy*	No, not correct, for the reason that the operation of the provisions of section 208 of the act is not dependent on a sale transaction being a slump sale or otherwise

	of interest u/s. 234 B of the Act was mandatory?	and even when the transaction is characterized as a slump sale, there can be ascertainable gains arising from the sale of the asset resulting in not only the tax liability but also other consequences due to the non-compliance/non-adherence to the other mandatory provisions of the act.

In ITA No. 325 of 2004

Q. No.	Question	Answer
a	*Whether the tribunal is justified in holding that the transaction of slump sale is taxable when the provisions of Section 50B of the Act was introduced from 1-4-2000 and thus not applicable to the assessment year 1999-2000?*	Tribunal is justified in holding that the transaction of slump sale is taxable even prior to the introduction of Section 50B of the Act, introduced w.e.f. 1-4-2000, in the light of our discussion above and therefore the question is answered in the affirmative, in favour of the revenue and against the assessee.

b	*Whether the tribunal, on facts of the case, is correct in law, in holding that the capital gain on the transfer of entire undertaking as a whole has to be computed?*	The tribunal is correct in holding that the capital gain on the transfer of entire undertaking as a whole has to be computed and in the light of the further clarification made in this judgment, the computation is to be made by the assessing officer, as we are remanding the matter to the assessing officer for such purpose. The question is answered in the affirmative, in favour of the revenue and against the assessee.
c	*Whether the slump sale amount received on the facts and circumstance of the appellant case constitute capital receipt?*	Answered in the affirmative in favour of the revenue and against the assessee.
d	*Whether, on facts and circumstance of the case, is the tribunal, justified in law, in holding that recomputation by the assessing officer for the purpose of determining book profit under Section 115JB of the Act, is in accordance with law?*	The question is answered in the affirmative, in favour of the revenue and against the assessee, holding that it is for the assessing officer to compute the book of profit for the purpose of

		Section 115JA of the Act, even after the preparation of the profit and loss account of the assessee for the relevant previous year, in accordance with the provisions of part-II and III of Schedule-VI of the Companies Act, 1956 and by examining the applicability of each clause in the explanation to sub-section (2) of Section 115JA of the Act.
e	*Whether the surplus on the sale of the undertaking as a whole requires to be credited to the profit and loss account in accordance with part-II and III of Schedule-VI of the Companies Act?*	The question as posed is not apt. While in the preparation of profit and loss account as per the main part of sub-section (2) of Section 115JA of the Act, it has to be only in terms of the provisions of part-II and III of Schedule-VI of the Companies Act, 1956, the computation of book profits for the purpose of this Section, of which 30% constitutes deemed income of the assessee for the relevant period, is only by operating the

		explanation to sub-section (2) of Section 115JA of the Act.
f	*Whether the tribunal is justified in law in holding that the decision of the Supreme Court in case of Apollo Tyres Ltd VS CIT in 255 ITR 273 is not applicable to the appellant's case?*	The tribunal is justified in holding that the decision of the Supreme Court in case of Apollo Tyres Ltd VS CIT [255 ITR 273] is not applicable to the appellant's case, both as indicated above and also for the reason that the decision of the Supreme Court being in the context of Section 115J of the Act, it cannot be said to be an authority or declaration of law, even in respect of provisions of Section 115JA of the Act. The question is answered in the affirmative in favour of the revenue and against the assesee.

In ITA No. 597 of 2004

Q. No.	Question	Answer
a	*Whether the tribunal was justified in law in holding that there are no mistake apparent from the face of records on the facts and circumstance of the case and application made by the appellant would amount to a review?*	In the light of our answers to questions in ITA No 320 of 2004, filed by the revenue, and ITA No 325 of 2004, filed by the assessee, the answer to these questions are academic and recede to the background. Hence, all the four questions are not answered, but for statistical purpose, the questions relating to the disposal of this appeal are answered in the affirmative in favour of the revenue and against the assessee.
b	*Whether the tribunal was justified in taking that non-applying of the decision of the Hon'ble Supreme Court in Apollo Tyres in 255 ITR 273 would not constitute apparent mistake liable for rectification under Section 254(2) of the Income Tax Act?*	
c	*Whether the tribunal is justified in holding that the surplus on the sale of the undertaking as a whole requires to be credited to the profit and loss account in accordance with part-II and II of Schedule-VI of the Companies Act, when the case is not part and parcel of the working results and consequently whether such finding constitutes apparent mistake on the facts of the case?*	

d	*Whether the finding of the tribunal that the transaction of slump sale is taxable for the assessment year 1999-2000 when the provisions of Section 50B of the Act was introduced from 1-4-2000 and consequently constitute an apparent mistake rectifiable under Section 254(2) of the Income Tax Act?*	

In ITA No. 2971 of 2005

Q. No.	Question	Answer
a	*Whether the Tribunal was correct in holding that interest under section 234B of the Act cannot be levied against the assessee as the computation of income has been made under Section 115JA of the Act.*	The tribunal is correct in holding that interest under section 234B of the Act cannot be levied against the assessee as the computation of income has been made under Section 115JA of the Act. The question is answered in the negative, in favour of the revenue and against the assessee.
b	*Whether the Tribunal was correct in taking into consideration irrelevant circumstances like 'bonafides of the assessee', 'whether the default was committed*	Not correct. The question is answered in the negative, in favour of the revenue and against the assessee.

	deliberately', in failing to pay advance tax under Section 208 of the Act when Section 234B interest is levied automatically as there is no discretion.	

117. In the result, the appeals of the revenue in ITA No.320 of 2004, 2971 of 2005 are allowed, and the orders of the assessing authority levying interest under section 234B of the Act in respect of the delayed remittance of advance tax is restored. The appeals filed by the assessee in ITA Nos.325 of 2004 and 597 of 2004 are dismissed.

Sd/-
JUDGE

Sd/-
JUDGE

*pjk/AN