IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 2298 OF 2013

The Commissioner of Income Tax -9
Mumbai .. Appellant
v/s.

M/s. Apollo Finvest (I) Ltd. .. Respondent

Mr. Arvind Pinto for the appellant
Mr. Sanjiv M. Shah for the respondent

CORAM : M.S. SANKLECHA &
B.P. COLABAWALLA, J.J.
DATED : 8th FEBRUARY, 2016.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 29th April, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 1996-97.

2. Mr. Pinto, the learned Counsel for the Revenue urges only the following question of law for our consideration :-

> . *Whether on the facts and in the circumstances of the case, the Tribunal was correct in holding that the respondent company would be entitled to depreciation on assets of the Haryana State Electricity Board, with whom the respondent company had a sale and lease back transaction that was both in form and content a financial lease."*

3. The respondent assessee had claimed 100% depreciation on Energy Measuring Devices purchased from Haryana State Electricity Board (the HSEB). After purchase, the same was leased back to HSEB under Lease Agreement dated 29th September, 1995. During the course of the assessment proceedings, the Assessing Officer held that the Lease Agreement styled as purchase and lease back transaction was infact and in substance a finance lease agreement. The Assessing Officer in his order dated 21st March, 2002 placed reliance upon Circular No.2 of 2001 issued by the CBDT, which states that "where assets are factually non-existent created by *havala* transaction, the question of allowing depreciation does not arise". On the aforesaid ground, the Assessing Officer disallowed the depreciation amounting to Rs.1.99 crores claimed by the respondent assessee and added the same to its income.

4. In appeal, the Commissioner of Income Tax (Appeals) (CIT(A)) examined the entire transaction of purchase and lease back in the context of CBDT Circular No.2/2001 dated 9th February, 2008. On examination, the CIT(A) came to the conclusion that the transaction entered into by the respondent assessee with HSEB under Agreement dated 29th September, 1995 were genuine as the assets were very much

available / in existence. Thus, the claim on depreciation is allowable. In fact the CIT(A) placed reliance upon the decision of the Tribunal in the case of ***West Coast Paper Mills Ltd. Vs. Joint Commissioner of Income Tax***, rendered for the Assessment Years 1996-97 and 1997-98, in identical fact situation to that of the respondent assessee's case consequently he held himself bound by the decision of the Tribunal and followed the same to allow the claim of the respondent assessee to depreciation.

5. Being aggrieved, the Revenue carried the issue in appeal to the Tribunal. The Tribunal by the impugned order dismissed the Revenue's appeal. This by placing reliance upon the decisions of Apex Court in *I.C.D.S. Ltd. Vs. Commissioner of Income Tax & Anr. (2013) 350 ITR 527 SC* and of the Tribunal in *Development Credit Bank Ltd. Vs. DCIT*, (ITA No. 3006/M/01, 4892/M/03 and 3620/M/01). The impugned order also makes a reference to the decision of the Tribunal in *West Coast Paper Mills Ltd.(Supra)* to conclude that the claim of depreciation on the sale and lease back of assets is allowable.

6. Mr. Pinto, learned Counsel for the Revenue in support of the appeal submits that the decision of the Apex Court in ICDS Ltd. (Supra)

would not apply to the facts of the present case as it proceeded on the ground that it was a hire purchase agreement unlike in this case. Further, the decision of the Tribunal in *West Coast Paper Mills Ltd. (Supra),* which came to be upheld by this Court in Income Tax Appeal 389 of 2001 by the decision dated 16th October, 2008 dismissing the Revenue's appeal will also not apply. However, it is conceded by him that the facts in *West Coast Paper Mills Ltd.(Supra)* are identical to the facts of the respondent assessee's in the present case. It must be recorded that Mr. Pinto does not dispute that the decision of the Tribunal in *Development Credit Bank (Supra)* is applicable to the present facts as no submissions to show its inapplicability were made even when sought.

7. We find that the decision of the Apex Court in *ICDS (Supra)* would apply to the present facts. The distinction drawn by Mr. Pinto is that the case *ICDS (Supra)* was a case of hire purchase and not so in this case, is no distinction for the reason that the Supreme Court in *ICDS (Supra)* held that the Assessee was in the business of leasing of vehicles and not hire purchase. The Apex Court in *ICDS (Supra)* has held that for claim of depreciation to be allowed, the condition precedent are ownership of the assets and user for purposes of business

i.e. not usage of the assets by the Assessee itself but for purposes of its business of leasing. Both in *ICDS (Supra)* and this case, the respondent is in the business of leasing. Thus, claim of depreciation is allowable. In fact, the Revenue has not even attempted to show that the decision of the Tribunal in *Development Credit Bank Ltd. (Supra)* is not applicable to the present facts. Besides, the entire case of the Revenue as made by the Assessing Officer is the basis of the Circular No.2 of 2001 issued by CBDT. However, in appeal, the CIT(A) has examined the transactions and found them to be genuine. In fact, the impugned order of the Tribunal also refers to its decision in *West Coast Paper Mills Ltd.(Supra)* which have been analyzed by the CIT(A) in his order and found to be identical to the facts of this case. In fact the order of the Tribunal in *West Coast Paper Mills Ltd.(Supra)* was challenged in appeal being Income Tax Appeal No.389 of 2008 filed by the Revenue in this Court. However, the same was dismissed on 16th October, 2008. Further, an SLP filed by the Revenue against the decision of this Court in *West Coast Paper Mills Ltd.(Supra)* was also not entertained by the Apex Court by its order dated 9th October, 2009 in SLP (c) No. 2667 of 2009. Besides, in these facts we find that it is not disputed that HSEB has not claimed any depreciation and the respondent assessee had also taken loan against security of the leased assets.

8. In view of the fact that the impugned order of the Tribunal stands covered by the decision of this Court in *West Coast Paper Mills Ltd.(Supra)* as well as decision of the Apex Court in *ICDS Ltd. (Supra)*, the question as framed does not give rise to any substantial question of law for our consideration.

9. Accordingly, appeal is dismissed. No order as to costs.

(B.P. COLABAWALLA, J.) **(M.S. SANKLECHA, J.)**