

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 5/7/2016

C O R A M

The Honourable **Mr.Justice S.Manikumar**
and
The Honourable **Mr.Justice D.Krishnakumar**

Tax Case Appeal No.845 of 2007

M/s.Upasana Finance Ltd
98 A Dr.Radhakrishnan Salai
Mylapore
Chennai 600 004.

...

Appellant

Vs

The Deputy Commissioner of Income Tax
Company Circle – III (3)
Nungambakkam High Road
Chennai 600 034.

...

Respondent

Prayer: Appeal filed against the order of the Income Tax Appellate
Tribunal, Madras 'B' Bench, Chennai, dated 28/7/2006, in ITA
No.67/Mds/2003.

For appellant : Mr.P.J.Rishikesh

For respondent : Mr.M.Swaminathan
Senior Standing Counsel
for Income Tax
for Mr.K.Suresh Kumar
Junior Standing Counsel for
Income Tax.

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J U D G M E N T

(Judgment of the Court was made by S.Manikumar,J)

Instant Appeal is filed against the order dated 28/7/2006, passed by the Income Tax Appellate Tribunal, Chennai Bench – 'B' in I.T.A.No.67/Mds/2003 for the assessment year 1998 – 1999.

2. Short facts leading to the appeal are that the appellant is a finance Company, engaged in hire purchase, leasing and discounting business. The appellant had filed its return of income for the assessment year 1998 – 1999, on 30/11/1998. In the said assessment year, a sum of Rs.21,13,705/- was over due, from defaulting customers/borrowers, for more than a period of six months. According to the appellant, since these monies were overdue (NPA/ Non-performing assets), the appellant did not show this as part of income. Assessing Officer, completed the assessment, on 23/3/2001, by which a sum of Rs.21,13,705/- was added as income and therefore, it was brought to tax. Assessing Officer, further completed the assessment by which he further added Lease Equalisation Reserve of Rs.42,55,549/- and Special Depreciation Reserve of Rs.54,76,039/- to the book profits offered under Section 115JA of the Income Tax Act.

3. Being aggrieved by the order of the Assessing Officer, dated

23/3/2001, assessee filed an appeal, in I.T.A.Tr.No.506/2001-2002/A.III, before the Commissioner of Income Tax (Appeals) III, Chennai.

4. After hearing the parties and considering the material on record, vide order, dated 1/10/2002, in Appeal No.506/2001-2002, the Commissioner of Income Tax (Appeals) III, confirmed the order of Assessing Officer with relation to NPA and a sum of Rs.21,13,705/- was over due on the ground that income accrues when it becomes due. The Commissioner of Income-Tax (Appeals) III, also reversed the order of the Assessing Officer and so far as Lease Equalisation Reserve of Rs.42,55,549/- and Special Depreciation Reserve of Rs.54,76,039/- on the grounds that, these reserves are ascertained liability and it is only a charge on profits and need not be added back to the book profits, thus accepting the contention of the assessee Commissioner of Income Tax (Appeals) III, partly allowed the assessee's appeal.

5. As against the other issues, the assessee filed an appeal in I.T.A.No.2016/Mds/2002. The Deputy Commissioner of Income-Tax, Company Circle - III (3), Chennai filed a cross-appeal in

I.T.A.No.67/Mds/2003. After hearing the parties by a common order, dated 28th July 2006, Tribunal dismissed the assessee's appeal and allowed the Department's appeal.

6. Not satisfied with the order made in I.T.A.No.67/MDS/2003, dated 28/7/2006, assessee has filed the present appeal, raising the following substantial questions of law:-

"1. Whether in facts and circumstances of the case, the Tribunal was correct in upholding the order of the CIT (A) in disallowing the provisions for non performing assets which was debited to the Profit and Loss Account?

2. Whether in facts and circumstances of the case, the Tribunal was right in treating the sum of Rs.21,13,705/- as income when the same was not actually received by the appellant?

3. Whether in facts and

circumstances of the case, the Tribunal was right in adding the over dues as income on a notional basis?

4. Whether in facts and circumstances of the case, the tribunal was right in concluding that once income is accrued it is liable to be offered to tax though not actually received and when it is doubtful of recovery?

5. Whether in facts and circumstances of the case, the tribunal was right in treating income not recoverable as income merely because the assessee is following the mercantile system of accounting?

6. Whether in facts and circumstances of the case, the Tribunal was correct in adding the sums of Lease

Equalisation Reserve and Special Depreciation Reserve to Book Profits, when these were merely a charge on profits of the Company?"

7. On this day, when the matter came up for hearing, Mr.P.J.Rishikesh, learned counsel appearing for the assessee, as well as Mr.M.Swaminathan, learned Senior Standing Counsel for the Income Tax Department submitted that on the date when the Tribunal decided the lis between the parties, decision in **TVS Finance and Services Ltd., Jayalakshmi Estates Vs. The Joint Commissioner of Income Tax Special Range - XI reported in (2009) 318 ITR 435 (Mad)** was not rendered.

8. A Hon'ble Division Bench of this Court in **TVS Finance and Services Ltd., Jayalakshmi Estates's** case held that Lease Equalisation charge over the period of lease is equal to the difference between the quantum of principal recovered and residual value and the provision was made as per the Institute of Chartered Accountants of India's (ICAI) note.

9. According to Mr.P.J.Rishikesh, learned counsel for the appellant, **TVS Finance's** case would lend support to the case of the assessee.

10. Per contra, Mr.M.Swaminathan, learned counsel for the Revenue submitted that in TVS Finance's case, this Court relied on a decision of the Hon'ble Supreme Court in **Commissioner of Income Tax – IV, Delhi Vs. HCL Comnet Systems and Services Limited reported in (2008) 14 SCC 470 = 305 ITR 409 (SC)**. However, subsequently, with Explanation to Section 115JA, Finance (No.2) Act, 2009 introduced an amendment (g) to the explanation, to the second proviso, which reads that “the amount or amounts set aside as provision for diminution in the value of any asset.” He further submitted that the said amendment has been introduced retrospectively with effect from 1/4/1998.

11. Having regard to the retrospective effect of the amendment from 1/4/1998, both the learned counsel for the parties submitted that the issue as to whether adding up of sums under Lease Equalisation Reserve and special depreciation reserve, would fall under clause (g) to the explanation to the second proviso to Section 115 JA of the

Income Tax Act, 1961 requires to be addressed, and adjudged by the assessing Officer.

12. In the light of the subsequent amendment with effect from 1/4/1998, now brought before this Court, and the submissions stated *supra*, we are of the view that the substantial questions of law involved in the instant appeal requires to be suitably framed and therefore, in exercise of powers conferred under Sub-Section 3 of Section 260 A of the Income Tax Act, 1961, the following substantial question of law is framed

“Whether Lease Equalisation Reserve and Special Depreciation Reserve would fall under clause 'g' to the explanation to the second proviso of Section 115 JA of the Income Tax Act.?”

13. To adjudge the above issue, with reference to the facts and circumstances of this case, we are also of the view that the matter requires to be remanded to the Assessing officer.

14. In the light of the above discussion, **Tax Case Appeal is allowed** and the impugned order passed by the Income Tax Appellate Tribunal, dated 28/7/2006, is set aside. Assessing Officer is directed to act in accordance with the provisions of the Income Tax Act and the Rules framed thereunder. The assessee is also at liberty, to place all the materials before the said authority, for an effective adjudication of the questions of law, now framed before this Court. No costs.

(S.M.K.,J) (D.K.K.,J)
5th July 2016.

mvs.

Index: yes/No

website: Yes/No.

S.MANIKUMAR,J

a n d

D.KRISHNAKUMAR,J

mvs.

Tax Case Appeal No.845 of 2007

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