

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.06.2022

CORAM :

THE HON'BLE MR. JUSTICE R.MAHADEVAN
AND
THE HON'BLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

T.C.A.Nos.695 of 2009
and
1100 to 1103 of 2010

Commissioner of Income Tax,
Chennai.

...Appellant/Appellant in
T.C.A.No.695 of 2009

Commissioner of Income Tax - I,
Chennai.

...Appellant/Appellant in
T.C.A.Nos.1100 to 1103 of 2010

Versus

M/s.Tube Investments of India Ltd.,
DARE House,
234, NSC Bose Road,
Chennai - 600 001.

...Respondent/Respondent in all T.C.As

T.C.A.No.695 of 2009: Tax Case Appeal filed under Section 260 (A) of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'C' Bench, Chennai in I.T.A.No.1650/Mds/2007 dated 09.01.2009 against the order of the office of the Commissioner of Income Tax Appeals VIII Chennai - 600 034 dated 30.03.2007 in ITA.No.139/2006-07/Tr.16/A VIII and against the Assement order of Assistant Commissioner of Income Tax company Circle III (2) Chennai - 34 dated 28.03.2006 for PAN/GIR No.AAACT1249H/32001-T for the Assessment year 1998-99.

T.C.A.Nos.1100 to 1103 of 2010:Tax Case Appeals filed under Section 260 (A) of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'A' Bench, Chennai in I.T.A.Nos.987/Mds/2009, 988/Mds/2009, 989/Mds/2009 & 990/Mds/2009 dated 06.11.2009 against the order of the Commissioner of Tax Appeal Large Tax Payers Unit, Chennai - 101 dated 13.02.2009 in ITA.Nos.66/07-08/LTU(A), 33/08-09(LTU(A), 67/07-08/LTU(A), 34/08-09/LTU(A) respectively and against the Assesment order passed by Assistant Commissioner of Income Tax

Company Circle III (2) chennai dated 31.12.2007 made in PAN NO/GIR No.AAACT1248G/32002-T (in TCA 1100, 1102/2010) and AAACT1249H (in TCA 1101, 1103/10)

For Appellant
in all T.C.As : Mr.T.Ravikumar

For Respondent
in all T.C.As : Mr.K.Vaitheeswaran

COMMON JUDGMENT

R.MAHADEVAN, J.

The parties to the proceedings are one and the same and the issues involved herein are identical. Hence, all these appeals were heard together and decided by this common judgment.

2.The Revenue is the appellant herein. TCA No.695 of 2009 is filed against the order of the Income Tax Appellate Tribunal, Chennai 'C' Bench, dated 09.01.2009, relating to the assessment year 1998-98, whereas TCA Nos.1100 to 1103 of 2010 are filed against the common order of the Income Tax Appellate Tribunal, Chennai 'A' Bench, dated 06.11.2009, relating to the assessment years 2000-01, 2001-02, 2002-03 and 2003-04 respectively.

3.On 11.08.2009, TCA No.695 of 2009 was admitted on the following substantial questions of law:

"1.Whether on the facts and circumstances of the case, the Tribunal was right in holding that the value of the MILIEV grant given by the Dutch government as a subsidy for purchase of wind turbine generator, could not be brought to tax in the hands of the assessee u/s.28(iv), when the assessee did not purchase the equipment, but transferred the right to another company?

2. Whether on the facts and circumstances of the case, the Tribunal was right in merely accepting the letter of the broker that no off set credits were given to the assessee, instead of remanding the matter to enable the assessing officer to get the correct facts from the Dutch government through diplomatic channels?

3.Whether on the facts and circumstances of the case, the Tribunal was right in allowing the "electricity charges" paid to Wescare as a deduction, when purchase of electricity from a person other than

the electricity board is illegal and contrary to public policy?"

4. By order dated 31.01.2011, Tax Case Appeal Nos. 1100 to 1103 of 2010 were admitted on the following substantial questions of law:

"1. Whether on the facts and circumstances of the case, the Appellate Tribunal was right in confirming the order of the Commissioner of Income Tax (Appeals) holding that the assessee was not the owner of the Wind Turbine Generators and the 'electricity charges' paid to M/s. Wescare India Ltd., was allowable as deduction?

2. Without prejudice to the preceding question, whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that the 'electricity charges' paid to M/s. Wescare India Ltd., was allowable as deduction, when purchase of electricity from a person other than the Tamil Nadu Electricity Board was illegal and contrary to the Public Policy?"

5. At the outset, the brief facts of the case, which are necessary for deciding the issues involved herein, have been stated below:

5.1. The respondent / assessee is engaged in the business of manufacture of bicycles, chains, precision steel tubes, CR steel strips, etc. For the assessment year 1998-99, they filed its return on 30.11.1998 declaring total income of Rs. 1,46,86,704/- and disclosing profit under section 115J at Rs. 4,04,28,085/-. The said return of income was processed under section 143(1) on 28.03.1999 accepting the book profit and assessment order was passed on 27.03.2001. Subsequently, notice under section 148 came to be issued on 04.03.2005 for reassessment, based on the survey conducted on 07.02.2005.

5.2. During the course of inspection, it was found that the respondent / assessee entered into an Engineering, Procuring and Commissioning Contract (for brevity, 'EPC contract') with M/s. Lagerway Wind Turbines BV, Netherlands, a Dutch entity (for brevity, 'LW') on 20.01.1997, for development of a wind farm of 20 MW capacity consisting of 80 Wind Turbine Generators (WTGs), to be built and delivered by LW. The total project cost was NLG 48,301,031 and the erection work was to be carried out in India by M/s. Das Lagerway Wind Turbine Ltd (DLWL), an Indian joint venture company involving LW. As per the EPC contract, on 17.02.1997, the respondent/assessee placed a purchase order with LW for design, manufacture, supply, erection, testing and commissioning of 80 nos. of WTGs at its site, in and around

Sankanapuram. Consequently, the respondent / assessee sent an application to the Dutch Government through LW seeking grant under the Miliev Programme (subsidy scheme), as per which, a substantial part of the cost of wind mills would be paid by the Dutch Government through NIO Bank as grant for such purchase directly to the supplier of the wind mill viz., LW, Netherlands and the balance cost would be paid to the LW by the assessee by opening letter of credit. Pursuant to the same, a MOU dated 17.02.1997 was entered into among the respondent / assessee, WIPRO and DLWL, whereby WIPRO was to syndicate the lease finance of the project and open the letter of credits in favour of LW. Besides this, another MOU was signed among the respondent/ assessee, WIPRO and Wind Energy System Care India Ltd (Wescare), in and by which, the respondent / assessee took lease operation of 20 MW wind farm at Sankanapuram from Wescare and WIPRO syndicated lease finance for the project.

5.3. On 24.03.1997, a grant agreement was entered into between the NIO Bank and the respondent/assessee, to disburse the Miliev grant to LW on behalf of the Dutch Government, as per which, the respondent/assessee shall not transfer or assign its rights under this agreement to a third party. The amount given under Miliev Grant was NLG 2,56,99,351. The total amount of benefit passed on to DLWL was Rs.58.85 crores and DLWL paid a sum of Rs.2 crores i.e., Rs.2.5 lakhs per wind turbine for 80 WTGs to the respondent/assessee to acquire its right under EPC contract.

5.4. Out of total contract of Rs.102.15 crores, as per the purchase order dated 17.02.1997, the respondent/assessee received only a part of the same valued at Rs.84,52,700/- and sold the same to M/s.DLWL on high sea sale basis for a consideration of Rs.86,21,753/- and the difference of Rs.1,69,053/- was accounted as commission by the assessee. They did not purchase the balance value of the goods and they requested LW to issue the same in the name of DLWL, which assembled the wind turbines and sold the same to various finance companies. On 05.09.1997, a performance guarantee letter was issued by LW in favour of the respondent / assessee; on 25.09.1997, no objection certificate was issued by the Tamil Nadu Electricity Board to the respondent / assessee for installation of WTGs; and on 29.09.1997, a tripartite agreement was entered into among the respondent / assessee, Wescare and the finance companies, as per which, the finance companies allowed Wescare to operate the wind mills on lease. The respondent / assessee was to pay operational lease rental calculated as: the electricity consumed x TNEB rates - 25 paise per unit. Accordingly, the respondent/ assessee paid a sum of Rs.59,56,238/- towards the electricity supplied to it by Wescare. As some of the wind mills were not working after

erection, the respondent / assessee assigned its rights under the EPC contract in favour of Wescare for taking legal action against LW and for getting compensation for inadequate working of the wind mills. Subsequently, arbitration proceedings were initiated and a compensation of Rs.24.27 crores was ordered under an international arbitration award dated 10.05.2004 and the respondent / assessee was entitled to receive 10% share in the compensation.

5.5. Taking note of all these aspects, the Assessing Officer by the reassessment order dated 28.03.2006, inter alia disallowed the electricity charges of Rs.59,56,238/- incurred by the respondent/assessee in respect of electricity supplied to it by Wescare by holding that the respondent/assessee was the owner of WTGs, besides making addition of Rs.58,85,41,252/- (Rs.54,35,41,274/- for miliev grant by the Dutch Government + Rs.4,49,99,978/- for additional subsidy granted by NIO Bank to the assessee for meeting various expenses in connection with the installation of the WTGs) towards consideration received by the respondent / assessee for surrendering its rights under EPC contract in favour of DLWL and Rs.33,87,06,625/- for off set credit. Aggrieved over the said assessment order, the respondent/assessee preferred an Appeal before the First Appellate Authority/Commissioner of Income Tax (Appeals) VIII, Chennai, who partly allowed the appeal, vide order 30.03.2007. Challenging the said order of the CIT(A), the appellant/Revenue preferred an Appeal before the ITAT. By order dated 09.01.2009, the said appeal was dismissed. Therefore, the appellant/Revenue is before this court with Tax Case Appeal No.695 of 2009.

5.6. In respect of the assessment years 2000-01, 2001-02, 2002-03 & 2003-04, the respondent/assessee company filed its return of income, declaring the total income of Rs.27,86,23,531/-, Rs.36,63,00,895/-, Rs.46,35,46,246/- & Rs.56,89,60,117/- respectively. They claimed payment of Rs.10,03,20,820/-, Rs.8,06,50,593/-, Rs.7,50,77,615/- and Rs.1,77,65,398/- respectively, for purchase of electricity generated by the wind mills. The returns of income filed by the respondent/assessee were processed under Section 143(1). Subsequently, notices under Section 148 came to be issued to the respondent/assessee on 06.03.2007, 11.10.2007, 05.02.2007 & 28.03.2008 respectively. Upon receipt of the same, the respondent/assessee filed its replies treating the original returns filed by them as response to the said notices. After following due procedure, the assessing officer ultimately passed the assessment order dated 31.12.2007 in respect of the assessment years 2000-01 and 2003-03 and assessment order dated 27.11.2008 in respect of the assessment years 2001-02 and 2003-04, thereby disallowing the electricity expenses incurred by the respondent / assessee, on the basis of the earlier order passed

in respect of the assessment year 1998-99.

5.7. Aggrieved over the assessment orders so passed by the Assessing Officer, the respondent/assessee preferred Appeals before the CIT(A), who by separate orders dated 13.02.2009, partly allowed the appeals. Challenging the same, the appellant/Revenue preferred Appeals and the respondent/assessee preferred cross objections before the ITAT and all the appeals and cross objections were dismissed, by a common order dated 06.11.2009, which is impugned in TCA.Nos.1100 to 1103 of 2010 filed by the appellant/ Revenue.

6.1. Mr.T.Ravikumar, learned senior standing counsel for the appellant/Revenue contended that according to the agreement with the Dutch Government for the Miliev grant, the respondent / assessee was not to transfer or assign the rights to any third party, whereas they entered into an agreement with M/s.DLWL, whereby the right to purchase the wind turbine generators, was transferred and consequently, the benefit of the Miliev grant given by the Dutch Government was enjoyment by the said DLWL, although the assessee continued to be the beneficiary and the moneys were purportedly paid to the manufacturer to subsidise the purchase of the machinery by the assessee. Taking note of the same, the assessing officer rightly made addition of Rs.58.85 crores representing the total amount of benefit passed on to DLWL, as against the claim of Rs.2 crores by the assessee, relating to the assessment year 1998-99. According to the learned counsel, the grant is given as a subsidy for purchase of a particular equipment and hence, the same would be treated as a capital receipt. On the other hand, in this case, the respondent / assessee had passed on the benefit of the grant to DLWL and no longer used the same for capital purchases and therefore, the said grant should be treated as a benefit received under section 28(iv) and the transfer of the same to a third party is an application of such benefit. Adding further, the learned counsel submitted that the respondent / assessee not only gave up the right of grant for a paltry consideration of Rs.2 crores, but also took the same goods on lease on the enhanced value from the banks / finance companies, which is inconceivable. However, the CIT(A) erred in deleting the said addition made by the assessing officer, which was also upheld by the Tribunal.

6.2. The learned senior standing counsel appearing for the appellant further contended that there were several documents to show that negotiations were on for claiming off set credits and permitting M/s.Lockheed Martin, USA to utilise the same; and M/s.Fremont were the brokers for the same and hence, mere letter from the broker that no off set credits were taken by M/s.Lockheed Martin, is not sufficient evidence and the Tribunal ought to have in all fairness remanded the matter to the

assessing officer so as to enable the revenue to get a clear certificate from the Dutch Government through diplomatic channels in this regard.

6.3. That apart, the learned senior standing counsel for the appellant submitted that the wind mills were installed in the name of the assessee and the assessee had been shown as the owner of the wind mills in the records of TNEB; the transaction with the finance company for the sale of wind turbines was not genuine and as such, the finance company cannot be construed to be the owner of the same; the sale of components of wind turbines by the assessee to DLWL was a sham transaction; and hence, the assessing officer wholly justified in disallowing the electricity charges incurred by the assessee in respect of the electricity supplied to it by Wescare. However, the CIT(A) erroneously concluded that the assessee was not the owner and accordingly, allowed the claim of the assessee in regard to the payment of operational lease rental to Wescare equivalent to the measure of units of electricity consumed by the assessee at TNEB rates less Rs.0.25 per unit. The said finding of the CIT(A) was also wrongly affirmed by the Tribunal.

6.4. With respect to the assessment years from 2000-01 to 2003-04, the learned senior standing counsel for the appellant submitted that following the order passed by the Tribunal relating to the assessment year 1997-98, the CIT(A) erred in allowing the claim of the assessee for deduction of electricity charges paid to Wescare and the same was also confirmed by the Tribunal. Though it was contended by the revenue before the Tribunal that the payment of operational lease rental though designated as electricity charges cannot be allowed to be deducted, as the same was violative of public policy within the meaning of Explanation 1 of section 37 of the Act, the Tribunal erred in rejecting the said contention and dismissed the appeals filed by Revenue.

6.5. Ultimately, the learned senior standing counsel appearing for the appellant referred to various decisions and submitted that these tax case appeals will have to be allowed by setting aside the orders impugned herein.

7. Mr. K. Vaitheeswaran, learned counsel appearing for the respondent/assessee submitted that in terms of EPC contract and the Miliev grant agreement, the respondent / assessee was a party recognized by the Dutch Government / NIO as ultimate consumer of electricity; and the grant was directly paid to LW and no part of the grant was received by the assessee. For the right transferred to DLWL, the assessee received consideration of Rs.2 crores, which was offered for taxation. Further, the respondent / assessee was not the owner of WTGs and they only

purchased some parts of WTGs amounting to Rs.84,52,700/- in its name, at the initial stage of the wind farm project, which were inturn, sold to DLWL on high sea sale basis and thereafter, no further purchases were made by the assessee. That apart, the WTGs were installed on the land owned by the assessee and were leased to Wescare and the electricity generated was to be supplied to the assessee, which inturn made payment on the basis of the electricity charges per unit produced. After considering those aspects, the CIT(A) rightly allowed the claims of the assessee by deleting the additions made by the assessing officer. The said orders of the CIT(A) were also affirmed by the Tribunal. To substantiate his contentions, the learned counsel placed reliance on various case laws. Therefore, according to the learned counsel, no interference of this court is required to the orders passed by the Tribunal, which are impugned herein.

8.Heard the learned counsel appearing for both sides and also perused the materials placed before this Court.

9.At the outset, it is to be pointed out that the assessee in all these appeals is M/s.Tube Investments of India Ltd. The first case viz., TCA No.695 of 2009 pertains to the assessment year 1997-98. Following the decision rendered by the Tribunal on 09.01.2009 in the appeal relating to the assessment year 1997-98, which is questioned in TC.No.695 of 2009, the appeals relating to the subsequent assessment years viz., 2000-01, 2001-02, 2002-03 and 2003-04 were decided by the Tribunal, by order dated 06.11.2009, which is impugned in TCA Nos.1100 to 1103 of 2010. Therefore, as a logical sequitur, the decision to be taken in the first case viz., TCA No.695 of 2009 will govern the subsequent cases too viz., TCA Nos.1100 to 1103 of 2010.

10.1.The three major issues involved in TCA No.695 of 2009 are with respect to (i)transfer of right by the assessee to another company; (ii)no offset credit; and (iii)electricity charges paid to Wescare as deduction. At the first instance, we are inclined to go into the findings of the authorities below in this regard.

10.2.As regards the first issue, according to the respondent / assessee, the benefit of Miliev grant given by the Dutch Government was enjoyed by DLWL and the respondent / assessee received consideration of only Rs.2 crores i.e., Rs.2.5 lakhs per wind turbine in respect of 80 WTGs for transferring its right to DLWL under EPC contract for installation of 80 WTGs delivered by LW. Whereas, the Assessing Officer brought to tax the value of the entire benefit of Rs.58,85,41,252/- and treated the sale by the respondent/ assessee to DLWL and the sale of the wind mills to the finance companies as sham transactions, on the premise that the wind mills were standing in the name of the

assessee in the books of TNEB, the finance companies never became the owners of the wind mills and these companies claimed 100 per cent depreciation; and also on the basis of the letter dated 30.06.1997 from the company secretary of the assessee requesting Sanjay Jayaraman in Hong Kong to send a letter directly to LW backdating it as 27.03.1997. However, the appellate authorities did not accept the same and accordingly, deleted the addition made by the assessing officer, on the ground that the grant was given by the Dutch Government as a matter of policy and it had nexus with the equipment and not with the buyer and hence, it was not possible for the purchaser to transfer the grant and the same was directly disbursed to the manufacturer. It was also pointed out by the appellate authorities that the revenue failed to produce any cogent material to prove that the assessee received over and above the disclosed consideration of Rs.2 crores; and there was no incriminating document made available against the assessee. The Appellate Authorities further noted that as per the agreements entered into the parties, the finance companies were allowed to operate the wind mills on lease and the payment of lease rentals was assured by Wescare and the assessee was to pay operational lease rental calculated as the electricity consumed x TNEB rates - 25 paise per unit. We do not find any good reason to disagree with the reasonings so recorded by the appellate authorities.

10.3. With regard to the second issue, the assessing officer made addition of Rs.33,87,06,625/- in respect of off set credits alleged to have been received by the respondent / assessee, stating that the respondent / assessee was entitled to claim the benefit by using the value of the WTGs imported from LW, under 'off set credit' or 'IP credit' allowed by the Dutch Government; Lockheed Martin, a US company, had certain commitments of purchasing goods from Dutch manufacturers to be fulfilled, the supply of 80 WTGs by LW to the assessee under the EPC contract was utilised towards the said commitment of Lockheed Martin to purchase goods from the Dutch manufacturers and the assessee claimed additional compensation from Lockheed Martin to facilitate the claim of the 'off set credit'. The assessing officer also referred to certain communications exchanged among Lockheed Martin, Fremont Group and the assessee in the financial year 1998-99, relating the steps being taken for availing 'off set credits', which were found at the premises of the assessee during the course of inspection. It was contended by the assessee before the appellate authorities that the efforts were made for facilitating the transaction and exploring the possibility of obtaining off set credits, which however, did not materialise and therefore, no amount was received by the assessee. Acceding to the same, the CIT(A) was of the view that there is absolutely no document on record to indicate with the authority that the assessee did receive offset credits and

accordingly, deleted the addition made by the assessing officer, which finding of the CIT(A) was also affirmed by the Tribunal. In the absence of any concrete material, we have no option except to concur with the view taken by the appellate authorities.

10.4.As regards the electricity charges, the assessing officer disallowed the said charges incurred by the assessee in respect of the electricity supplied to it by Wescare through wind turbines, on the premise that the assessee was the owner of the wind turbines and the TNEB made payments to the assessee for the electricity generated and hence, there is no justification for claiming the electricity charges paid to Wescare as deduction. It was pleaded by the assessee before the appellate authorities that they purchased only some components of wind turbines in its name in the initial stage of the wind farm project, which were inturn sold to DLWL on high seas sale basis and the same was also duly accepted in the sales tax assessment. The bill of lading and the bill of entry were in the name of DLWL and delivery of the items under such invoices was taken by DLWL and DLWL paid a sum of Rs.2 crores i.e., Rs.2.5 lakhs per wind turbine for 80 wind turbines to the assessee to acquire its right under the EPC contract for the purchase of wind turbines, which was duly accounted and offered to tax; and the assessee was only interested in supply of electricity and not in the ownership of the wind turbines. Considering the same, the CIT(A) noted that various agreements / arrangements / MOU were entered into by the assessee with various parties from time to time with the object to supply of electricity for a long duration at an economical / concessional rate; DLWL was the real owner of the wind farm project and it accounted for the income in relation to the sale of wind turbines to the finance companies; the assessments of the finance companies were completed treating them as the owners of the wind turbines and depreciation was also allowed. It was further pointed out that there is absolutely no evidence to indicate that the assessee did purchase indigenous parts in connection with the erection and commissioning of the turbines. Ultimately, the CIT(A) concluded that the assessee was not the owner of the wind turbines and accordingly, allowed the claim of the assessee in regard to the payment of operational lease rental to Wescare. Though it was contended by the appellant/Revenue that the allowance of electricity charges incurred by the assessee as deduction, is violative of public policy within the meaning of Explanation 1 of section 37 of the Act, the appellate authorities rejected the same, by observing that the payment of operational lease rental was in terms of the lease arrangement between finance companies, Wescare and the assessee though measured in terms of units of electricity consumed; and the same was admittedly, for the consumption of electricity for business purposes; and there is

no violation of the policies/ guidelines by any of the parties to the lease agreement pointed out by the TNEB till date. The said findings of the appellate authorities do not require any interference by this court, as the same are based on the materials available before the same.

11.1. Before this court, the learned counsel for the appellant/ Revenue placed reliance on the following decisions:

(i) Sahney Steel & Press Works Ltd v. Commissioner of Income Tax [(1997) 94 Taxman 0368], wherein, it was held by the Hon'ble Supreme Court that "subsidy from public funds granted by Government by way of refund of sales tax on purchase of machinery, etc. after commencement of production to enable the assessee to run the business more profitably, and not for setting up of the industry, is operational subsidy and hence, a revenue receipt".

(ii) Upasana Finance Ltd v. Joint Commissioner of Income-tax, [(2013) 40 taxmann.com 252 (Madras)], wherein, the assessee purchased a boiler and subsequently, leased it out to sister concern of seller and they claimed depreciation on the said boiler. The assessing officer found that boiler was attached to land and sale could not be completed by mere issuance of sale bills and the boiler was still lying and functioning in the factory of seller and it was not installed in its sister concern and hence, the transaction in question was a loan transaction and it was wrongly given colour of lease transaction and hence, disallowed the assessee's claim. The same was upheld by the Tribunal, against which, the assessee preferred the Tax case appeal and the same was dismissed by this court, by holding that "when the finding of fact on the genuineness of the transaction had not been challenged in the manner known to law and the same having attained finality, there exists no ground to interfere with the order of the authorities below rejecting the claim for depreciation".

(iii) CIT v. Ganapati Finance Ltd [(2013) 29 taxmann.com 162 (Delhi)], wherein the assessee claimed depreciation on LPG cylinders leased out to Janta Gases and Air Jet Spindle Assembly and Positar disc leased out to Maruti Syntax. The assessing officer disallowed depreciation after forming a view that assessee did not purchase the said assets, but merely financed their purchase. The same was reversed by the CIT(A), which was also affirmed by the Tribunal. However, the Delhi High Court was of the opinion that "the Tribunal ought to have tested the evidence adduced by the assessee in the light of the material gathered by the assessing officer, the conduct of the parties and other surrounding circumstances, whereas the Tribunal seems to have proceeded merely on the basis of the documentary

evidence without putting it to rigorous examination in the light of the aspects highlighted by the assessing officer". "In the case of LPG cylinders, the transaction was only a financing transaction and not a lease, with no material to show that the assessee became the owner of the cylinders and leased them to Janta. In the case of air jet spindles and positar disc, the very existence of the assets and the genuineness of the purchase of the assets by the assessee was not proved. Therefore, the assessee was not entitled to depreciation".

(iv)Avasarala Technologies Ltd v. Joint Commissioner of Income tax [(2016) 66 taxmann.com 377 (SC)]. In that case, the assessee claimed depreciation on certain machinery allegedly purchased from Andhra Pradesh State Electricity Board vide sale deed dated 29.09.1995 which, as per the assessee, was given to the APSEB itself on lease. All the authorities below had found, as a fact, that there was no such purchase of machinery and the transaction in question was sham. On that basis, it was concluded that since the machinery was not purchased by the appellant, it never became the owner of the machinery and therefore, could not claim any depreciation thereof. "These are pure findings of facts recorded by the authorities below and therefore, no question of law arose out of impugned order", according to the Hon'ble Supreme Court.

(v)Commissioner of Income Tax v. Southern Cables & Engineering Works [(2007) 289 ITR 0167], in which, it was held by Kerala High Court that "an assessee who is following mercantile system of accounting, is entitled to deduct, from the profits and gains, its business liability which arose during the relevant previous year and that liability did not cease to be a liability because the assessee had taken proceedings before higher authorities for getting it reduced or wiped off".

11.2.We are in agreement with the legal proposition laid down in the aforesaid decisions. However, the same have no relevance to the facts of the present case, wherein, the respondent / assessee did not make any claim for depreciation before the assessing officer as if they were the owner of the wind mills. On the corollary, the appellant /Revenue failed to produce concrete material evidence against the respondent / assessee.

12.At the same time, it is pertinent to refer to the following decisions cited by the learned counsel for the respondent / assessee, viz.,

(i)Godhra Electricity Co.Ltd v. Commissioner of Income-tax [(1997) 91 Taxman 351 (SC)], in which, it was observed by the Hon'ble Supreme Court, as follows:

"14.The question whether there was real accrual of income to the assessee-company in respect of the enhanced charges for supply of electricity has to be considered by taking the probability or improbability of realisation in a realistic manner. If the matter is considered in this light, it is not possible to hold that there was real accrual of income to the assessee-company in respect of the enhanced charges for supply of electricity which were added by the ITO while passing the assessment orders in respect of the assessment years under consideration. The AAC was right in deleting the said addition made by the ITO and the Tribunal had rightly held that the claim at the increased rates as made by the assessee - company on the basis of which necessary entries were made represented only hypothetical income and the impugned amounts as brought to tax by the ITO did not represent the income which had really accrued to the assessee-company during the relevant previous years..."

(ii)Commissioner of Income Tax Chennai v. Sundaram Finance Ltd. [(2016) SCC Online Mad 3072], wherein, it was held by this court as follows:

"14.As rightly pointed out by the Commissioner of Income Tax (Appeals), the question of ownership of the land has nothing to do with the claim for depreciation. Depreciation is claimed in respect of the plant and machinery installed on the land.

15.Unfortunately, the Assessing Officer was misguided by the fact that the Electricity Authority granted permission only to the land owner to run the windmills. It is not the case of the Department or the respondent herein that the respondent was in the business of generating power through windmills. There is no restriction by the Electricity Board that unless the applicant for the generation of wind power also owns the plant and machinery he would not be entitled to a license.

16.In other words, the Assessing Officer as well as the Tribunal misdirected themselves to the actual issue on hand, without realizing what is the income either from the land owner or from the financier depending each side of the table as per the terms of the financing agreement. The Revenue cannot claim revenue from both. Therefore, the question of law is answered against the Revenue and the appeals are dismissed".

In the light of the ratio laid down in the aforesaid decisions, this court is of the opinion that without any substantive material, the respondent / assessee cannot be construed as owner of the wind mills and hence, the payment made by them to Wescare can be treated only as consumption charges for the electricity supplied to them, that too, for business purposes. As such, there is no question of law much less substantial question of law arisen for consideration.

13. In the result, all these tax case appeals filed by the Revenue stand dismissed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

mrr

To

1. The Commissioner of Income Tax,
Chennai.
2. The Commissioner of Income Tax - I,
Chennai.
3. The Income Tax Appellate Tribunal 'C' Bench,
Chennai.
4. The Income Tax Appellate Tribunal 'A' Bench,
Chennai.
5. The Commissioner of Income Tax - I,
Chennai.
6. The Commissioner of Tax Appeals VIII
Chennai - 34.

+2cc to Mr.Ravikumar, Advocate, S.R.No.33383

T.C.A.Nos.695 of 2009 &
1100 to 1103 of 2010

MG(CO)
RGA(26/07/2022)