IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCHES "I", MUMBAI

BEFORE SHRI P M JAGTAP, ACCOUNTANT MEMBER

& SHRI SANJAY GARG, JUDICIAL MEMBER

ITA No. 4069/Mum/2001 Assessment Year : 1994-95

M/s. Hathway Investments Pvt. Ltd., Rahejas, 4th floor, Plot No.8C, Santacruz (West) Mumbai- 400 054 PAN : AAACH1675B	Vs.	Addl. CIT Spl. Range 50, Mumbai
(Appellant)		(Respondent)

ITA No. 2406/Mum/2001 Assessment Year : 1994-95

Addl. CIT Spl. Range 50, Mumbai	Vs.	M/s. Hathway Investments Pvt. Ltd., Mumbai- 400 054
(Appellant)		(Respondent)

ITA No. 7317/Mum/2002 Assessment Year : 1995-96
ITA No. 7318/Mum/2002 Assessment Year : 1996-97
ITA No. 103/Mum/2005 Assessment Year : 1996-97
ITA No. 734/Mum/2005 Assessment Year : 2000-01
ITA No. 735/Mum/2005 Assessment Year : 2001-02
ITA No. 5085/Mum/2005 Assessment Year : 2002-03

DCIT CC-34, Mumbai	Vs.	M/s. Hathway Investments Pvt. Ltd., Mumbai- 400 054
(Appellant)		(Respondent)

For the assessee : S/Shri Percy J Pardiwala, NirajSheth, Harish Shah
For the revenue : ShriO.P.Singh
Date of hearing : 16.07.2013

Date of Pronouncement : 07.08.2013

O R D E R

PER SANJAY GARG, JM:

These appeals by the revenue and the assessee include cross-appeals for A.Y. 1994-95 and six other appeals by the revenue against separate orders of the CIT(A) for Assessment years as captioned above. As common issues are involved in all these appeals, they were heard together and are disposed off by this common order for the sake of convenience.

ITA No. 4069/Mum/2001 Assessment Year : 1994-95

2. The grievance raised in ground nos. 1 to 7 pertain to disallowance of depreciation claim of Rs. 4,99,72,800/- in respect of electric meters acquired from Gujarat State Electricity Board (GEB) & leased back to GEB:

3. The facts of the case are that the appellant purchased 1,43,600 energy meters of different makes for measuring electrical energy as per sales invoice dated 23rdMarch, 1994 for a consideration of Rs. 49972800.00 from Gujarat State Electricity Board , herein referred to as GEB. These meters (assets) were then immediately leased back to GEB vide lease agreement dated 21/23-3-1994. After deduction of lease management fee and first month's rental, the appellant paid Rs. 4,83,86,154/- to GEB. In the P & L A/c, the appellant has credited lease rental income and lease management fees of Rs.8.16 lakhs and at the same time it has claimed depreciation of Rs. 4,99,72,800/- i.e. @ 100% of the cost of assets, under proviso to Section 32(1) of the I.T. Act, on the ground that the cost of each meters was below Rs.5,000/-. Income-tax return was earlier processed under section 143(1)(a) accepting the returned loss. However, subsequently, notice under section 148 dated 25.10.1999 was issued in response to which the assessee filed the return of income showing net loss of Rs. 11,676/-. The assessment was completed on income of Rs.5,15,19,234/- as the A.O. rejected the claim for depreciation of Rs.4,99,72,800/- and also made disallowance of depreciation

on certain office premises and residential premises as well as charged interest under section 234B. It was submitted on behalf of the assessee that it paid full consideration for the purchase of the said meters to GEB and accordingly became the owner of the said meters. The Gujarat Government exempted the transaction from Sales Tax. Subsequently it entered into an agreement for lease of these meters on 23rd March 1994 on the terms and conditions as contained in the said agreement for lease. It claimed depreciation in respect of the said meters leased to GEB and lease rentals for the said period were offered for taxation as business income. The A.O. however completed the assessment disallowing depreciation for the reasons as summarized by the learnedCIT(A) in the impugned order, which are reproduced as under:-

A) There are certain terms in the lease agreement which if considered in the light of the surrounding circumstances, it would show that it was a transaction of finance only and the assets were held as a security for the finance given. Several terms of the lease agreement are incongruent or contrary to the legal norms regarding mutual rights and liabilities of the owner and hirer in a true agreement of hire. These have been mentioned in para 1(1) to 1(10) of notice u/s. 142 (1) dated 10.02.2000.

B) Further, as per the aforesaid notice u/s 142(1), there was no physical delivery of the assets, identification and exact location of the assets was not specified, the sale value of the assets has been fixed on lump-sum basis without ascertaining the value of each item and apparently, it was a paper transaction.

C) The appellant has not assumed any risk of ownership of the asset which is contrary to the provisions of Section 26 of Sale of Goods Act.

D) GEB has been made liable to the lessor for any loss or damage occurring to the asset during transportation, delivery, use or its failure to perform or operate, etc.

E) In the event of irreparable loss or damage to the asset as a whole for whatever reasons, the lessor would be entitled to recover from the lessee all the lease rentals for the fixed period of the lease, including the lease rentals for the unexpired portion of the fixed period.

F) The clause of the lease bring out the reality of the terms of lease transaction which was in the nature of a finance transaction only.

G) The lessee has been made liable to obtain all consents/licences/approvals, etc. for import, storage,

installation, use, operation of the asset during the currency of the lease and also to meet all costs in connection with preservation, insurance, maintenance and operation of the asset.

H) Other important clauses as mentioned in the notice u/s 142(1) which are said to be contrary or inconsistent to claim of legal and absolute ownership over leased assets and are also contrary to the legal norms regarding mutual rights and liabilities of a lessor and lessee are:-

i) Lease was for a fixed period which was non-cancellable either by lessor or lessee except as provided in the agreement.

ii) All payments made/cost incurred by the lessor (for acquisition of asset) will carry interest at a stipulated rate.

iii) The lessor would be entitled to terminate the lease for any default committed by the lessee on occurrence of any event as enumerated in Article 8.1 and on such termination, the lessor would be entitled to repossess the assets and shall recover and the lessee should pay the entire amount of rental for the fixed period including the rental for the unexpired portion of the fixed period as if the lease has not been terminated.

iv) After the expiry of the lease period the lease can be renewed indefinitely at the lessee's (sole) option on a year to year basis on payment of a token lease rental @ Rs.1/- per Rs.1,000/- of the cost of the assets.

v) The lease rental payable for the fixed period of lease is to be worked out on the basis of actual cost of acquisition of the asset at the stipulated rates @ 100% depreciation allowance to which the lessor would be entitled.

I) There may be indefinite renewal of the lease under which the leased asset would for all practical purposes pass into the hands of the lessee.

J) The appellant has only financed the cost of acquisition of the asset by the GEB without any intention of every possessing the asset or exploiting the asset for profit in the capacity of the owner of the asset.

K) The asset never leaves the possession of the lessee.

L) It is not a transaction of lease but a transaction of loan or finance in reality, with the assets held in the name of the appellant only for the purpose of the security and the

transaction has in fact been embodied in the garb of lease transaction for expected tax benefits.

M) As per the International Accounting Standard No. 17, the treatment of lease transaction in case of a finance lease is different. As per this Standard for the purpose of accounting the lessor in respect of finance leases should not claim themselves as the owner of the leased assets, but should disclose the amount receivable (loan advanced) from the lessee as asset in the balance sheet. For the purpose of disclosure of profit the lessor should bifurcate the lease rental in two parts namely finance income (interest) and repayment of loan and should only disclose as income from the finance income reflecting return at a constant periodic rate (interest rate implicit in the lease) on the outstanding investment following reducing balance method.

N) The guidance note issued by the Institute of Chartered Accountants of India also adopts substantially the same criteria to distinguish between 'finance lease' and 'operating lease' and in the matter of accounting of lease income in the hands of the lessor in case of a 'finance lease', agrees in substance with the view expressed in the International Accounting Standard 17 that the lessor should only recognize from year to year the interest component of the lease rentals received as income in consonance with the inherent nature of a 'finance lease'. The guidance note also suggests that one can also follow the International Accounting Standard 17 in the matter of such accounting.

O) Reference has been made to the accounting policies in respect of such lease transaction adopted by the GEB and it is stated in para 13 of the Annual Report as under:-

"Having recognized the position of the lease arrangements and associated terms and conditions thereof and the principles followed as stated above, the lease rentals payable by the board in installments of the leasing company have been provided towards charges for interest and balance towards the liability for the assets on lease."

P) Para 13 of the notes to the Annual Accounts (reproduced below) strengthens the view that the appellant is not the legal owner of the assets:-

"The board has availed finance under Lease Finance Arrangements from various institutions and under the said arrangements, the leased assets will get transferred to the Board on expiry of the lease period on payment of terminal value ranging from 1 to 2% of the original cost of the relevant

assets. Accordingly, the Board's financial obligations under the Lease Arrangements has been provided as liability in the books of accounts and correspondingly, the leased assets are taken under the block of fixed assets. Depreciation has also been provided for on the leased assets for the use of these assets."

.....

"The Board has also availed finance under Sale and Lease back arrangement. On sales of such assets to the Leasing Company, the relevant amount has been booked as "Gain on sale of Fixed Assets" and as "Capital Reserve". The assets taken back on lease under such arrangement has been shown as "Assets taken on lease" in the accounts at the value at which it has been sold and the corresponding liability of these loans have been credited in the books of Accounts (Statement-I, Schedule-12, Statement-3, Schedule-19 & Schedule-32 & Schedule-35)".

Q) Physical inspection of the assets has not been taken.

R) The lease agreement is against public policy.

S) The appellant did not get absolute ownership & title over the assets and the whole transaction is a colourable device to give picture of a genuine transaction with the twin purpose of financing the GEB and making a claim of depreciation.

T) The transaction is a collusive arrangement/transaction of finance only that served as a colourable evidence in avoiding the incidence and payment of income-tax by claiming huge depreciation against a small rental income offered to tax."

4. In view of the various reasons given in the assessment order, it was held by the Assessing Officer that the intention of the assessee was to enter into a transaction of loan or finance and the assets were held in the name of the assessee only for the purpose of security of the loan given which could be seized in case of default by the lessee and the assessee had never intended to be the real owner of the assets. It was thus, concluded that the alleged lease transaction was in reality a transaction of finance/loan only and the assessee was never the real and legal owner of the assets in as much as it was not in a position to exercise rights of a lawful owner of the assets.

Accordingly, the claim of depreciation on the assets of Rs.4,99,72,800/- was disallowed. However, since the transaction was held to be a finance transaction, capital component of payment comprised in lease rental as

worked out by the appellant at Rs. 3,16,000/- was deducted as a consequence of the treatment accorded to the transaction subject to rectification.

5 The ld. CIT(A) vide impugned order under appeal also upheld the action of the A.O. in disallowing the claim of depreciation to the assessee.

6. Before us the learned representative of the assessee has submitted that the assessee is a company which inter alia carries on leasing activities. There was constructive delivery of energy meters and as such physical movement of the meters was not necessary. The meters have been installed in Godhra O & M Circle of GEB. A confirmation of existence of assets by State Electricity Board of Government of Gujarat is concrete and complete evidence of the existence of the assets. it was only for the assessee and not for the Income-tax authorities to decide whether to enter into any transaction without insisting on the exact specification of the items or not; and that by avoiding physical delivery of meters as the same had already been installed in various residences and industrial places, the assessee has not only avoided unnecessary expenditure on removing and reaffixing of the meters but also helped the consumers by providing uninterrupted supply of power and saved loss of revenue to the Government on account of a discontinuance of the power supply. The transaction was a bona fide, genuine and real transaction and there is no evidence to suggest that the Agreement of lease was entered into only as a means to obtain security or that the assessee had advanced loan to GEB. It is stated that the purpose for which GEB has entered into the transaction cannot alter the nature of the transaction viz. lease of assets and does not in any way affect the claim of the assessee for grant of depreciation. It has been further submitted that the assessee had purchased full ownership rights in the assets and paid full consideration thereof to GEB. The various terms and conditions of the lease agreement as have been referred to in the assessment order are the normal clauses which form part of any lease transaction. It is further stated that there are several clauses in the agreement for lease which categorically refer to the assessee as the owner of

the assets and to the various rights of the assessee as an owner. Even the very act of the Government of Gujarat in exempting the transaction from Sales Tax is to recognize the transaction as a sale from GEB. The ld. AR has further submitted that in a case of sale and lease back transaction, the asset would remain with the lessee only and it would not be really necessary for the assessee to take possession of the asset and then give it back to the lessee. He has further submitted that the claim of depreciation in not dependent on the fact whether the asset leaves the possession of the lessee. The transaction was with a State Government and it would be highly improper to impute any collusiveness or colourable nature of the transaction without any concrete evidence. The fact that GEB may have already claimed depreciation on the said assets or its W.D.V. in the books of lessee is nil is in no way relevant and does not affect the claim of the assessee for depreciation. The decision to purchase the asset and lease it back to the seller was purely a business decision to earn income by way lease rental. In the process, if assessee gets tax benefits to which it was entitled under the law, it cannot be described as a colourable device. It is stated that while striking a business deal, tax aspect will always be considered, because it directly affects the fund flow and cash flow situation of the business. It has been elaborated that to claim depreciation on assets, two conditions need to be fulfilled- one that the assessee must be the owner of the assets and secondly the assets must be used for the business of the assessee. According to the assessee it is beyond doubt, it is the full and true owner of the meters and that the said meters and the meters have been used by it in its business of leasing. Accordingly, both the conditions as stated above have been fulfilled and the assessee is therefore, entitled to claim depreciation. The assessee has also relied upon various case laws, which we will discuss in subsequent paras of this order.

7. The Ld. DR on the other hand relied upon the detailed orders of the authorities below.

8. We have carefully considered the rival submissions made on behalf of the parties and have also minutely gone through the record. Our findings in respect of the matter are as under:

There is no doubt about the legal provisions that an assessee being the owner of the assets is entitled to claim the depreciation on assets under Section 32 of the Income Tax Act.

The meaning of the word 'depreciation' as well the requirements of Section 32 to be eligible to claim such depreciation of assets has been discussed by the Hon'ble Supreme Court in 'M/S I.C.D.S. Ltd v Commissioner of Income Tax, Mysore and another' (Civil Appeal No. 3282/2008 decided on 14.01.2013) as under:-

> *"9. Section 32 of the Act on depreciation, pertinent for the controversy at hand, reads as follows:*
>
> *"32. (1) in respect of depreciation of-*
>
> *(i) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed-*
>
> *i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed ;]*
>
> *ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed*
>
> *Provided that no deduction shall be allowed under this clause in respect of—*
>
> *(a) any motor car manufactured outside India, where such motor car is acquired by the assessee after the 28th day of February, 1975 but before the 1st day of April, 2001, unless it is used—*
>
> *i) in a business of running it on hire for tourists ; or*
>
> *ii)outside India in his business or profession in another country ; and*

(b) any machinery or plant if the actual cost thereof is allowed as a deduction in one or more years under an agreement entered into by the Central Government under section 42

Provided further that where an asset referred to in clause (i) or clause (ii) or clause (iia) as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub- section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) [or clause (iia)], as the case may be." (Emphasis supplied)

10. Depreciation is the monetary equivalent of the wear and tear suffered by a capital asset that is set aside to facilitate its replacement when the asset becomes dysfunctional. In P.K. Badiani Vs. Commissioner of Income Tax, Bombay[2], this Court has observed that allowance for depreciation is to replace the value of an asset to the extent it has depreciated during the period of accounting relevant to the assessment year and as the value has, to that extent, been lost, the corresponding allowance for depreciation takes place.

11. Black's Law Dictionary (5th Edn.) defines 'depreciation' to mean, inter alia*:"A fall in value; reduction of worth. The deterioration or the loss or lessening in value, arising from age, use, and improvements, due to better methods. A decline in value of property caused by wear or obsolescence and is usually measured by a set formula which reflects these elements over a given period of useful life of property.... Consistent gradual process of estimating and allocating cost of capital investments over estimated useful life of asset in order to match cost against earnings..."*

The 6th Edition defines it, inter alia, in the following ways:

"In accounting, spreading out the cost of a capital asset over its estimated useful life.

A decline in the value of property caused by wear or obsolescence and is usually measured by a set formula which reflects these elements over a given period of useful life of property."

*1*2. Parks in Principles & Practice of Valuation (Fifth Edn., at page 323) states: *As for building, depreciation is the measurement of wearing out through consumption, or use, or effluxion of time. Paton has in his Account's Handbook (3rd Edn.) observed that depreciation is an out-of- pocket cost as*

> *any other costs. He has further observed-the depreciation charge is merely the periodic operating aspect of fixed asset costs.*
>
> 13. The provision on depreciation in the Act reads that the asset must be "owned, wholly or partly, by the assessee and used for the purposes of the business". Therefore, it imposes a twin requirement of 'ownership' and 'usage for business' for a successful claim under Section 32 of the Act."

So as held by the Hon'ble Supreme Court, the section 32 of the Income Tax Act imposes two conditions to be eligible for assessee to claim depreciation i.e. the assessee must be owner of the assets either wholly or partly and secondly the assets must be used for the business of the assessee.

9. Now in view of above parameters, as laid down by the Hon'ble Supreme Court in M/S I.C.D.S. (supra), we will have to see whether in the case in hand, the assessee satisfies the requirements of the above mentioned twin conditions to be eligible to claim depreciation on the assets/meters?

10. It is pertinent to mention here that in this case, the transaction in dispute is relating to sale and lease back of the assets i.e. of electric meters in question. The assessee has claimed that after purchasing the meter in question from GEB, it has become owner of the meters and, thus, is entitled to claim depreciation being the owner of the assets. On the other hand, the case of the revenue is that the sale transaction in question was a Sham transaction. In fact, it was a transaction of finance given by the assessee to the GEB to earn interest on the financed amount. It is also the case of the revenue that the lease deed relied upon by the assessee is 'sham' and even in no event can be said to be an 'operating lease deed', but at the most a 'finance lease deed', in which case, it is the lessee, who is the owner of the assets.

It is pertinent to mention here that there is no definition given either of operating lease or of the finance lease either under the Income Tax Act or under the Transfer of Property Act so as to make a distinction between the two.

However the term lease has been defined under Section 105 of the Transfer of Property Act, 1882 but the same is in context to lease of immovable property. The said definition is reproduced as under:-

> *"a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms"*

The said definition when applied in case of lease of moveable properties would mean that the lease is the transfer of right to enjoy the property in question. Such a transfer of right can be made for a fixed time or for indefinite time and in lieu of getting the right to possess and enjoy the property, the lessee has to pay certain considerations either in cash or in kind to the lessor.

The terms like finance lease, operating lease, sale and lease back etc. have found their mention in commercial transactions. The terms finance lease and operating lease, have been explained in guidance note on Accounting for Leasesof the ICAI as under:

> *"'Finance lease' means: 'A lease under which the present value of the minimum lease payments at the inception of the lease exceeds or is equal to substantially the whole of the fair value of the leased asset.*
>
> *'Operating lease' has been defined to mean: 'A lease other than a finance lease'.*
>
> *The phrase 'fair value' as used in the definition of 'Finance lease' has been further defined to mean: 'The amount for which an asset could be exchanged between a knowledgeable, willing buyer and a knowledgeable, willing seller in an arm's length transaction"*

11. The issue relating to definition and meaning of operating and finance lease came into consideration before the Special Bench of the ITAT in 'M/s. IndusInd Bank Limited' (ITA No. 6566/M/2002) decided on 14.03.2012.

The Special Bench of the Tribunal, in the said authority, after carefully considering the guidance note of Accounting Standard (AS) 19, the law laid down by the *Hon'ble Supreme Court in 'Asea Brown Boveri Limited v. Industrial Finance Corporation of India' [(2006) 154 Taxman 512 (SC)]*,and further in *'Association of Leasing & Financial Services Companies v. Union of India &Ors.' [2010-(SC2)-GJX-0838-SC]* and also by the Hon'ble Bombay High Court in 'Avinash Bhosale v. Union of India &Ors' [(2010) 322 ITR 381 (Bom)] has drawn the following broad features of a finance lease:-

> *"5.14 Thus it is apparent that the broader guidelines laid down by the Hon'ble Supreme Court in the case of ABB Ltd have been reiterated in the latter case of Association of Leasing & Financial Services Companies v. Union of India &Ors. On a fair reading of the aforenoted two judgments rendered by the Hon'ble Supreme Court in the light of the Guidance Note and the AS 19, we can draw the following broad features of finance lease :-*
>
> *- Such a lease is non-cancellable and there is a fixed obligation on the lessee for payment of lease money. In case lease is terminated prematurely by the lessee, the lessor is entitled to recover his investment with expected interest.*
>
> *- Such a lease is always for a fixed period, which period is decided by taking into consideration the economic life of the asset.*
>
> *- The initial lease period is settled in such a way so as to fully recover the investment of the lessor together with interest thereon.*
>
> *- Lessor is always interested in the recoupment of his investment with interest in the shape of rentals over the period of lease and not the asset or its user.*
>
> *- It is the responsibility of the lessee to bear all costs of insurance, repairs and maintenance and other related costs and expenses for the leased equipment.*
>
> *- Though the equipment is chosen by the lessee but the payment to the supplier is made by the lessor. Thus it is the lessee who chooses the assets, takes delivery, enjoys the use of the asset, bears its wear and tear. It is the lessee who becomes the real owner of the asset.*
>
> *- It is the lessee who pays taxes etc. in relation to such asset.*

- The risks and rewards incidental to the ownership vest with the lessee.

- The features of bailment are absent in such a lease.

- The lessor simply holds the title of asset as his security till his investment and interest thereon is recouped. The lessor is only symbolic owner during the period of lease and on the expiry of lease period, even such symbolic ownership also comes to an end."

12. From the perusal of the above said features drawn by the 'Hon'ble Special Bench' of the ITAT, it can be gathered that in fact a 'finance lease' can be said to be a 'sale' which is given the colour of the 'lease' by the parties for their mutual benefit and to avoid the consequences pertaining to tax liability or otherwise. In case of sale and lease back transactions, the asset is sold by the first person to the second person and thereafter is taken back on lease from buyer by the seller. In such type of transactions, it is to be seen whether the sale transaction is the real transaction or is a sham transaction with the object of enabling the alleged purchaser/second person to claim himself as the owner of the goods, which are further claimed to be leased back to the first person i.e. seller or the original owner of the goods. In a Sham transaction of sale and lease back, in fact, the ownership of the goods is not transferred to the alleged lessor, but is shown to be done, so as to enable the second person/purchaser to claim ownership for the goods for the purpose of claiming relief, deduction or allowances under the taxation statutes or otherwise.

While defining the term 'sham transaction'; the The Kolkata Bench of the Income Tax Appellate Tribunal in the case of Maersk Line UK Limited (ITA No. 2150/Kol/2009) has observed as under :

"a transaction can be regarded as a "sham" where "the document is not bona fide nor intended to be acted upon, but is only used as a cloak to conceal a different transaction" or where "it is intended to give to third parties the appearance of creating between the parties legal rights and obligations which are different from the actual legal rights and obligations which the parties intend to create".

The question before us is whether the 'sale and lease back' transactions in question in the case in hand is a genuine transaction or a Sham transaction done with the object to defeat the provisions of Income Tax Act and to facilitate the benefits of deduction/depreciation to a person who otherwise is not eligible to claim the same.In the case in hand, the GEB allegedly sold143600 meters to the assessee vide sale invoice dated 23.3.1994. To decide whether the said sale transaction is a genuine sale transaction or a sham transaction, we think it proper to firstly discuss the relevant provisions of 'Sales of Goods Act,1930, as to what constitutes a valid sale.

The term sale has been defined under Section 4 of the sales of the Goods Act, 1930 as under:-

> "***4. Sale and Agreement to sell-***
>
> *(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.*
>
> *(2) A contract of sale may be absolute or conditional.*
>
> *(3) Where under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.*
>
> *(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."*

13. A perusal of section 4 of the sale of Goods Act as reproduced above, reveals that there are three essentials for the contract of sale i.e.

(i) There must be a transfer of general property in the goods sold

(ii) It must be by the seller to the buyer which means from one person to another i.e. the seller and buyer must be different persons. It follows from the general rule that a person cannot purchase his own goods.

(iii) The third requirement is that the sale must be for a price.

14. In the case in hand, the alleged sale has been made by GEB to the assessee for a price of Rs. 49972800/-.However, though the assessee has claimed that the property in the goods has transferred to it, but, the revenue claims that the property in goods has never transferred to the assessee.

As per Section 18 of the Sale of goods Act for the transfer of the property in the goods, Goods must be ascertained. The said section for the sake of convenience is reproduced as under:

> *"**18. Goods must be ascertained.** - Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained."*

It has been provided that no property in the goods is transferred to the buyer unless and until the goods are ascertained. The identification of the goods is a sine qua non for the contract of sale. Even in case of unascertained goods or future goods, ownership will not pass to the buyer until the goods are ascertained.

As per Section 21 of the said Act, where the sale is of specific goods, the said goods must be in a deliverable stage.

> *"**21. Specific goods to be put into a deliverable state.-** Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof."*

It is now well settled that even in case of sale of portion of a specific larger stock, till the portion is identified and appropriated to the contract, the property does not passes to the buyer as per Section 23 of the Sale of Goods Act.

> *"**23. Sale of unascertained goods and appropriation.-***
>
> *(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in*

a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Delivery to carrier. Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the Purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

So even in case of sale of unascertained goods or future goods by description, the goods of that description in deliverable state should be unconditionally appropriated to the contract and both the buyer and seller must have given their ascent to it. The very essential for passing of the property in goods is that the goods must be ascertained and the same should be in a deliverable state and further should be appropriated to the contract and both the parties to the contract must have assented to the said apportionment.

15. Now coming to the case in hand, the goods were allegedly owned by the GEB. The same are allegedly purchased by the assessee vide sale invoice dated 23.03.1994. A perusal of the said sale invoice, copy of which has been placed in the file as Annexure-A, reveals that it is a general sale invoice regarding sale of 1,43,600 ISI marked AC single phase 2.5/10 and 5/20 240 volts energy meters of different make. The specific description of the meters have not been mentioned in the sale invoice. The fact of non-mention of specific details like meter numbers, make/manufacture etc. is very much important in the case because the possession of the meter/goods in question was never delivered by the GEB to the assessee. The seller i.e. GEB may be the owner of so many meters as it is in the business of supplying the electricity to the consumers in the State of Gujarat and so many meters must have already been installed by the GEB in the premises of its consumer even before the sale transaction in question and even after the sale transaction in question. The goods were not delivered practically to the

purchase in this case. Under such circumstances, which ascertained goods were actually the subject matter of the sale transaction cannot be gathered from the perusal of the sale invoice.

16. Now coming to the lease agreement in question, clause 1.3, of the said lease deed relates to the description of the 'equipment' ,which for the sake of convenience is reproduced as under:-

> *"1.3 "Equipment"*
>
> *The Equipment described in the Schedule to this Agreement purchased/imported by the Lessor, at the request of the Lessee, from the Manufacturer named in the Schedule and leased to the Lessee for its use and includes any individual items comprised in the Equipment and all alterations, replacements and/or additions to the Equipment or any item or part thereof during the period of this Agreement."*

In the schedule to the lease agreement, the description of the lease agreement has been mentioned as under:-

"1. Description of the equipment:

ISI Marked AC Single Phase 2.5/10 and 5/20 240 vots energy meters of different makes.

Total quantity 1,43,600 nos.

2. Equipment to be used at:

In the State of Gujarat"

So, neither from the sale invoice nor from the lease agreement, it is revealed that which specific ascertained goods were sold by the GEB to the assessee. What has been mentioned is that 'single phase meters of different make which were to be used in the State of Gujarat'. Out of so many meters used and installed in the premises of the consumers by the GEB which specific 1,43,600 meters were sold by the GEB to the assessee and further leased out by the assessee to the GEB cannot be ascertained. Hence it can be safely observed

that the property in the goods never passed to the alleged buyer and thus the alleged contract of sale is hit by the provisions of the sale of Goods Act 1930.

Once it has been found that the transaction in question cannot be said to be a "Sale" being falling short of the requirements of the provisions of the "Sale of Goods Act, 1930", the assessee cannot be said to be the owner of the goods and as such the subsequent lease back of the goods automatically gets invalidated.

17. The learned AR before us, has relied upon a certificate issued by GEB dated 22.03.1994 vide which, it has been certified that 1,43,600 of meters sold to assessee vide sale invoice dated 23.3.1994 have been installed in the premises of various customers located in the State of Gujarat and have been put to use.

Even this certificate also does not reveal the identity as to which specifically ascertained meters were actually purchased by the assessee from the GEB.

18. Another fact which can be noted here is that the sale invoice is dated 23.03.1994, whereas, the certificate in which reference has been made to the sale invoice dated 23.03.1994 has been surprisingly issued by the GEB on 22.03.1994 i.e. one day prior to the date of sale of invoice.

19. Further the lease deed which is claimed to have been executed after the transaction of sale of the meters by the GEB to the assessee is dated 21.03.1994 whereas the sale invoice of meters is dated 23.03.94 i.e. two days after the date of lease deed. Even there is no mention in the lease deed that the equipments in question i.e. the electric meters has been or would be purchased by the assessee for GEB and thereafter be further leased out to GEB. Rather the entire context of the lease deed gives inference that new equipments would be purchased/ordered by the assessee from the manufacturer and the same would be the subject matter of lease and further that the rental would start from the moment the order is placed to manufacturer or from the date of advance, if any paid by the assessee to the manufacturer. It is nowhere mentioned that it is a case of sale and lease back as has been alleged by the assessee.

20. Further the perusal of the lease agreement as a whole reveals that the said lease agreement is a sham transaction. Given the colour of the lease, virtually, the same is a finance agreement. The intention of the parties to the transaction was not that of sale or lease, rather the same was a loan transaction given the colourof the 'lease', only to defeat the provisions of the Income Tax Act, so as to give undue benefit of claim of depreciation on the assets to the assessee and in return benefit of lesser rate of interest on the loan amount to the GEB. To be more elaborate, we here under discuss some of the clauses of the said lease agreement:

(I) which specific equipment/meter have been leased back by the assessee to the GEB cannot be gathered from the lease agreement

(II) in clause 1.2 of the lease agreement, it has been mentioned that the commencement of date of rental shall be the earliest of :

(i) the date of last payment made by the Lessor to the manufacturer.

(ii) the date of delivery of the Equipment; or

(iii) the date which comes seven days after the date on which intimation has been given by the manufacturer to the lessor that the equipment is ready for delivery

(iv) the date on which the equipment is put to use.

In a normal lease agreement, the lessee is liable to pay the rental only when the leased goods are delivered or possessed by him for use, but, in the case in hand, the moment, the assessee makes payment to the manufacturer for purchase of the goods ,the rental would start, irrespective of the fact, whether or not the goods are delivered for the use of the lessee. The first clause of the agreement itself reveals that interest on the loan amount starts on the day as and when the financer pays money for the purchase of equipment and not when the lessor has delivered the goods to the lessee i.e.GEB.

(III) As per clause 2.4 of the said lease agreement, whenever, the lessor will place order(s) on the manufacturer of the goods at the request of the lessee and if the lessor makes any advance for other payments towards the purchase of the equipment, but the manufacturer fails to deliver the equipment to the lessor by the stipulated date, the lessee shall make payment to the lessor of the advance along with costs, charges, expenses and even interest on the amount paid by the lessor to the manufacturer. This type of clause is strange to a lease agreement.

Further it has been provided that the lessee agrees to indemnify the lessor against all type of losses and damages, the lessor may suffer on account of non delivery by the manufacturer. We are unable to understand as if the equipment will not be delivered by the manufacturer to the lessor, which in turn, is to be leased to the lessee, how can the lessee be liable to pay any loss or damage even before its delivery by the manufacturer to the lessor. The clause stipulates that the lessee is not only liable to pay rent, but the cost and expenditure of the equipment to the lessor even before the start of the lease period.

(IV) As per clause 2.5, even in case of any advance or other payments made by the lessor for the purchase of equipment which are to be further leased out to the lessee after its purchase from the manufacturer by the lessor, the lessee will pay interest at the rate of 19% p.a. from the date of such advance or payment made by the lessor for the purchase of the said equipments from the manufacturer.

(V) Under clause 3.3, it has been provided that the lessee is entitled to import the equipment as if the lessee had bought the equipment and was using and operating the same as owner thereof.

(VI) Clause 3.4 of the lease agreement is important which for the sake of conveyance is reproduced as under:-

> *"3.4 Under the applicable provisions of the Income Tax Act, 1961 and the rules made thereunder and the relevant Finance Act as prevailing at present, the Lessee would have been entitled to and could have claimed depreciation at the rate(s)*

prescribed thereunder, if it had bought the Equipment and was using and operating the same as the owner thereof."

(VII) The following clauses of the lease agreement are further reproduced hereunder for the sake of convenience:

"5.2 In the event that the Lessee shall refuse or be unable for any reason to accept delivery and installation of the Equipment, the Lessor shall be entitled to terminate this Agreement within one month thereafter, by a notice in writing to the Lessee and the Lessee shall, on demand, pay to Lessor all costs of the Equipment together with interest thereon and all costs and expenses incurred by the Lessor for insuring, transporting, storing and maintaining the Equipment and for its disposal and/or lease to third party or in any other manner whatsoever, without prejudice to the Lessor's remedies for damages for breach of contract."

'6.1 The Lessee alone, as an agent of the Lessor, is responsible for obtaining timely delivery of the Equipment and also for obtaining all the necessary clearances, statutory or otherwise required for obtaining such delivery.

The Equipment is of the required size, design, capacity and manufacture, suitable for its purpose and is selected by the Lessee relying entirely on its own judgment and not on the statements or representations if any, made by the Lessor or its agents or servants."

"6.2 The Lessor is not the manufacturer or dealer of the Equipment and that the essential function of the Lessor in this Lease is to purchase the Equipment selected by the Lessee from the Manufacturer designated by the Lessee."

"8.2.2. Without prejudice to and in addition in the Lessor's rights provided in Clause 8.2.1 hereinabove, the Lessor shall also be entitled to recover from the Lessee and the Lessee shall be bound to pay to the Lessor the following amounts, viz:

(a) the entire amount of the rental for the fixed period of the Lease computed in the manner set out in the Schedule on the footing and as if the Agreement had not been terminated to the end and intent that the Lessee shall pay to the Lessor not only arrears of installments of rental upto the date of termination of the Agreement but also such further installment for the then unexpired residue of the term which the Lessee would have been bound to pay to the Lessor had the Agreement continued.

(b) the cost of all repairs and maintenance of the Equipment to render and maintain it in good working order and condition and all costs charges and expenses incurred by the Lessor pursuant to the Agreement and in repossessing the Equipment and in enforcing its remedies howsoever occasioned.

(c) all other sums payable by the Lessee under or pursuant to this Agreement."

(VIII) The various clauses of the lease agreement reveal beyond doubt that the transaction in question is a loan or finance transaction. The moment, the assessee would part with his money either for the purchase of equipment or for making any advance, the interest (which has been named here as rental) on the said amount would start to run. Even the so called rental is liable to be paid by the GEB, in case the goods are not delivered, destroyed or even if the lease agreement is terminated. Even the lessee has to pay interest for any loss, expenditure, transport expenses etc. incurred by the assessee whether or not the goods are delivered to or used by the lessee. The construction of the said lease agreement is as simple as it can be that the assessee will be entitled to refund along with interest on each and every payment made by him for or on behalf of the GEB and the interest start to run, the moment the payment is made, what else can be the definition of a finance agreement?

(IX) It can be gathered from the facts and circumstances of this case that it was never the intention of the assessee to repossess the assets on the expiry of the lease period, assets were neither inspected before the purchase nor identifiable, the GEB had not described the exact location of these assets, there was neither physical nor constructive delivery of the assets, the general property in the assets never passed to the appellant and as such the sale transaction in question falls short of the requirements of a "Sale" as prescribed in the Sales of Goods Act.

(X) In its Annual Report these assets were shown as owned by GEB. The lease transaction was a transaction for finance given by the assessee

without any intention of ever possessing the asset or exploiting the same for profit in the capacity of the owner. The transaction in question was a collusive arrangement for avoiding incidence and payment of income-tax by claiming huge depreciation against a small rental income offered to tax from the alleged leased transaction. The lease was non-cancelable by the two parties except as provided in the agreement. It is very important to note that the lease can be renewed indefinitely at the sole discretion of GEB on a year to year basis on payment of a token lease rental @ Rs. 1/- per Rs. 1,000/- of the cost of the asset. This would mean that though the assessee on paper had become the owner of the electric meters but in reality it could never take possession of those assets. In fact, the lease rentals appeared to have been fixed at such a rate that the investment of the assessee together with the interest would be recoverable over the lease period and thereafter the assessee was to receive token lease rental only. Another important condition which is there in the lease agreement is that even in the event of irreparable loss or damage to the asset as a whole for whatever reason, the lessor would be entitled to recover from GEB the entire amount of rental in the fixed period including the rental for the unexpired portion of the fixed period as if the lease has not been terminated and all other costs incurred by the lessor. According to this strange condition, even after the asset is no longer in existence the lessee has to pay the lease rental even for the unexpired portion of the lease period. The inference is clear that the assessee as lessor had provided finance to GEB and in turn it was interested only in getting back its investment along with interest. In the case in hand, all the facts and circumstances show that it was in fact the agreement of loan between the two parties and there was no intention to actually sell the electric meters by the State Electricity Board to the assessee. It may also be considered that even if the State Electricity Board allowed the assessee to remove the electric meters on expiry of lease period which particular electric meters could be removed by him as no location at all of the meters has been given.

(XI) Now coming to the most important part of the agreement, as to what is the lease amount or rent settled in the lease agreement in question. As per the schedule, the lease deed is fixed and non-cancellable for the period of 60 months. The working of the rental has been made as under:

"For Equipment eligible for depreciation@100% per annum as per the Income tax Act:-

Profile	**Rate (per Rs.1000 of acquisition cost/month/per meter**	**Number of instalments of rentals**	**Interval**
Fixed period	**Rs. 21.75**	**60**	**1**

Thus the monthly rental per meter is Rs.7.569 and the aggregate monthly rental for 143600 meters is Rs. 1086908/-

Secondary	**Rs.1.00**	**open**	**1"**

- **In clause 2 of the schedule it has been provided that in the event of upward revision in the minimum lending rate of commercial banks, the lease rental at the discretion of the lessor will be increased accordingly in accordance with the terms/rates as mentioned in the said clause.**
- **In clause 7(i), it has been mentioned that the lease rentals have been worked out taking into consideration the depreciation on assets presently available to lessor.**
- **In clause 7(ii), it has been provided that if for any reason, what so ever, the eligibility of the lessor to claim depreciation is increased or decreased, or the claim is disallowed, the rates of the rentals will be increased or decreased accordingly at the discretion of the lessor to the**

extent of the loss or gain to the lessor on account of such increase/decrease in the claim of depreciation.

21. So a perusal of the above mentioned schedule reveals beyond doubt that the agreement in question is a finance agreement. The rates of interest/ rental has been fixed taking into consideration that the equipments are eligible for 100% claim of depreciation for the purpose of Income Tax Act. If the banks' minimum lending rate would increase, the rental rate would also increase. If for any reason, the claim of depreciation is increased, decreased or disallowed, the rate of rentals in the shape of interest will accordingly decrease or increase. In ordinary sense, these types of clauses cannot be a part of any lease agreement but finance agreement only. The only and only purpose or object of the assessee for this agreement is to earn interest on its capital together with timely refund of the invested capital. The object and purpose of the GEB is to wrongly transfer the right/ eligibility to claim depreciation@100% to the assessee and in lieu thereof to get the loan or finance at a reduced rate of interest in proportion to the gains which the assessee would avail by claiming depreciation. Otherwise, in a normal lease agreement, how can the lessee be concerned as to what benefits are available to the owner/ lessor under income tax act. The lessee may be concerned in the use or enjoyment of the leased property not about the tax benefits available to the owner. The rentals in certain cases of lease may be increased according to demand and supply of the type of goods leased out, even that type of increase is seldom found in cases of fixed lease period, however in this case, irrespective of any appreciation or depreciation in the value of the goods, or its availability in market, the rentals will increase, if the minimum lending rate of commercial banks is increased. After consideration of the clauses of the document in question, there leaves no doubt in our mind that it is essentially a finance agreement given the colour of 'sale and lease back' with wrongful object of passing the tax benefits to the assessee to which he otherwise is not eligible.

22. The contention of the ld. AR that transaction is with a State Government and it would be highly improper to impute any collusiveness or colourable nature of the transaction without any concrete evidence, in our view is misconceived. The facts on the file itself speak that the transaction in question was a colourable device with the twin purposes of financing GEB, and at the same time making such an arrangement so as to enable the financer to claim depreciation on the assets @100% and in lieu there off to pay reduced rate of interest to the financer in proportion to the value of benefit availed by the financer, for which it otherwise was not entitled to. Though there is always a strong presumption of a valid transaction, in case, one of the parties to the transaction is a Govt. Undertaking, yet, the said presumption cannot be said to be absolute but rebuttable. In the case in hand though GEB is a State Govt. undertaking, but the facts on the file beyond any doubt speak that it has entered into a sham transaction to get mutual benefit out of the amount of tax sought to be evaded. It is a case of *res ipsa loquitur* i.e. where the facts speak itself. It may be observed that State Boards and Corporations some time have their own budgetary or financial constraints, and the fact that the collection of Income tax goes in the kitty of the central Govt. and not to the respective State Govt. and further not to the respective State Board or corporation, may be the relevant considerations for the State Govt. undertaking to enter intosuch transactions. However we are not supposed to go deep into the matter to search out the cause or the reason as to why the GEB has entered into such a transaction, but are concerned only to find out whether the said transaction was sham or a valid transaction for the purpose of claim of the assessee regarding depreciation on the assets under the Income Tax act.

23. The ld. counsel for the assessee has relied on the decision of the co-ordinate Bench of this Tribunal in assessee's own case for A.Y. 1995-96 rendered vide its order dated 19.01.2004 in ITA No.976/Mum/1997. A perusal of the said order of the Tribunal shows that the appeal for A.Y. 1995-96 was filed by the assessee against the order passed by the ld. CIT u/s 263

of the Act whereby the order of the A.O. was held to be erroneous and prejudicial to the interest of the Revenue by the ld. CIT on the ground that the claim of the assessee for depreciation was allowed by the A.O. without conducting proper enquiries to ascertain as to whether the transaction was a lease transaction or a finance transaction. In this regard, six errors were pointed out by the ld. CIT in the order of the A.O. and keeping in view of the same, it was held by the Tribunal that the fact that these purported mistakes were observed by the ld. CIT was sufficient to show that material in this behalf was available on record. It was further held by the Tribunal that the fact that the A.O. had referred to the relevant documents and had referred to discussion held in this behalf before allowing the claim of the assessee for depreciation was sufficient to show that the depreciation was allowed after due application of mind. It was held that even if the ld. CIT was having different opinion on this issue, that by itself was not enough to make the assessment order erroneous and prejudicial to the interest of Revenue as the decision taken by the A.O. was also a permissible view in law. Accordingly, the order of the ld. CIT passed u/s 263 of the Act was set aside by the Tribunal restoring that of the A.O. passed u/s 143(3) of the Act. There was thus no decision rendered by the Tribunal on merit of the issue of depreciation in its order dated 19.01.2004 (supra) and in our opinion, the reliance of the ld. counsel for the assessee on the said order is clearly misplaced.

24. The ld. counsel for the assessee has also relied on the decision of Mumbai Special Bench of the Tribunal in the case of Indus Ind. Bank Ltd. Vs. ACIT and has invited our attention to para 6.7 of the order of the Tribunal wherein a distinction was made by the Tribunal in the sale and lease back transaction and the transaction involving the finance lease. What is, however, contemplated by the Special Bench of the Tribunal while making such distinction is the genuine sale and lease back transaction in which the asset is transferred to the lessor first and the seller of the asset becomes lessee subsequently. As already discussed by us, there was, however, no

such genuine sale and lease back transaction in the present case and it was, in fact, a colourable device used by the parties to give colour to the finance transaction as sale and lease back. Incidentally, one of the questions before the Special Bench of the Tribunal in the case of Indus Ind Bank Ltd. (supra) was whether on the facts and in the circumstances of the case the lessor is entitled to depreciation on assets leased back in the event of the transaction being held as finance lease and the same was decided against the assessee by holding that only the lessee can be treated as owner of the asset in the case of finance lease and it is he who is entitled to claim depreciation as per law and not the lessor. The decision of the Special Bench of the Tribunal in the case of Indus Ind Bank Ltd. (supra), in our opinion, thus supports the Revenue's case on the issue under consideration.

25. He has further submitted that the Hon'ble Supreme Court in the case of Arvind Narottam-173 ITR 479 (SC) has held that where the true effect on the construction of the deeds is clear, the appeal to discourage tax avoidance is not a relevant consideration. It has been further submitted that in the case of New deal Finance & Investment Ltd; ITAT Chennai Bench in a similar type of case of sale and lease back of electric meters involving RSEB had held that there is no illegality in the claim of the assessee (the lessor) for depreciation because once the assessee is considered as the owner of the assets, the assessee is eligible for the allowance under the Act. Apart from the authorities which found mention in the order under appeal, learned AR has further relied upon the following case laws in support of his averments:

1. The West Coast Paper Mills Ltd. Vs. JCIT ITA No. 5403 decided on 21.6.2005 by ITAT, Mumbai further upheld by the Hon'ble Bombay High court vide order dt. 16.10.2008 and by the supreme Court vide order dated 9.10.2009
2. Prakash Industries vs. Development Credit Bank Ltd.
3. M/s IndusInd Bank Ltd. Vs. ACIT ITA No. 6566 of ITAT Special Bench, Mumbai dated 14.3.2012
4. Development Credit bank Ltd. Vs. DCIT, ITANo. 3006 ITAT Mumbai, decided on 20.3.2013

5. M/s Larson & Turbo Ltd. Vs. JCIT, ITA No. 2200, ITAT Mumbai, decided on 1.5.2013

It may be observed that the following authorities have been considered by the ld. benches of the lTAT in cases mentioned at serial no.3 & 4 above:

- CIT vs. M/s Cosmo Films Ltd. ITA No.1404, Delhi High Court decided on 18.7.2011
- M/s I.C.D.S. ltd. Vs. CIt, CA No. 3282 of 2008 decided on 14.1.2013

26. The revenue, on the other hand, has relied upon the following case laws:-

i) Sundaram Finance Ltd. (1966) AIR (SC) 1178

ii) Board of Revenue Vs. A.M. Ansari (3 SC 512)

iii) Damodar Valley Corporation Vs. State of Bihar (12 STC 102)

iv) SohanlalNarayandasVs. Laxmidas (67 Bom LR 400)

v) B.M. Karwar -72 ITR 603

vi) Order of ITAT, Mumbai in the case of CMIE in ITA No. 3820/B/90 dated 29th April 1996.

vii) McDowell & Company. Ltd.-154 ITR 148 (SC)

viii)CIT vs. British Paints India Ltd-188 ITR 44/53

27. Without separately discussing the facts of each of the case law mentioned above, it may be well observed that in none of the authorities it has been held that each case of Sale and Lease back transaction or of thelease whether claimed to be operative or financial, the depreciation or the deduction or relief under the Income Tax act is to be allowed or disallowed. In each of the authorities as mentioned above, it is only after considering the facts and the evidence on the file, the various courts have given finding in the respective authorities to the effect that transactions in question were genuine transactions or sham transactions. Where from the facts and evidence on the file, it was found that the transaction was real or the genuine, the relief was granted and where it was found that the same was

'sham', the relief was denied. Whether a transaction or the agreement etc. is genuine or sham cannot be a question of law but the question of fact only. In our humble view, there is no doubt about the legal position as stated above that once the transaction is held to be genuine or the assessee is considered as the owner of the assets, he will be eligible to claim depreciation on the assets as per provisions of the act. However whether the transaction is genuine or not or the assessee is the real owner of the assets or not is again a question of fact which can be determined from the perusal and consideration of the facts of each of the individual case and findings in this respect may differ from case to case. No straight jacket formula can be adopted to say that every case of sale and lease back transactions is sham or genuine. The finding in this respect can be given after appreciation of facts of each case separately. A perusal of the above mentioned authorities reveal that the judges of the Honb'le Apex Court as well Hon'ble High Courts are unanimous to hold that the true legal relation arising from a transaction determines the taxability of the receipt arising from the transaction under the Income Tax Act. In a case, where the terms of the transaction are embodied in a document, the true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case the court has, unless prohibited by the Statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of document. For the purpose of deciding whether a particular transaction is a lease or not, the question of intentions of the parties is to be determined and the intention has to be inferred from the circumstances of each case.

28. The next contention of the ld. AR that there is no bar for the assessee for making the tax planning so as to avoid or reduce its taxes, provided it is within the framework of the law. He has further submitted that the sale and lease back transactions made by it, even if it is assumed that the same were for the purpose to avoid tax, have not been forbidden by law.

So far the contention of the ld. AR to the effect that such type of transactions, are not forbidden by law is concerned, in our view section 23 of the Indian Contract Act, 1872 is relevant in this respect which for the sake of convenience is reproduced as under:

*"**23. What consideration and objects are lawful, and what not:***

The consideration or object of an agreement is lawful, unless -

It is forbidden by law; or

is of such nature that, if permitted it would defeat the provision of any law or is fraudulent; or

involves or implies, injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

A perusal of above reproduced Section 23 of the Indian contract Act, 1872, reveals beyond doubt that even if, the consideration or object of an agreement may not be expressly forbidden by law, but if it is of such a nature that, if permitted, it would defeat the provisions of law, the same will not be lawful. Section 10 of the Contract Act provides that for the formation of a valid contract, the agreement should be for a lawful consideration and with a lawful object. We have no doubt here to observe that in the case in hand the sole motive or object of the agreement in question is to defeat the provisions of Income Tax Act,1961 so as to enable the assessee to claim depreciation @ 100% on the value of goods worth Rs.49972800.00 to which it otherwise is not entitled to and, further, to get mutual benefit of this wrongful claim by making wrongful loss to the revenue. Moreover ,in our view, the provisions of Explanation 3 to Section 43(1) of the Income Tax Act, 1961 are also get attracted in this case

because the sole intention of the parties to the agreement in question was to directly or indirectly, enter into such transaction with a view to reduce the tax liability by claiming higher depreciation. We agree with the view of authorities below that we have to go by the true construction of the agreement between the two parties and not merely by the description given by the two parties.

29. It may be observed that tax avoidance by way of tax planning or structuring the transactions so as to reap the largest tax benefit may be permissible under law but fraudulent transfer of assets or income or engaging in sham transactions with the object of reducing the tax liability cannot be said to be a case of tax avoidance but of tax evasion. Any act or attempt to reduce the tax liability by deceit, subterfuge or concealment is not permissible under law.

30. In the case in hand, whole of the effort has been made to transfer the right to claim depreciation on the assets to the assessee for the purpose of the Income Tax Act, but not the assets itself. It is always the goods or the assets itself which are the primary subject of a valid transfer, not the incidental benefits, which automatically pass to the transferee with the transferred asset. In the case in hand, only the incidental tax benefits are intended to be transferred without any intention to transfer the asset itself.

31. For the year under consideration, there is another fact on the file which goes against the assessee. In Para 13 of the notes to the Annual Accounts of GEB for F.Y. 1993-94, as reproduced in para which has been reproduced in Para 3.(P) above, shows the true intentions of the parties. This para indicates that the real intention was to enter into transaction of loan/finance only and the assessee was never intended to be the real and legal owner of the assets.

32. For the reasons given above and in agreement with the authorities below, it is held that the Assessing Officer has rightly disallowed depreciation on electric meters. This issue is decided against the assessee.

33. For the detailed reasons given above, Ground No. 1 to 7 of the ITA 4069/Mum/2001 for A Y 1994-95 above are hereby rejected.

34. **Interest u/s 234 B**

Ground No.8 of the above appeal is relates to levy of interest upon the assessee under section 234 B of the income Tax Act 1961.

35. The appellant vide this ground has contested the confirmation of the finding of the A.O. relating to levy of interest u/s 234 B of the act on the ground that since while passing intimation under section 143(1)(a) of the act, no interest was levied under section 234b of the act. While passing an order under section 143 read with section 147 of the act, the commissioner ought to have held that the interest under section 234B could not be levied.

36. The ld. AR has submitted that since as per the return, there was a loss and refund was due to appellant, no interest was payable u/s 234B once the effect to appeal order is given. Theld. AR has relied upon an authority of the ld. Co-ordinate bench of the Tribunal styled as Datamatics Ltd. Vs. ACIT 110 ITD 224(Mumbai) in this respect. On the other hand the ld. DR has relied upon the orders of the authorities below.

37. We have considered the rival submissions of the representatives of the parties.

38. The ratio of the law laid down in Datamatics Ltd.(supra), in our view, is not applicable to the case in hand. In the case of Datamatics (supra) the contention of the assessee was that additional liability had arisen consequent to the judicial decision subsequent to the filing of original return, hence levy of interest u/s 234B was not justified. It was

further contended in the said case that the additional liability of tax was neither known nor anticipated at the time of filing of the revised return. It is also pertinent to mention here that in the said case, the assessee had already deposited advance tax more than the amount of tax which was finally worked out to be payable by the assessee in consequence of reassessment under section 147 of the Act. The ld. Tribunal in the said case while relying upon various case laws, observed that where due to subsequent judicial decisions of the High Court or the Hon'ble Supreme court, the tax liability of the assessee was increased in reassessment cases, and such additional liability was never anticipated by the assessee and where the assessee has already deposited advance tax more than the amount of additional tax liability, the levy of interest under section 234B was held to be not justified. It was also observed by the Tribunal that where despite taking due care and diligence , the assessee could not have anticipated the enhancement of income, the levy of interest was not justified.

39. However, as observed above, in the instant case, the assessee was very much in knowledge of the fact that it was liable to pay tax but it deliberately entered into a sham transaction to evade the tax. Hence the above mentioned authority relied upon by the assessee does not fit into the facts and circumstances of the case in hand.

40. The second contention of the assessee that for the application of section 234 B, there should be default in the regular assessment and the assessee should have been liable to pay interest and incase of reassessment or recomputation, liability is increased and not otherwise. It may be observed that as per explanation 2 to section 234B, it has been provided that where an assessment is made for the first time under section 147 or section 153A, the assessment so made shall be regarded as a regular assessment for the purpose of this section. Section 234(3) is to be read in conjunction with and not in isolation to section 234(1) of the Act. Hence this contention of the assessee is also not found to be tenable.

41. It is pertinent to mention here that the Hon'ble Supreme Court in the case of Karanvir Singh Gossal V. Commissioner of Income-tax, (2012) 349 ITR 692 (SC), has held that levy of interest u/s 234B of the Act is mandatory and compensatory in nature and this controversy finally stood settled by the Five Judge Bench decision of the Hon'ble Apex Court in the case of CIT vs. Anjum Ghaswala and Ors. [2001] 252 ITR 1 (SC) wherein it was held that in appropriate cases only the Chief Commissioner has an authority to waive the interest.

42. In the result, the appeal No.4069 filed by the assessee is hereby dismissed.

Appeal no. 2406/M/2001 forA.Y. 1994-95

43. Disallowance on depreciation on official and residential premises

This appeal by the revenue is against the deletion of the disallowance of Rs.1874110 by the CIT(A) being the depreciation on office premises and residential premises.

44. The assessee claimed depreciation on residential flats in a building known as Brindavan and office premises in Raheja Chambers. The Assessing Officer took a view that the amount paid by the assessee for the purchase of aforesaid premises will include the cost of land. He therefore, estimated the cost of super structure at Rs. 600/- per Sq. Ft. in respect of office premises and Rs. 400/- per Sq. ft. in respect of residential premises after taking into consideration the cost of construction of super class construction in the year 1993-94. On the aforesaid basis the cost of super structure was worked out at Rs. 75,36,000/- and entitlement of depreciation was worked out at Rs. 4,04,700/- against the claim of depreciation of Rs. 22,81,810/-. Thus, he disallowed depreciation to the extent of Rs. 18,74,110/-. While doing so, the Assessing Officer observed that the cost of the premises includes the cost of Landas well as cost of super structure. He referred to the judgment of Hon'ble Supreme Court in

the case of Alps Theatre-65 ITR 317 as per which depreciation is admissible in respect of the cost of super structure only and not in respect of the cost of land.

45. On appeal the ld. CIT(A) deleted the said disallowance observing that the cost of land in comparison to the cost of flat might be very nominal and it was not possible to separately calculate the same, hence was liable to be ignored.

46 . The ld. DR before us has relied upon the Assessment order. He has further submitted that Assessee by becoming the member of the society gets his undivided share in the land owned by the society. On the other hand, the ld. AR has submitted that its claim for depreciation is fully allowable. It is stated that it has purchased flats and it did not purchase any land in any of the aforesaid premises. It also did not become the owner of the land which always belonged to the co-operative society managing the buildings. the learned AR has further relied upon the Third Member decision of the co-ordinate Bench of this Tribunal in "Shri Mahesh R Jethmalani vs. ITO"-ITA No. 42 & 7488/Bom/95 for A.Ys. 1991-92 & 1992-93 decided on 25.10.2004.

47. We have considered the rival contentions of the counsel for the parties and also gone through the above said decision relied upon by the AR.

It may be observed that the facts of the said case before the Hon'ble Third Member were different. In that case it had been observed that the assessee acquired right to occupy and use the flat by virtue of becoming share holder in the Co-operative Society. The society was the owner of the super structureonly, however, the land over which the super structure had been built vested with the municipal corporation. There was also no lease executed in favour of the society. It was held that in fact the said society was just a licensee on the land over which the super structure was built. It was in such circumstances held that since the land

did not vest with the society, the assessee cannot be said to be owner of any part or share in the land. The society was also not paying any lease rent to the Municipal Corporation. It was further observed that normally the society is required to pay annual lease rent, which in turn is recovered from the flat owner in the society. In such circumstances, value of the land in the total consideration of the flat paid by the assessee can only be very nominal which can be ignored. However, in the case in hand the land does not vest with the Municipal Corporation but with the society itself. The assessee being a member-share holder of the said society can be considered as the part owner in the land in proportion to his share holding in the super structure over it.

The learned AR has further submitted that even if the assessee is held to be proportionately owner of the land, the working out of the value of the land with regard to the share of the assessee will be very difficult and even such a value will be nominal and liable to be ignored.

48. It may be observed that the assessee itself before the CIT(A) has submitted the estimated cost of super structure valuation report obtained by it from the government approved valuer, which fact can be observed from para 5.3 of the CIT(A)'s order. Under such circumstances, the assessee is bound by the working of the cost/value of the land of super structure submitted by itself. The said valuation according to the assessee has been done by the government approved valuer. In our view, the estimation of the value of land by the Assessing Officer himself cannot be sustained in the presence of the report of the government approved valuer. Accordingly, we direct that the value of the land be taken as per the valuation report given by the assessee and the claim of depreciation of the super structure be allowed accordingly.

49. The appeal of the revenue on this issue, subject to our above observations, is hereby allowed.

ITA No. 7317/M/02 A.Y. 1995-96

50. This appeal by the revenue is against the deletion of the disallowance of Rs.3770931 by the CIT(A) being the depreciation on office premises and residential premises.

51. The issue under consideration in this appeal is identical to the issue involved in ITA No. 2406/M/2001relevant to the AY. 1994-95

52. In view of our findings given above in ITA. No.2406/M/2001 for A.Y. 1994-95, the appeal of the Revenue is allowed in terms of the order passed in ITA. No. 2406/M/2001

ITA No. 7318/M/02 A.Y. 1996-97

53. This appeal by the revenue is against the deletion of the disallowance of Rs.3827688/- by the CIT(A) being the depreciation on office premises and residential premises.

54. The issue under consideration in this appeal is identical to the issue involved inITA No. 2406/M/2001relevant to the AY. 1994-95

55. In view of our findings given above in ITA. No. 2406/M/2001 for A.Y. 1994-95 , the appeal of the Revenue is allowed in terms of the order passed in ITA. No. 2406/M/2001

ITA No. 734/M/05 A.Y. 2000-2001

56. This appeal by the revenue is against the deletion of the disallowance of Rs.1061592/- by the CIT(A) being the depreciation on office premises and residential premises.

57. The issue under consideration in this appeal is identical to the issue involved in ITA No. 2406/M/2001relevant to the AY. 1994-95

58. In view of our findings given above in ITA. No. 2406/M/2001 for A.Y. 1994-95 , the appeal of the Revenue is allowed in terms of the order passed in ITA. No. 2406/M/2001.

ITA No. 735/M/05 A.Y. 201-2002

59. This appeal by the revenue is against the deletion of the disallowance of Rs.1061592/- by the CIT(A) being the depreciation on office premises and residential premises.

60. The issue under consideration in this appeal is identical to the issue involved in ITA No. 2406/M/2001relevant to the AY. 1994-95

61. In view of our findings given above in ITA. No. 2406/M/2001 for A.Y. 1994-95 , the appeal of the Revenue is allowed in terms of the order passed in ITA. No. 2406/M/2001

ITA No. 5085/M/05 A.Y. 2002-03

62. This appeal by the revenue is against the deletion of the disallowance of Rs.1061592/- by the CIT(A) being the depreciation on office premises and residential premises.

63. The issue under consideration in this appeal is identical to the issue involved inITA No. 2406/M/2001relevant to the AY. 1994-95

64. In view of our findings given above in ITA. No. 2406/M/2001 for A.Y. 1994-95 , the appeal of the Revenue is allowed in terms of the order passed in ITA. No. 2406/M/2001

ITA No. 103/Mum/2005 Assessment Year : 1996-97

65. In the above appeal, the revenue has raised the following grounds of appeal:

> *"1. On the facts and in the circumstances of the case and in law, the learned CIT(A) was not correct in cancelling the withdrawal of reduction of the so-called capital component of Rs.87,99,044/- out of the lease rent received from Gujrat Electricity Board when the same was offered to tax by the assessee in its return of income and no such claim was made before the Assessing Officer during the assessment proceedings.*

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) was not correct in holding that the provisions of section 234D of the I.T. Act, 1961 are substantive and not procedural."

66. In view of our finding in ITA No. 4069/Mum/2001 for Assessment Year 1994-95 holding that the transaction in question is held to be a finance transaction, the principal component in the lease rent received cannot be treated as income. Evidently, since the transaction was held to be for financing the electric meters, only that portion of the lease rent which represents interest/finance charges can be treated as income. The capital component included in the lease rent being return of capital investment cannot be treated as income.

In view of our finding above, we do not find any merits in this appeal of the revenue. It is accordingly dismissed.

67. In the result, in view of our separate findings above on each issue, the respective appeals as noted above are decided accordingly.

Order pronounced in the open court on this 07th day of August, 2013.

Sd/-	**Sd/-**
(P M JAGTAP)	(SANJAY GARG)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated:07.08.13
*Srivastava
Copy to:The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR " I " Bench
//True Copy//

By Order

Dy/Asstt.Registrar, ITAT, Mumbai.