THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 18.07.2011

+ ITA 1404/2008

COMMISSIONER OF INCOME-TAX … Appellant

Versus

M/S COSMO FILMS LIMITED … Respondent

Advocates who appeared in this case:

For the Appellant : Ms Suruchi Aggarwal
For the Respondent : Mr Ajay Vohra with Ms Kavita Jha, Mr Sriram Krishna and Ms Akansha Aggarwal

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE V.K. JAIN

1. Whether Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in Digest? Yes

BADAR DURREZ AHMED, J

1. This appeal under Section 260-A of the Income-tax Act, 1961 (hereinafter referred to as 'the said Act') has been preferred by the revenue being aggrieved by the judgment and / or order dated 22.02.2008 passed by the Income-tax Appellate Tribunal in revenue's appeal being ITA No.4516/Del/2003 pertaining to the assessment year 1996-97,

inasmuch as the Income-tax Appellate Tribunal had dismissed the appeal of the revenue on the ground that the Commissioner of Income-tax (Appeals) had erred in deleting the addition of ₹ 2,30,40,000/- made on account of depreciation. The Assessing Officer by virtue of his assessment order dated 29.03.2001 had disallowed the claim of the respondent / assessee with regard to 100% depreciation on the equipment purchased by it from the Haryana State Electricity Board (hereinafter referred to as 'HSEB'), which was already installed at the said Board's Thermal Power Station at Faridabad and immediately thereupon leasing the said equipment back to the HSEB on certain terms and conditions. The assessing officer had placed reliance on the Supreme Court decision in the case of ***McDowell and Company Limited v. Commercial Tax Officer*****: 1985 (154) ITR 148**. The Assessing Officer came to the conclusion that the transaction was not a case of purchase and lease back of equipment, but was a pure financial and loan transaction and, accordingly, the claim of 100% depreciation to the tune of ₹ 2,30,40,000/- claimed by the respondent / assessee was disallowed. The Commissioner of Income-tax (Appeals) by virtue of his order dated 31.07.2003, placed reliance on the decision of the Income-tax Appellate Tribunal in the case of ***Consortium Finance Limited v. JCITD*****: 82 ITD 808** and held that a genuine transaction of purchase and lease back had

taken place and that, as the assessee was carrying on the business of leasing also, apart from other businesses, it was entitled to the claim of depreciation and consequently the appeal was allowed insofar as the claim of depreciation was concerned.

2. As indicated above, the revenue, being aggrieved by the order passed by the Commissioner of Income-tax (Appeals), New Delhi filed an appeal (ITA No.4516/Del/2003) on the following grounds:-

> "On the facts and in circumstances of the case the learned CIT (A) has erred in deleting the addition of Rs 2,30,40,000/- made on account of depreciation."

3. The Income-tax Appellate Tribunal by virtue of the impugned order dated 22.02.2008 dismissed the revenue's appeal after observing that the departmental representative of the revenue could not bring to the notice of the Tribunal any fact from which the tribunal could come to the conclusion that the sale and lease back transaction between the assessee and the HSEB was not a genuine transaction. Relying upon the decision of the High Court of Bombay in the case of ***Commissioner of Income-tax v. Zuari Finance Ltd and Another:*** **271 ITR 538** and on the decision of the Rajasthan High Court in the case of ***Commissioner of Income-tax v. Rajasthan State Electricity Board:*** **2006 (204) CTR (Raj) 415**, the Tribunal held that in similar circumstances the said High Courts had

allowed the claim of depreciation in the cases of sale and lease back transactions involving the State Electricity Boards. The Tribunal also took note of the fact that the decision of the Karnataka High Court in the case of ***Avasarala Automation Limited v. The Joint Commissioner of Income Tax*****: 266 ITR 178 (Kar)**, which had been relied upon by the department, had been considered in the Bombay High Court decision as well as in the decision rendered by the Rajasthan High Court and had been distinguished by the said High Courts.

4. The present appeal was admitted on 06.07.2009, when the following question of law had been framed for adjudication:-

> "Whether the Tribunal was justified in law in allowing depreciation on the assets for which the Assessing Officer had treated the transaction as that of finance and not of leasing ?"

5. Ms Suruchi Aggarwal, the learned counsel appearing on behalf of the revenue, contended that the transaction in question was a pure lease finance transaction and, therefore, the assessee was not entitled to claim depreciation in respect of the equipment in question. The learned counsel placed strong reliance on a letter dated 26.09.1995 written by the Chief Accounts Officer, Haryana State Electricity Board, Panchkula to the Financial Commissioner and Secretary to the

Government of Haryana, Irrigation and Power Department, Civil Secretariat, Haryana where, it is stated that the transaction was entered into by the HSEB as a means of raising finance. She also placed strong reliance on the decision of the Karnataka High Court in the case of ***Avasarala Automation Ltd*** *(supra)* as also on the decision of the Supreme Court in the case of ***Asea Brown Boveri Ltd v. Industrial Finance Corporation of India*****: AIR 2005 SC 17** to submit that the transaction in the present case was not of a sale and lease back, but merely one of a financial lease, where all the risks and rewards incident to the ownership of an asset are transferred to the lessee. Consequently, she submitted that the respondent / assessee was not entitled to claim depreciation in respect of the equipment in question and that the Assessing Officer had taken the correct view in the matter. She, therefore, submitted that the question be answered in favour of the revenue and the appeal be allowed.

6. On the other hand, Mr Ajay Vohra, appearing on behalf of the respondent / assessee, submitted that this was a clear case of purchase and lease back of assets and as the respondent / assessee was the owner of the said equipment, it was entitled to claim depreciation thereon. He submitted that there is no evidence on record to show that the transaction

between the respondent / assessee and HSEB was not genuine or was a sham transaction. He also submitted that both the Commissioner of Income-tax (Appeals) and the tribunal, which is the final fact finding authority, have clearly held the transaction to be genuine. In fact, Mr Vohra submitted before the Tribunal, as recorded in the impugned order itself, it has been noted that the representative for the revenue could not bring any fact to the notice of the tribunal from which it could come to a conclusion that the sale and lease back transaction between the assessee and HSEB was not a genuine transaction. He further submitted that on going through the documents, which include the sale deed dated 28.09.1995 and lease agreement dated 29.09.1995, it would be apparent that the ownership of the equipment was with the lessor (respondent / assessee) and that the erstwhile owner (HSEB) acknowledged the ownership of the new owner (i.e., the respondent / assessee). He also submitted that there is nothing on record to show that the respondent / assessee was entering into a financial transaction. He submitted that the title in the equipment had passed on to the assessee and for this purpose, reliance was placed on Sections 19 and 33 of the Sale of Goods Act, 1930. The learned counsel submitted that what is to be seen in the present case is – whether the equipment in question came into the ownership of the respondent / assessee ? If it were to be so, then the

respondent / assessee would certainly be entitled to claim depreciation in respect thereof because leasing was also a part of its business. He submitted that, therefore, the entire question hinges on the factual determination of whether the transaction was genuine or not. The tribunal, being the final fact finding authority, has held it to be genuine and the revenue has not been able to point out any perversity in such conclusion. In fact, Mr Vohra submitted that no question of law has been framed on the issue of perversity. Therefore, on the facts as on record, the question framed in the present appeal has to be decided in favour of the assessee and against the revenue and the revenue's appeal is liable to be dismissed. Mr Vohra placed reliance on the following decisions:-

1) ***Industrial Development Corporation of Orissa Limited v. Commissioner of Income-tax and Others*****: 268 ITR 130 (Ori)**;

2) ***Commissioner of Income-tax v. Rajasthan State Electricity Board*****: (2006) 204 CTR 415 (Raj)**;

3) ***Commissioner of Income-tax v. Gujarat Gas Company Limited*****: (2009) 308 ITR 243 (Guj)**;

4) ***SBI Home Finance Limited v. Commissioner of Income-tax:*** **280 ITR 6 (Cal)**;

5) ***Commissioner of Income-tax v. Zuari Finance Limited and Another*****: 271 ITR 538**;

6) ***Commissioner of Income-tax v. George Williamson (Assam) Limited:*** **265 ITR 626 (Gau)**.

7. Mr Vohra also referred to the decision of the Income-tax Appellate Tribunal, Mumbai (A) Bench in the case of ***West Coast Paper Mills Limited v. Joint Commissioner of Income Tax***: **(2006) 100 TTJ 833 (Mumbai)** where, in an identical case, which also partly involved the Haryana State Electricity Board, was considered and decided in favour of the assessee by allowing the assessee therein the benefit of 100% claim of depreciation. Mr Vohra pointed out that the said decision of the Mumbai Bench of the tribunal was taken in appeal before the Bombay High Court in Income-tax Appeal No.389/2008, which came up for hearing before the said High Court on 16.10.2008. The said High Court observed that the case of the revenue before the Tribunal was that the transactions of buy back of lease equipments and granting lease of that equipment to various boards were sham transactions entered into only for the purposes of claiming benefits of 100% depreciation. The High Court further observed that the tribunal had considered that aspect of the matter in the light of the material on record and had recorded a finding that it was not a sham and bogus transaction. It was also observed that one of the grounds considered for recording that finding was that when the other party was a statutory body, the question of evasion of tax does not arise and, therefore, according to the tribunal, the inference of collusion could not be drawn. The Bombay High Court, in

these circumstances, took the view that no question of law arose for its consideration. Being aggrieved by the said order passed by the Bombay High Court, the revenue took the matter further by filing a special leave petition before the Supreme Court, which was dismissed in *limine* by virtue of an order dated 09.10.2009. Of course, Ms Suruchi Aggarwal, appearing on behalf of the revenue, rightly contended, on the strength of the decision of the Supreme Court in the case of ***Y. Satyanarayan Reddy v. The Mandal Revenue Officer, A.P.*: 2009 (9) SCC 447** that the dismissal of an SLP in *limine* by the Supreme Court does not amount to the merger of the order of the High Court with that of the Supreme Court and does not entail a decision on the question of law by the Supreme Court.

8. Before we examine the rival contentions raised by the learned counsel for the parties, it would be appropriate to set out the facts. By a sale deed executed on 28.09.1995, the HSEB, a statutory corporation constituted under Section 5 of the Electricity (Supply) Act, 1948 and having its head office at Shakti Bhawan, Sector-6, Panchkula, Haryana – 134108, sold the equipments installed at its Thermal Power Station at Faridabad and described in the invoice No.CAO/95-96/13 dated 28.09.1995 to the respondent / assessee for a consideration of ₹

2,30,40,000/-. The description given in the invoice-cum-delivery challan dated 28.09.1995 is – Instrumentation and Monitoring System for Monitoring Energy Flows – Automatic Electrical Load Monitoring System at Thermal Power Station Faridabad. A valuation certificate dated 23.09.1995 had been obtained by the respondent / assessee through Virtuous Finance Limited Bombay, who had facilitated the transaction with HSEB, from M/s M. Chaudhary and Associates, Registered Valuers and Chartered Engineers, New Delhi, which gave the replacement value of the said equipment as on 15.09.1995 to be at ₹ 2,30,40,000/-. On the purchase of the said equipment, the respondent / assesse entered into an agreement for lease of the same with HSEB on 29.09.1995, whereby the entire said equipment was leased back to HSEB for a period of 72 months w.e.f. 29.09.1995. A sum of ₹ 1,38,24,000/- was paid by the respondent / assessee to HSEB by cheques dated 30.09.1995 with regard to the purchase of the said equipments. The respondent/assessee also retained a sum of ₹ 92,16,900/- as interest free security deposit for the leased equipments. Thus, the sum of ₹ 1,38,24,000/- paid by the respondent / assessee to HSEB and the sum of ₹ 92,16,000/- retained by the respondent / assessee as and by way of interest free security deposit represented the total sale consideration of ₹ 2,30,40,000/-. The total lease rentals for the said lease period in respect of the said equipment,

which was to be paid by HSEB to the respondent / assessee, was ₹ 1,55,38,176/- and the same was to be paid on a monthly basis as per Annexure – A to the First Schedule of the said lease agreement dated 29.09.1995.

9. In clause 2(c) of the lease agreement, the lessee (HSEB) confirmed that it had received possession of the said equipment in good order and condition. The lessee's covenants were set out in clause 4 of the lease. Sub-clause (k) of the said lease stipulated that the lessee shall not transfer / create any charge or otherwise dispose of the lessee's interest in the said equipment in favour of any person in any manner whatsoever and to hold the equipment as trustee and bailee of the lessor. Clause 4(m) of the lease further provided that the lessee covenanted to affix a name plate or other distinguishing mark on the equipment identifying the sole and exclusive ownership thereof of the lessor and not to allow or permit the same to be removed or defaced. By virtue of clause 5(a) of the lease, the lessee declared that it shall not create any encumbrances or charge or lien of any nature whatsoever in favour of any person in relation to the said equipment. Again, in clause 6(f) of the lease, the lessee declared that the equipment would always remain free from any charge, lien or encumbrance of any type and that the lessor

would have all the rights of owner, including the right to mortgage the same with the owners, bankers / financiers without prejudice to the rights of the lessee under the said lease. Clause 8(a) specifically provided as under:-

> "Notwithstanding the grant of lease of the said Equipment, the lessor shall continue to be the sole owner thereof (as a Hire Purchase Hirer) and the Lessee would not, merely by reason of grant of this lease, have or claim any right, title or interest in any of the said equipments except as the Lessee thereof in accordance with the terms and conditions of this Lease Agreement."

The lease also provided that the lessee (HSEB) shall not part with the possession of the equipment, nor shall the lessee (HSEB) sub-lease the equipment without prior approval of the lessor (the respondent / assessee).

10. From a plain reading of the sale deed, the invoice-cum-delivery challan and the lease agreement, we are inclined to agree with the submission made by the learned counsel for the respondent / assessee that the ownership of the equipment in question was that of the respondent / assessee. The sale of the equipment by HSEB to the respondent / assessee resulted in the transfer of title from HSEB to the assessee. The lease evidences the fact that the right of purchase and use

of the equipment in question was transferred from the respondent / assessee to the lessee (HSEB), for which purpose, a security deposit was taken and the lessee (HSEB) had covenanted to pay the lease rentals as per the schedule totaling to ₹ 1,55,38,176/- for the duration of the lease. When the lease agreement was entered into, while the possession of and the right to use the equipment was transferred to the lessee, the lessor (respondent / assessee) retained its title and ownership over the said equipment as also the right of reversion of possession at the end of the lease period.

11. Section 19 of the Sale of Goods Act, 1930 also makes it clear that when there is a contract for the sale of specific or ascertained goods, such as the equipment in question in the present case, the property in them is transferred to the buyer at such time as the parties to the contract intended to be transferred. It is also made clear in Section 19(2) of the Sale of Goods Act, 1930 that for the purposes of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case and by virtue of Section 19(3) thereof, unless a different intention appears, the rules contained in Sections 20-24 are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to

the buyers. A plain reading of the sale deed makes it clear that the property in the said equipment passed on to the assessee / respondent on 28.09.1995 itself as the documents themselves indicate that the vendor (HSEB) conveyed and transferred its title, interest rights and privileges in the equipments sold completely and irrevocably in favour of the purchaser (respondent / assessee). The lease, as indicated above, clearly mentions in clause 2(c) that the lessee (HSEB) confirmed that it had received possession of the said equipment in good order and condition. Thus, this is an acknowledgement from HSEB that it had received the equipment pursuant to the lease in its favour from the respondent / assessee. All these circumstances point in the direction that the ownership of the equipment was of the respondent / assessee and this fact had also been acknowledge by the HSEB which was the erstwhile owner of the same.

12. It is true that the letter dated 26.09.1995, written by the Chief Accounts Officer, HSEB, Panchkula to the Financial Commissioner and Secretary to the Government of Haryana, which had been relied upon by the learned counsel for the revenue, does indicate that the transaction was entered into by HSEB in order to raise finance for its day-to-day needs and that HSEB had decided to go in for tapping the system of sale and

lease back assets as a mode of raising finance at a lower cost. But, this does not bind the respondent / assessee. What was the intention of HSEB in going in for the transaction in question cannot be transposed onto the respondent / assessee.

13. Insofar as the respondent / assessee is concerned, on the basis of the factual position on record, it had purchased the equipment which was already installed at HSEB's Thermal Power Plant at Haryana and immediately thereafter, it had leased back the said equipment to HSEB for a period of 72 months on condition of the payment of lease rentals as well as an interest free security deposit. If, in doing so, it was attracted by the prospect of availing 100% depreciation on the value of the equipment (₹ 2,30,40,000/-), the respondent / assessee cannot be denied the benefit merely because it did so. In order to deny the claim of depreciation, it would have to be held that the transaction was not genuine and that the same was a subterfuge. Merely because an assessee gets a commercial advantage because of the factoring in of a tax benefit, it cannot be said that the transaction is not genuine. There is no finding in the present case or evidence to indicate that the transaction was not genuine.

14. The decision of the Karnataka High Court in the case of ***Avasarala*** *(supra)* is clearly distinguishable because in that case, there was a clear finding of fact, which had been conclusively arrived at by the lower authorities, including the Income-tax Appellate Tribunal, that the transaction in question was not genuine. Reliance placed by the Assessing Officer as also the learned counsel for the revenue on the observations of O. Chinappa Reddy, J in the case of ***McDowell and Company Limited*** *(supra)* needs to be considered in the light of the subsequent decisions of the Supreme Court. We may note that in ***Inland Revenue Commissioners v. Duke of Westminster:*** **1936 (AC-1)**, Lord Tomlin had expressed the following view:-

> "Every man is entitled if he can to order his affairs so that the tax attaching under the Appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however, unappreciative the Commissioners of Inland Revenue or his fellow tax payers may be of his ingenuity, he cannot be compelled to pay an increased tax."

15. This view expressed in the case of ***Inland Revenue Commissioners v. Duke of Westminster*** *(supra)* was remarked upon by O. Chinnappa Reddy, J. The remarks were in connection with the observation of J.C. Shah, J in ***Commissioner of Income-tax v. A. Raman and Company*****: (1968) 67 ITR 11 (SC)**, which was based on ***Duke of***

Westminster *(supra)*. The remarks of O. Chinnappa Reddy, J were as under:-

> "We think that time has come for us to depart from the Westminster principle as emphatically as the British Courts have done and to dissociate ourselves from the observations of Shah, J. and similar observations made elsewhere."

O. Chinnappa Reddy, J further observed in ***McDowell and Company Ltd*** *(supra)* as under:-

> "In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord approval to it."

16. However, these observations as also the other decisions were considered by the Supreme Court in ***Union of India and Another v. Azadi Bachao Andolan and Another*****: 2003 (263) ITR 706 (SC)**, wherein the court observed that "*tax planning may be legitimate provided it is within the framework of law*". Furthermore, the Supreme Court concluded that:-

> "With respect, therefore, we are unable to agree with the view that ***Duke of Westminster***'s case: 1936 (AC-1); is dead, or that its ghost has been exorcised in England. The House of Lords does not seem to think so, and we agree, with respect. In our view, the principle in ***Duke of***

> ***Westminster***'s case [1936 (AC-1)] is very much alive and kicking in the country of its birth. And as far as this country is concerned, the observations of Shah, J, in ***Commissioner of Income-tax v. Raman*****: 1968 (67) ITR 11 (SC)** are very much relevant even today."

17. Thus, after the Supreme Court decision in the case of ***Azadi Bachao Andolan*** *(supra)*, the observations of O. Chinnappa Reddy, J, in ***McDowell and Company*** *(supra)* would not hold good. This is also the position taken by the Orissa High Court in the case of ***Industrial Development Corporation of Orissa Limited*** *(supra)* as also the Gauhati High Court in the case of ***Commissioner of Income-tax v. George Williamson*** *(supra)*. Clearly, therefore, the reliance placed by the Assessing Officer on the said observations in ***McDowell and Company Limited*** *(supra)* was misplaced.

18. We also note that in ***Industrial Development Corporation of Orissa Limited*** *(supra)*, the Orissa High Court was dealing with a case which was similar to the one before us where, in place of the Haryana State Electricity Board, it was the Orissa State Electricity Board (OSEB). The said High Court observed that if the sale and lease back agreement between the assessee and the OSEB indicate that the assessee had purchased the plant and machinery from OSEB for a price and had leased out the same to OSEB on lease rent, the revenue department cannot

discard the said sale and lease back agreement on the ground that the underlying motive of the assessee to enter into the said transaction was to reduce its income-tax liability. The Orissa High Court observed that the revenue could, however, discard the said transaction only if there were materials or evidence before it to show that the intentions of the parties were different from what had been incorporated in the sale and lease back agreements and that the transaction was really a sham and dubious transaction and was a colourable device. We are in complete agreement with these observations of the Orissa High Court in the case of ***Industrial Development Corporation of Orissa Limited*** *(supra)*. We are also in agreement with the conclusion of the said High Court that in such cases, the court would have to find out as to what was the real intention of the parties in entering into the sale and lease agreement and that such intention has to be gathered from the words in the said agreement in a tangible and in an objective manner and not upon a hypothetical assessment of the supposed motive of the assessee to avoid tax. We have already indicated that the intention gathered from the documents on record shows that the ownership and title of the said equipment had been transferred to the respondent / assessee and that after the said transfer, the lease was entered into and the said equipment was leased back to the HSEB. It has not at all been established on the basis of evidence on

record that the transaction was a colourable device entered into by and between the HSEB and the respondent / assessee.

19. We also note that a similar view has been taken by the Rajasthan High Court in the case of ***Commissioner of Income-tax v. Rajasthan State Electricity Board*** *(supra)* and the Gujarat High Court in the case of ***Commissioner of Income-tax v. Gujarat Gas Company Ltd*** *(supra)* which followed the decision of the Rajasthan High Court in the case of ***Commissioner of Income-tax v. Rajasthan State Electricity Board*** *(supra)*.

20. We find that the observations of the Supreme Court in the case of ***Asea Brown Boveri Ltd*** *(supra)* with regard to the nature of a financial lease are not of much use to the case of the revenue in view of the factual backdrop that, on facts, the transaction in question has been found to be genuine. Once it is established that the ownership of the said equipment is that of the assessee, then it is clear that the respondent / assessee would be entitled to claim depreciation as allowed by the Commissioner of Income-tax (Appeals) and the Income-tax Appellate Tribunal.

21. In these circumstances, we answer the question in the affirmative and against the revenue. The appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

V.K. JAIN, J

JULY 18, 2011
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