

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **{ITA No.1854 OF 2010}**

% *Judgment reserved On: 08.12.2010*
Judgment delivered on: 14.01.2011

THE COMMISSIONER OF INCOME TAX

. . . APPELLANT

Through :

Mr. Sanjeev Sabharwal, Sr. Standing
Counsel with Mr. Utpal Saha,
Advocate

VERSUS

JAGSON INTERNATIONALS LTD.

....RESPONDENT

Through:

Mr. S.C. Aggarwal, Sr. Advocate
with Mr. Prakash Kumar, Advocate

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The grievance of the appellant/Revenue in this appeal is in a very limited sphere. The claim of the assessee for depreciation on the aircraft was disallowed by the Assessing Officer (AO) on the ground that the said aircraft was grounded in the relevant assessment year and was not put to use. Therefore, there is no question of allowing any depreciation thereupon. In the process, the AO also noted that the assessee had given the said aircraft on lease and even the lease rental was not charged and the assessee had granted moratorium in respect thereof. The Income Tax Appellate Tribunal has allowed the depreciation, *inter alia*, observing that there was no finding of the AO that during the entire year, the aircraft was not put to use. In these circumstances, it is the argument of the learned counsel for the Revenue that

the matter could have been remitted back to the AO to record the finding thereupon.

2. The respondent/assessee on the other hand pleads that the order of the Tribunal is perfectly justified. In order to appreciate the aforesaid contention of the parties, we would like to take note of the facts of the case in brief.

3. The assessee is a public limited company. It furnished its return of income declaring an income of Rs.3,14,46,353/- after claiming depreciation, *inter alia*, of a sum of Rs. 1,86,60,752/- including a sum of Rs. 43,57,834/-, on the Aircrafts, deduction of which had been disallowed by the Assessing Officer, on the ground that it did not receive any lease rent, in respect of Aircraft leased by it to its related company namely M/s Jagson Airlines Ltd. and thus he held that the company had not put the Aircraft to use and disallowed the claim of depreciation observing as under:-

“The assessee company is engaged in the business of shipping and storage. During the course of examination of case, it is revealed that during the period under consideration, the Assessee company had entered into an agreement with M/s Jagson Airlines Limited, being on the groups of the companies regarding giving an aircraft on lease basis to this company. Accordingly to the terms and conditions of the lease agreement, the lease company had to pay lease rent to the assessee company at the rate as was agreed upon, contrary to this, it is found that the assessee company granted moratorium and no lease rent was agreed upon, was received from the lessee company. Despite being so, the assessee company claimed the depreciation for the entire period of the year amounting to Rs. 43,57,834/- at the rate of 40% on the aircraft on the ground of his ownership still being vested with the assessee company. It is therefore, concluded that since the assessee company has not put the aircraft to use for his business purpose, the depreciation as claimed by him is not admissible”.

4. The aforesaid decision of the CIT (A) has been upheld by the Tribunal vide impugned order dated 14th January, 2010 on the following basis:-

“Rival contentions have been heard and found from the record that assessee company itself was running the airlines. Accordingly, the aircraft was used for its business purposes. W.e.f. 1st July, 1994, it had leased two Dornier Aircrafts to M/s Jagson Airlines Limited which were put into operation by the later and Assessee company was receiving lease rent for the same. **During the year under consideration, the aircraft leased to m/s Jagson Airlines Limited grounded because the Major repairs.** Considering the fact that major repairs were required by the lessee, the Assessee company allowed moratorium for payment of the lease rent. The Assessing Officer declined assessee's claim of depreciation on the aircraft merely on the ground that it had granted moratorium to the lessee for payment of lease rent. **There is no finding that during the entire year, the aircraft was not put to use. The aircraft was already under lease to M/s Jagson Airlines Limited and was being used for its business.** The moratorium for payment of lease rent was granted purely on business consideration since the lessee was required to undertake major maintenance and repairs which in itself were huge equivalent to lease rent”

5. It is clear from the above that the Tribunal accepted that for the entire year the Aircraft leased to M/s Jagson Airlines Ltd. was grounded because it needed major repairs. Since this reason for grounding the Aircraft would clearly demonstrate that the Aircraft was incapable of being used and therefore cannot be treated a case of “right to use”. Therefore, conditions laid down in Section 32 of the Income-Tax Act are prima facie not satisfied. The highlighted portion of the Tribunal's order would show that on the one hand it has stated that during the year under consideration, the Aircraft was grounded and at the same time, reason for allowing the depreciation is that there was no finding recorded by the Assessing Officer that the Aircraft was not put to use. This appears to be self-contradictory.

6. Be as it may, as per the Assessing Officer even when this Aircraft was leased, no lease rent, as agreed upon, was charged and moratorium granted in this behalf by the assessee, the Aircraft could not be treated as 'put to use'. For this reason, the Assessing Officer did not go specifically into the question as to whether the Aircraft was grounded during the whole year. We, thus, agree with the contention of the learned counsel for the Revenue that if there was no specific finding recorded that too, because of the circumstances explained above, proper course of action for the Tribunal was to remit the case back to the Assessing Officer to find out as to whether Aircraft was put out of use during the entire year or not. It would be more so when the Tribunal itself is not clear about it and has spoken in two voices in the same order.

7. We may take note of the contention of Mr. C.S. Aggarwal, learned Senior Counsel for the assessee that since the Aircraft was leased, it would amount to "put to use" by the assessee. However, this argument cannot be considered without knowing as to whether the lessee had in fact used the Aircraft or not. It is because of the reason that there is a moratorium granted by the assessee/lessor to the lessee in respect of lease rentals. Position would have been different had the assessee received the lease rentals. In that case, the assessee could argue that in so far as assessee is concerned it has put the Aircraft to "use" by renting and whether the lessee has actually used it or not is not the concern of the assessee. That is not the position here. The argument of Mr. Aggarwal cannot be accepted on its face value without ascertaining the aforesaid fact regarding the actual use.

8. We may also record another argument of Mr. Aggarwal was that the incurring of expenditure on repair and maintenance of these aircraft in itself is an indicator to keep it ready to fly in the sky whenever it is economically viable. This is again presumptuous. When the matter is remitted back to the Assessing Officer it would be open to the assessee to take all such pleas justifying ground of depreciation.

9. In these circumstances, we modify the order of the Tribunal to that extent and instead of granting depreciation at this stage, we give the following direction:-

“The matter is remitted back to the file of the Assessing Officer, who shall record a specific finding as to whether during the entire year the Aircraft was not put to use. The Assessing Officer shall give full opportunity to the assessee in this behalf. After recording a finding to this effect, the Assessing Officer shall consider, in the light of relevant law, whether the assessee would be entitled to depreciation or not. All the submission which would be available to the assessee and advanced by it shall be considered by the Assessing Officer while passing fresh orders”

10. Appeal stands disposed of in the aforesaid terms.

(A.K. SIKRI)
JUDGE

(INDERMEET KAUR)
JUDGE

January 14, 2011
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