Tax-treatment of the share of a company in the income of an AOP

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Recently, an Opinion was sought by a company relating to the tax-treatment of its share of income in an association of persons (AOP). Presently, a trend is visible in the Indian business circles, where certain entities including companies undertake big infrastructure jobs, etc. through the medium of a joint venture (JV) with other entities. In other words, two or more companies enter into a joint venture agreement for the purpose of completion of big infrastructure jobs. In such a situation, the joint venture formed by the companies is assessed to tax, under the Income-Tax Act, 1961 (the Act), as a separate taxable entity in the status of an association of persons (AOP).
In the aforesaid situation, a number of queries may arise, some of which are listed as follows :

(i) Whether a company could be a member of an AOP.

(ii) What would be the tax-treatment of the share of income of the company in an AOP.

(iii) Whether the provisions of section 115JB of the Act, relating to the levy of minimum alternate tax (MAT) will be applicable in such a scenario.

In order to answer the aforesaid queries, the following issues will have to be examined :

1. Whether a company could be a member of an AOP.
2. Impact of the relevant provisions of the Act, on the matter under consideration and examination of such provisions.
3. Tax-treatment of the share of a company in an AOP, in the computation of its total income.
4. Applicability of the provisions of section 115JB, relating to MAT in the present scenario.

All the aforesaid issues are discussed in detail, as follows :

I. Whether a company could be a member of an AOP

As regards the query whether a company can be a member of an AOP, a reference will have to be made to section 2(31), which defines '*person*'. For the sake of ready reference, section 2(31) of the Act, is reproduced as follows :

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2. Definitions.

In this Act, unless the context otherwise requires,—

(31) "person" includes—

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not,

(vi) a local authority, and

(vii) every artificial juridical person, not falling within any of the preceding sub-clauses.

Explanation.—For the purposes of this clause, an association of persons or a body of individuals or a local authority or an artificial juridical person shall be deemed to be a person, whether or not such person or body or authority or juridical person was formed or established or incorporated with the object of deriving income, profits or gains.

From the aforesaid provisions of section 2(31), it may be seen that the term '*person*' includes an individual, a Hindu undivided family (HUF), a company, a firm, etc. Further, an association of persons (AOP) or a body of individuals (BOI) is normally constituted by individuals, HUFs, etc. Therefore, there can be no reason as to why a company cannot be a member of an association of persons (AOP).

In this context, a reference may be made to the judgement of the Tribunal in the case of *Birla Tyres Vs JCIT [2004] 267 ITR (AT) 1 (Kol) (TM) : [2003] 80 TTJ 915 (Kol)*. In the aforesaid judgement it was held that an AOP is an independent taxable entity, different and distinct from its members and its loss can be set off only against its own profits and not against the profits of its members. This apart, what is more important for our purpose in this case is that the assessee, viz. *Birla Tyres*, was an AOP which was constituted by four members all of which were limited companies, viz. M/s Century Textile and Industry Ltd., M/s Kesoram

Industries Ltd., M/s Jayashree Tea and Industries Ltd.; and M/s Bharat General and Textile Industries Ltd. There was absolutely no objection raised from any side as regards the issue of membership of a company in an AOP.

In this connection, it would also be automatically clear that an AOP being an independent taxable entity, will be liable to tax in respect of its total income, irrespective of the nature and quantum of income of its members.

II. Impact of the relevant provisions of the Act, on the matter under consideration and examination of such provisions.

The sections which may be relevant in the present context may be listed as follows :

(i) Section 2(10) – Providing meaning of the expression '*average rate of income-tax*'.

(ii) Section 2(29C) – Providing meaning of the expression '*maximum marginal rate*'.

(iii) Section 66 – It relates to '*total income*' and it falls under Chapter VI relating to '*Aggregation of income and set off or carry forward of loss*'.

(iv) Section 67A – It relates to the method of computing a member's share in income of association of persons or body of individuals and it falls under Chapter VI relating to '*Aggregation of income and set off or carry forward of loss*'

(v) Section 86 – It relates to share of member of an association of persons or body of individuals in the income of the association or body and it falls under Chapter VII, relating to '*Incomes forming part of total income on which no income-tax is payable*'.

(vi) Section 110 – It relates to determination of tax where total income includes income on which no tax is payable and it falls under Chapter XII, relating to '*Determination of tax in certain special cases*'.

(vii) Section 167B – It relates to charge of tax where shares of members in association of persons or body of individuals are unknown, etc.

Besides, it falls under Chapter XV, which relates to '*Liability in special cases*'. In addition, section 167B falls under Sub-Chapter XV-DD, which relates to '*Firms, association of persons and body of individuals*'.

All the aforesaid sections of the Act are discussed as follows :

1. Section 2(10) – Providing meaning of the expression *'average rate of income-tax'*

Section 2(10) of the Act provides the meaning of the expression '*average rate of income-tax'*. For the sake of ready reference, section 2(10) is reproduced as follows :

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*2. **Definitions.***

In this Act, unless the context otherwise requires,—

(10) "average rate of income-tax" means the rate arrived at by dividing the amount of income-tax calculated on the total income, by such total income

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It may, thus, be seen that as per section 2(10), the expression '*average rate of income-tax*' means the rate arrived at by dividing the income-tax calculated on the total income, by such total income.

The concept of average rate of income-tax is relevant where the total income includes income on which no tax is payable. For example Chapter VII of the Act relates to '*Incomes forming part of total income on which no income-tax is payable*'. Further, section 86 relating to the taxation of the share of a member of an AOP or BOI in the income of AOP or BOI; falls under the aforesaid Chapter VII. In the present context, however, section 66 of the Act is also relevant. According to section 66, in computing the total income of an assessee, there shall be included all income on which no income-tax is payable under Chapter VII. In view of the aforesaid reasons, a query may arise regarding the tax-treatment of the share of income of a member in an AOP or BOI. In such a situation, provisions of section 110 will come into play. Section 110 provides for tax at average rate, where total income includes an income on which no tax is payable so that the rest of the income may suffer tax at the rate applicable on the total income inclusive of such income.

Agricultural income is another instance, which is included in the total income for rate purposes only.

2. Section 2(29C) – Providing meaning of the expression *'maximum marginal rate'*

Section 2(29C) provides the definition of the expression '*maximum marginal rate'*. For the sake of ready reference, section 2(29C) is reproduced as follows :

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2. Definitions.

In this Act, unless the context otherwise requires,—

(29C) "maximum marginal rate" means the rate of income-tax (including surcharge on income-tax, if any) applicable in relation to the highest slab of income in the case of an individual , association of persons or, as the case may be, body of individuals as specified in the Finance Act of the relevant year.

It may, thus, be seen that as per section 2(29C), the expression '*maximum marginal rate*' means the rate of income-tax (including surcharge on income-tax, if any), applicable in relation to the highest slab of income in the case of an individual, AOP or BOI, as specified in the Finance Act of the relevant year.

From the aforesaid definition of the expression '*maximum marginal rate'*, it may seem that this concept applies in the case of an individual, an AOP or BOI. It clearly implies that the concept of maximum marginal rate will not apply in respect of other taxable entities, viz. a Hindu undivided family, a company, a firm, a local authority or an artificial juridical person.

3. Section 66 – Relating to '*total income*'

Section 66 falls under Chapter VI relating to '*Aggregation of income and set off or carry forward of loss*'. For the sake of ready reference section 66 of the Act, is reproduced as follows :

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66. Total income.

In computing the total income of an assessee, there shall be included all income on which no income-tax is payable under Chapter VII.

It may, thus, be seen that as per section 66, in computing the total income of an assessee, all income on which no income-tax is payable under Chapter VII, shall be included therein.

If we examine the scope and effect of the provisions of section 66, it may be seen that the inclusion of exempt income in the total income is merely for rate purpose.

In other words, the effect of section 66 is to push up the rate of tax applicable to the assessee's non-exempt income. Thus, though the exempt income may not bear any tax itself, its inclusion in the total income will increase the average rate of tax leviable on the assessee.

In the present context, it must be understood that if an item of income cannot be included in the total income, then it cannot be included or taken into account merely for the purposes of rate of income-tax, unless it is covered under section 66. Therefore, the share income from an AOP or BOI, where the AOP / BOI is not liable to maximum marginal rate of tax, will be liable to tax under section 66.

In this context, a reference may also be made to the judgement of the Apex Court in the case of *Sabarkanhta Zilla Kharid Vechan Sangh Ltd. Vs CIT [1993] 203 ITR 1027 (SC)*. It was, *inter- alia*, held in this case that since section 66 requires the computation of total income by including all income on which no income-tax is payable under Chapter VII, the income on which no tax was payable by a co-operative society in the erstwhile section under section 81(i)(d) falling in Chapter VII, had to be necessarily included in its total income.

4. Section 67A – Relating to method of computing a member's share in the income of an AOP or BOI

Section 67A falls under Chapter VI, which relates to '*Aggregation of income and set off or carry forward of loss*'

As the heading of section 67A itself suggests, it provides the method of computing a member's share in the income of an AOP or BOI.

On examination of the provisions of section 67A, it may be seen that it provides for the method of computing a member's share in the income of an AOP or BOI, wherein the shares of the members are determinate and known.

Besides, section 67A was held applicable in a case where the assessee had suffered loss as a member of an AOP and its share of loss was determinate and known.

This was the view expressed by Mumbai Bench of the Tribunal in the case of *Mahindra Holdings & Finance Ltd. Vs Dy.CIT [2009] 311 ITR (AT) 1 (Mum) : [2008] 11 DTR (Trib) 481 (Mum)(TM)*. Same was the view of the Bombay High Court in the case of *CIT Vs Smt. Lalita M. Bhat [1998] 234 ITR 319 (Bom)*. It was held in this case that loss of an AOP can be set off only against its own profits and not against the profits of its members

and a member of an AOP cannot claim in his personal assessment the set off of loss of the AOP.

5. Section 86 – Relating to share of a member of an AOP or BOI in the income of the AOP / BOI

In the present context, the provisions of section 86 are very relevant. It may be stated here that section 86 falls under Chapter VII relating to incomes forming part of total income on which no income-tax is payable. For the sake of ready reference section 86, is reproduced as follows:

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86. Share of member of an association of persons or body of individuals in the income of the association or body.

Where the assessee is a member of an association of persons or body of individuals (other than a company or a co-operative society or a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any law corresponding to that Act in force in any part of India), income-tax shall not be payable by the assessee in respect of his share in the income of the association or body computed in the manner provided in section 67A :

***Provided** that,—*

(a) where the association or body is chargeable to tax on its total income at the maximum marginal rate or any higher rate under any of the provisions of this Act, the share of a member computed as aforesaid shall not be included in his total income;

(b) in any other case, the share of a member computed as aforesaid shall form part of his total income :

***Provided further** that where no income-tax is chargeable on the total income of the association or body, the share of a member computed as aforesaid shall be chargeable to tax as part of his total income and nothing contained in this section shall apply to the case.*

From the aforesaid provisions of section 86, it may be seen that it deals with the tax-treatment of the shares of members of an AOP or BOI in the income of the AOP or BOI and it provides that income-tax shall not be payable in respect of such share, although it shall form part of the total income of the member.

There are two provisos to section 86 of the Act. The first proviso lays down that where the AOP or BOI is taxed at the maximum marginal rate or any higher rate, the share of the member shall not be included in his total income at all. Further, the second proviso lays down that where no income-tax is chargeable on the total income of the AOP or BOI, the share of a member therein, shall be chargeable to tax as part of his total income.

It may also be stated here that an AOP is entitled to carry forward and set off its loss. In this regard, reliance may be placed on the following legal precedents :

(i) *Mahindra Holdings & Finance Ltd. Vs Dy.CIT [2009] 311 ITR (AT) 1 (Mum) : [2008] 11 DTR (Trib) 481 (Mum)*(TM)

(ii) *CIT Vs Smt. Lalita M. Bhat [1998] 234 ITR 319 (Bom).*

In the present context, it will be appropriate to examine the provisions of section 86 *vis-à-vis* the provisions of section 66 of the Act. As per section 66, in computing the total income of an assessee, there shall be included all income on which no income-tax is payable under Chapter VII. Further, as per section 86 of the Act, where the assessee is a member of an AOP or BOI, income-tax shall not be payable by the assessee in respect of his share in the income of an AOP or BOI computed in the manner provided under section 67A. Therefore, on a conjoint reading of section 66 and the main part of section 86, no income-tax shall be payable in respect of share of a member in the income of an AOP or BOI, but the same will be included in the total income of the member for rate purposes.

However, if we examine the provisos to section 86, there appears to be a conflict between the first proviso to section 86 and the provisions of section 66 of the Act. As per clause (a) of the aforesaid first proviso, where the AOP or BOI is chargeable to tax at the maximum marginal rate or any higher rate, the share of a member therein, shall not be included in his total income. Thus, the aforesaid clause (a) is in conflict with the provisions of section 66 and as per the well settled position of law in this regard, the provisions of section 66 will override the provisions of the aforesaid clause (a) and the resultant effect would be that the shares of a member of an AOP / BOI will have to be included in his total income, at least for rate purposes.

However, there is no such conflict between the provisions of section 66 and clause (b) of the aforesaid first proviso and also the second proviso to section 86 of the Act.

6. Section 110 – Relating to determination of tax where total income includes income on which no tax is payable

Section 110 falls under Chapter XII of the Act, the heading of which is, '*Determination of tax in certain special cases*'. Section 110 deals with rebate of tax where the total income of an assessee includes income on which no tax is payable. For the sake of ready reference section 110 of the Act, is reproduced as follows :

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110. Determination of tax where total income includes income on which no tax is payable.

Where there is included in the total income of an assessee any income on which no income-tax is payable under the provisions of this Act, the assessee shall be entitled to a deduction, from the amount of income-tax with which he is chargeable on his total income, of an amount equal to the income-tax calculated at the average rate of income-tax on the amount on which no income-tax is payable.

From the aforesaid provisions of section 110, it may be seen that in respect of incomes on which no tax is payable under the provisions of the Act, first tax is calculated on the total income inclusive of such exempt income and thereafter, income-tax calculated at the average rate on the amount of such exempt income, is allowed as a deduction from the tax payable on the total income. In other words, such incomes are included in the assessment only for rate purposes.

In the present context, a reference may also be made to the judgement of the Apex Court in the case of *Madurai District Central Co-operative Bank Ltd. Vs ITO [1975] 101 ITR 24 (SC).* In this judgement the observations of the Apex Court on page 34 of the Report are relevant, wherein it has been observed that section 110 of the Income-Tax Act, 1961, provides that where there is included in the total income of an assessee, any income on which no tax is payable, the assessee shall be entitled to deduction, from the amount of income-tax with which he is chargeable on his total income, of an amount equal to income-tax calculated at the average rate of income-tax on the amount on which no income-tax is payable.

Besides, in this context, a reference to the judgement of Bombay High Court in the case of *CIT Vs Smt. Lalita M. Bhat [1996] 221 ITR 257 (Bom)*, will also be useful. In this case the observations of the High Court on page 262 of the Report are relevant, wherein it has been observed that in view of the provisions of sections 66 and 86 of the Act, income-tax payable by the assessee has to be determined with reference to the total income (including exempt income), which has the effect of enhancing the average rate of income-tax applicable to the taxable income. In this process, the income-tax computed on the total income at the specified rates would also include income-tax on the exempt income. It is for this reason that section 110 of the Act, provides for grant of deduction of income-tax calculated at the average rate of income-tax on the amount on which no income-tax is payable.

7. Section 167B – Relating to charge of tax where shares of members in an AOP or BOI are unknown, etc.

As could be seen from the heading itself, section 167B relates to charge of tax where shares of members in an AOP or BOI are unknown. It also deals with some other connected situations. Besides, section 167B falls under Chapter XV, which relates to '*Liability in special cases*'. In addition, section 167B falls under Sub-Chapter XV-DD, which relates to '*Firms, association of persons and body of individuals*'. For the sake of ready reference section 167B of the Act, is reproduced as follows :

167B. Charge of tax where shares of members in association of persons or body of individuals unknown, etc.

(1) Where the individual shares of the members of an association of persons or body of individuals (other than a company or a co-operative society or a society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India) in the whole or any part of the income of such association or body are indeterminate or unknown, tax shall be charged on the total income of the association or body at the maximum marginal rate :

***Provided** that, where the total income of any member of such association or body is chargeable to tax at a rate which is higher than the maximum*

marginal rate, tax shall be charged on the total income of the association or body at such higher rate.

(2) Where, in the case of an association of persons or body of individuals as aforesaid not being a case falling under sub-section (1),—

(i) the total income of any member thereof for the previous year (excluding his share from such association or body) exceeds the maximum amount which is not chargeable to tax in the case of that member under the Finance Act of the relevant year, tax shall be charged on the total income of the association or body at the maximum marginal rate;

(ii) any member or members thereof is or are chargeable to tax at a rate or rates which is or are higher than the maximum marginal rate, tax shall be charged on that portion or portions of the total income of the association or body which is or are relatable to the share or shares of such member or members at such higher rate or rates, as the case may be, and the balance of the total income of the association or body shall be taxed at the maximum marginal rate.

Explanation.—For the purposes of this section, the individual shares of the members of an association of persons or body of individuals in the whole or any part of the income of such association or body shall be deemed to be indeterminate or unknown if such shares (in relation to the whole or any part of such income) are indeterminate or unknown on the date of formation of such association or body or at any time thereafter.

From the provisions of section 167B, it may be seen that sub-section (1) deals with a case where the individual shares of the members of an AOP or BOI are indeterminate or unknown and provides that in such cases the AOP / BOI would be assessed at the maximum marginal rate or the higher rate applicable in the case of any of its members.

On the other hand, sub-section (2) deals with a case where the shares are determinate or known, but the total income or part of the total income, is made assessable at the maximum marginal rate if a member of an AOP or BOI, has taxable income. Besides, if

the income of a member is chargeable at a rate higher than the maximum rate, then the AOP / BOI will be assessed at the higher rate in respect of the share of such member and at the maximum marginal rate in respect of the balance of its income.

As regards the interpretation of the provisions of section 167B, a reference may be made to Circular No.551, dt. 23.1.1990 [*183 ITR (St) 7*]. The provisions of section 167B have been explained in para 11 of the aforesaid Circular. As per para 11.3 of the aforesaid Circular, the effect of the provisions of section 167B is that only those AOPs or BOIs will be taxed at the normal rates applicable to the individual, etc., where the shares of the members are determinate and none of the members has taxable income or none of the members is taxable at a rate higher than the maximum marginal rate. Thus, only small AOPs or BOIs formed by persons who themselves are not taxable, would henceforth be taxed at the normal rates. Persons who are taxable in the high income brackets or are taxable at a rate higher than the maximum marginal rate, shall no longer be tempted to form an AOP or BOI, for being taxed at lower rates.

In this context, a reference may also be made to the meaning of the expression '*maximum marginal rate*' as defined under section 2(29C) of the Act. In this context, it will be relevant to state that, as already explained in the aforesaid para (2), the concept of maximum marginal rate will not apply under the provisions of section 167B, if the member of the AOP / BOI is a Hindu undivided family, a company, a firm, a local authority or an artificial juridical person.

In other words, the provisions of sub-section (1) and sub-section (2)(ii) of section 167B will not apply if an AOP / BOI is constituted by the aforesaid category of persons, viz. a Hindu undivided family, a company, a firm, a local authority or an artificial juridical person. It would, therefore, imply that in the aforesaid situation if the total income of any member of the AOP / BOI is more than the maximum amount not chargeable to tax, then and only then such AOP / BOI will be chargeable to tax at the maximum marginal rate.

8. Meaning of the expression '*other than a company or a co-operative society or a society registered under the Societies Registration Act, 1860, or under any law corresponding to that Act in force in any part of India'*, as used in sections 67A, 86 and 167B.

There has been a lot of controversy regarding the purpose and meaning of the phrase – (*other than a company, or a co-operative society or a society registered under the Societies Registration Act, 1860, or under any law corresponding to that Act in force in any part of India*). The aforesaid phrase has been used in sections 40(ba), 67A, 86 and 167B, which were inserted in the Act by the Taxation Laws (Amendment) Act, 1989, w.e.f. 1.4.1989.

The meaning and purpose of the aforesaid phrase, viz. '*other than a company or a co-operative society or a society registered under the Societies Registration Act, 1860 or under any law corresponding to that Act in force in any part of India*', have been explained in the case of *Mahindra Holdings and Finance Ltd. Vs Dy.CIT [2008] 11 DTR (Trib) 481 (Mum) (TM) : [2009] 311 ITR (AT) 1 (Mum) (TM).*

It was held in this case that the words in the parenthesis in all these provisions are identical and therefore, the meaning given to the words in parenthesis in all these provisions must be the same unless the context indicates otherwise. Section 40(ba) provides certain disallowances in computing the income of AOP / BOI. However, such AOP / BOI excludes a company or a co-operative society or a society or other entities specified in the parenthesis. Section 167B(1) provides the rate of tax at which tax on the income of AOP / BOI is to be charged where shares of members of such AOP / BOI are indeterminate or unknown. However, the Legislature has excluded the company or a co-operative society or a society or other entities specified in the parenthesis from the scope of such AOP / BOI. The perusal of these provisions clearly shows that the income of the entities specified in the parenthesis is not to be computed in the manner in which the income of AOP / BOI is to be computed. Section 67A provides the manner in which share of income / loss of member of such AOP / BOI is to be determined. Section 86 provides that such share of income / loss of member of such AOP / BOI shall be included in the total income but no tax shall be payable in respect of such income. If all the provisions are read together, the entities specified in the parenthesis in section 67A would qualify the AOP / BOI and not the member of such AOP / BOI. The context in which all the sections are placed in the statute book does not suggest that different

meanings can be given to the words in the parenthesis in different sections even though identically worded.

It was further held that the expression AOP includes a company or a co-operative society or a society mentioned in the parenthesis and they are excluded for the purposes of the applicability of these sections, to avoid double taxation, once under section 67A, r.w.s. 86 and again when dividend is distributed by them. If it is held that the words in the parenthesis qualify the word '*member*' and not the AOP / BOI, then the company or a co-operative society or a society or other entities in the parenthesis, would not be liable to pay any tax in respect of their share of income in the AOP / BOI. As per the provisions of section 86, even though such share of income is includible in the total income. That would give birth to a legal device for evading the tax by the entities specified in the parenthesis and such absurd result could never have been intended by the Legislature.

It was, thus, clearly laid down that the words in the parenthesis in sections 67A, 86 and 167B, qualify the words AOP and BOI and not the member of such AOP / BOI and therefore, the share of loss of the assessee company in the AOP could not be set off against the assessee's other income. It also implies that a company or a co-operative society, etc. can be members of an AOP / BOI as contemplated under the aforesaid sections 67A, 86 and 167B.

III. Tax-treatment of the share of a company in an AOP, in the computation of its total income.

The proper import of the provisions of section 86, read with the provisions of section 66 of the Act, has already been explained in the earlier para II(5), wherein the provisions of section 86 of the Act, have been discussed in detail. As explained therein, there appears to be a conflict between the first proviso to section 86 and the provisions of section 66 of the Act. As per clause (a) of the first proviso to section 86, where the AOP or BOI is chargeable to tax at the maximum marginal rate or any higher rate, the share of a member therein shall not be included in his total income. Thus, the aforesaid clause (a) is in conflict with the provisions of section 66.

In view of the aforesaid reasons, it will be necessary to examine the purpose of a proviso as also the title of the Chapter and heading of a section of the Act. The same are discussed as follows :

1. The function / purpose of a proviso

In order to understand the proper function or purpose of a proviso, it may e necessary to refer to the following legal precedents :

(i) CIT Vs Indo-Mercantile Bank Ltd [1959] 36 ITR 1 (SC)

It was, *inter-alia*, held in this case by the Supreme Court that the proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out from the main enactment, a portion which, but for the proviso, would fall within the main enactment. Ordinarily, it is foreign to the proper function of a proviso to read it as providing something by way of an addendum. Besides, if the language of the main enactment is clear, it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says.

(ii) CIT Vs Pyarilal Kasam Manji And Co.[1992] 198 ITR 110 (Orissa)

It was, *inter-alia*, held in this case that the function of a proviso is to carve out an exception to the main enactment. It cannot, normally, be so interpreted as to set at naught the real object of the main enactment.

2. Use of title of a Chapter for the interpretation of a section thereunder

In the present context, it has to be noted that sections 66 and 67A fall under Chapter VI, the title of which is, '*Aggregation of income and set off or carry forward of loss*'. It is, thus, clear that Chapter VI of the Act, relates to computation of total income. It would, therefore, imply that section 67A also relates to the inclusion of share of a member in the AOP, for the purposes of computation of his / its total income.

Similarly, the title of Chapter VII of the Act is '*Incomes forming part of total income on which no income-tax is payable'*. It clearly implies that Chapter VII of the Act, which includes section 86, primarily deals with incomes which are included in the total income of the assessee but on which no income-tax is payable.

In this context, it may also be stated that the title of a statute is an important part of the Act and may be referred to for the purposes of ascertaining its general scope and of throwing light on its construction, although it cannot override the clear meaning of the enactment.

The aforesaid view is supported by the following judgements of the Supreme Court.

(i) Ashwini Kumar Ghose Vs Arabinda Bose, AIR 1952 SC 369; and

(ii) Poppat Lal Shah Vs State of Madras, AIR 1953 SC 404.

3. Use of heading of a section for its interpretation

In this context, it may be stated that for ascertaining the legislative intent, regard may be had to the heading as conveying the spirit of the section in the legislation. The aforesaid view is supported by the judgement of the Calcutta High Court in the case of *CIT Vs Indian Products Ltd. [1994] 207 ITR 647 (Cal)*

It was held in this case that the heading of a section is relevant in order to ascertain the legislative intent of any provision of law.

In addition to the aforesaid discussion, a reference may again be made to the provisions of section 86 of the Act. As per section 86 of the Act, where the assessee is a member of an AOP or BOI, income-tax shall not be payable by the assessee in respect of his share in the income of the AOP or BOI computed in the manner provided in section 67A of the Act. In this regard it may also be pointed out that section 67A falls under Chapter VI which relates to '*Aggregation of income and set off or carry forward of loss*'. Besides, section 66 which clearly lays down that all the income on which no income-tax is payable under Chapter VII shall be included in the total income of the assessee; also falls under Chapter VI of the Act.

In the light of the aforesaid reasons, clause (a) of the first proviso to section 86 of the Act, will have to be ignored and therefore, notwithstanding the provisions of the aforesaid clause (a), share of a member of an AOP shall be included in his / its total income, irrespective of the fact, whether or not the AOP is chargeable to tax at the maximum marginal rate or any higher rate of tax.

In other words, the total income of a member of an AOP will include his share of income in the AOP, though such member will be entitled to get a rebate of income-tax in respect of the aforesaid share of income, as per the provisions of section 110 of the Act.

IV. Applicability of the provisions of section 115JB, relating to MAT in the present scenario.

We may now examine the provisions of section 115JB of the Act, which relate to the levy of minimum alternate tax (MAT).

From the provisions of section 115JB(2), it may be seen that every assessee, being a company shall 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. Further, as per

Explanation 1 to section 115JB(2), '*book profit*' means the net profit as shown in the profit and loss account for the relevant previous year under section 115JB(2), subject to clauses (a) to (*i*) and also clauses (i) to (viii), thereunder.

Normally, the share of a company as member of an AOP will be disclosed in its profit and loss account, as prepared under the relevant provisions of the Companies Act, 1956. Therefore, the aforesaid share of profit from an AOP will form part of the '*book profit*' for the purposes of levy of MAT under section 115JB of the Act.

In the present context, it will also be relevant to examine the meaning of the term '*book profit*', under section 115JB and also examine the provisions of section 115JB(5) of the Act. The same are discussed as follows :

1. **The meaning of the term '*Book profit*'**

   If we examine the provisions of section 115JB(1), it may be seen that '*Book profit*' shall be deemed to be the '*total income*' of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of 18.5 per cent.

   It may, thus, be safely concluded that all the provisions of the Act, applicable to '*Total income*' will equally apply to '*Book profit*', as contemplated under section 115JB(1) of the Act.

2. **Examination of the provisions of section 115JB(5)**

   In the present context, the provisions of section 115JB(5) are quite relevant. For the sake of ready reference section 115JB(5), is reproduced as follows :

   115JB. Special provision for payment of tax by certain companies.

   (5) Save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company, mentioned in this section.

From the aforesaid provisions of section 115JB(5), it may be seen that save as otherwise provided in section 115JB, all other provisions of the Act shall apply in relation to section 115JB.

In the present context, Circular No.13 of 2001, dt. 9.11.2001, issued by the CBDT, is quite significant. The aforesaid Circular was issued by the CBDT in order to explain the

provisions of the newly inserted section 115JB, by the Finance Act, 2000, w.e.f. 1.4.2001. In para (2) of the aforesaid Circular, the CBDT has provided a clarification regarding the provisions of sub-section (5) of section 115JB. The relevant part of para (2) of the aforesaid Circular is reproduced as follows :

Sub-section (5) specifies that save as otherwise provided in this section, all other provisions of this Act shall apply to every assessee, being a company mentioned in that section. In other words, except for substitution of tax payable under the provision and the manner of computation of book profits, all the provisions of the Act including the provisions relating to charge, definitions, recoveries, payment, assessment, etc. would apply in respect of the provisions of this section.

From the aforesaid clarification provided by the CBDT, regarding section 115JB(5), it is quite clear that except for the substitution of tax payable and the manner of computation of book profit, all the provisions of the Act, including the provisions relating to charge, definitions, recoveries, payment, assessment, etc., would apply in respect of the provisions of section 115JB. It, therefore, implies that all the aforesaid other provisions of the Act, will be fully applicable in regard to section 115JB of the Act.

In the light of the aforesaid reasons, it may be stated that though the provisions of section 115JB(1) start with a *non-obstante* clause, yet in view of the provisions of section 115JB(5), the aforesaid provisions of the Act, viz. sections 66, 86, 110 and 2(10), etc, will be equally applicable in respect of the provisions of section 115JB, for the computation of MAT.

In the light of the aforesaid reasons, in the first place the share of income of a company from an AOP will have to be included in the total income of the company as contemplated under section 2(45) of the Act. In addition, the aforesaid share profit will also form part of the book profit which is deemed to be the total income of the assessee under section 115JB(1) of the Act. Therefore, the tax payable by the company on its total income, being thirty per cent (30%) thereof, will be more than the MAT computed at the rate of eighteen and one half per cent (18.5%) of the book profit and accordingly, the provisions of section 115JB will not apply in the case of the company.

Besides, as already pointed out, the rebate in respect of MAT computed on the aforesaid book profit will be equally available to the company, in respect of its share of income from the

AOP. Thus, under all circumstances, the tax payable by the company on its total income as contemplated under section 2(45) of the Act, will be more than the MAT computed on the book profit, wherein the share of profit of the company from the AOP is included.

V. Conclusion

In the light of the discussion in the preceding paras, it may be seen that :

1. A company can be a member of an AOP.
2. The share of income of a company from an AOP, will have to be included in its total income as contemplated under section 2(45) of the Act.
3. The provisions of section 115JB, relating to levy of MAT, will not be applicable in such a scenario.
4. The expression '*other than a company, or a co-operative society, or a society registered under the Societies Registration Act, 1860, or under any law corresponding to that Act in force in any part of India*' used in section 67A, 86 and 167B, qualify the words AOP or BOI and not the member of such AOP or BOI.

   Besides, in view of the aforesaid reasons, the share of loss of a company in an AOP cannot be set off against the other income of the company.
5. The concept of '*maximum marginal rate*' will not apply in respect of a Hindu undivided family, a company, a firm, a local authority, or an artificial juridical person.
6. The provisions of sub-section (1) and sub-section (2)(ii) of section 167B will not apply if an AOP is constituted by a Hindu undivided family, a company, a firm, a local authority, or an artificial juridical person.

   In other words, if an AOP is constituted by a number of companies, then the provisions of sub-section (1) and sub-section (2)(ii) of section 167B will not apply.

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