MCORP GLOBAL PVT. LTD. A

v.

COMMISSIONER OF INCOME-TAX, GHAZIABAD

Civil Appeal No. 955 of 2009

FEBRUARY 12, 2009 B

[S.H. KAPADIA AND H.L.DATTU, JJ.]

Income Tax Act, 1961 :

Depreciation – claim for – In respect of two lease transactions by the assessee– In respect of first transaction initially partly denied by AO but on remission of the matter assessee held to be 100% entitled – Order of AO on remission not challenged – The order of AO denying depreciation confirmed by Tribunal and High Court – In respect of second transactions, depreciation denied by AO and the appellate courts holding the same to be a sham– On appeal, held: Denial of depreciation in respect of first transaction not correct – Tribunal has no power to enhance the assessment – The order of AO after remand granting depreciation also attained finality – Second transaction since not proved and since held to be a sham, denial of depreciation, correct. C D E

Assessing Officer disallowed claim of the assessee a lessor of soft drink bottles, for depreciation, in respect of two transactions i.e. regarding lease dated 15.2.1991 and regarding lease dated 15.3.1991. F

In respect of first transaction, as regards lease of 5,46,000 bottles, depreciation was allowed by AO only in respect of 42,000 bottles having been received prior to 31.3.1999 i.e. the relevant period. The depreciation claim of assessee was also disallowed by Income Tax Appellate Tribunal and by High Court. During pendency of the appeal before Tribunal, the case having been remanded by CIT(A), the AO held that the assessee was entitled to G

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A 100% depreciation. That finding of AO has not been challenged so far.

In respect of the second transaction, AO denied depreciation, holding that the lease deed was not proved and in fact it was a sham. The said finding was accepted
B by the Tribunal and the High Court. Hence, the present appeal in respect of both the transactions.

Partly allowing the appeal, the Court

HELD : 1.1 The Tribunal is not authorized to take back
C the benefit granted to the assessee by the AO. The Tribunal has no power to enhance the assessment. In the present case, the AO had granted depreciation in respect of 42,000 bottles out of the total number of bottles (5,46,000), by reason of the impugned judgment. That
D benefit is sought to be taken away by the Department, which is not permissible in law. [Para 6] [218-B, C]

1.2 According to the impugned judgments of the High Court and the Tribunal, the transaction dated 15.2.1991 was a financial transaction and not a lease. If depreciaE tion is to be granted for 42,000 bottles under transaction dated 15.2.1991 then it cannot be said that 42,000 bottles came within the lease dated 15.2.1991 and the balance came within the so-called financial arrangement. In the circumstances, the benefit of depreciation given to the
F assessee by the AO in respect of 42,000 bottles out of 5,46,000 bottles cannot be withdrawn by the Department and to that extent alone the assessee succeeds in this civil appeal.[Para 7] [218-D, E, F]

G 1.3 CIT(A) had remitted the matter to the AO who on remand came to the conclusion that all 5,46,000 bottles stood sold before 31.3.1991. This finding of fact has become final. It has not been challenged. Hence, the Department has erred in disallowing depreciation of Rs. 18,04,572/-. [Para 7] [218-F, G]
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Hukumchand Mills Ltd. vs. CIT (1967) 63 ITR 232 – relied on.

2.1 The assessee has not proved the transaction dated 15.3.1991. The question of "appropriation" of the bottles to a particular contract is different from the concept relating to the nature of the transaction. In the present case, sub-lease is dated 8.3.1991 between lessee and sub-lessee precedes the lease dated 15.3.1991 between the assessee (lessor) and lessee. As rightly questioned by the AO as to lessee could have entered into a sub-lease on 8.3.1991 when it had not acquired leasehold rights till 15.3.1991 from the assessee as the lessor. Moreover, there is nothing in the alleged lease deed dated 15.3.1991 indicating commencement of the lease from a prior date. There is nothing in the so-called lease dated 15.3.1991 as to the arrangement between the parties prior to 15.3.1991. There is nothing, indicating any prior practice. On the contrary, the so-called lease dated 15.3.1991 recites that it shall commence only from 15.3.1991. Moreover, under the sub-lease it is stated that the lessee is the absolute owner of the bottles. Lastly, the so-called lease dated 15.3.1991 stipulated that the lessee, shall have no right, title or interest to create a sub-lease without the permission of the lessor. No such permission has been produced. For the aforestated reasons, there is no infirmity in the concurrent findings of fact recorded by the authorities below.[Para 11] [220-F, G, H; 221-A, B, C, D, E]

2.2 The matter cannot be remitted for recalculation. The concurrent finding shows that transaction dated 15.3.1991 is a sham. The finding shows that the transaction had not been proved by the assessee. .[Para 12] [221-G, H; 222-A]

Case Law Refernece

(1967) 63 ITR 232 Relied on Para 6

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 955 of 2009

A From the Judgement and Order dated 22.9.2006 of the High Court of Delhi at New Delhi in I.T.A. No. 164 of 2004.

Ajay Vohra, Kavita Jha and Sandeep Karhail (for Bhargava V. Desai) for the Appellant.

B V. Shekhar, 11. Raghavendra Rao, Shweta Garg, Ashish Gopal Garg and B.V. Balaram Das, with him for the Respondent.

The Judgement of the Court was delivered by

C **S.H. KAPADIA, J.**

1. Leave granted.

2. This civil appeal filed by the assessee is directed against judgment and order dated 22.9.2006 in ITA No. 164/04 by the Delhi High Court. By the impugned judgment, confirming D the decision of the Tribunal, the High Court has held that the appellant (assessee) is not entitled to claim depreciation under Section 32(1)(ii) of the Income-tax Act, 1961 ("1961 Act" for short) in respect of two separate transactions dated 15.2.1991 and 15.3.1991. The impugned judgment has been rendered in E respect of Assessment Year 1991-92 (corresponding to the previous year ending 31.3.1991).

(A) <u>Facts Regarding Lease dated 15.2.1991 (Transaction No. I):</u>

F 3. Before coming to the facts, the following is the relationship between the parties:

- M/s Glass & Ceramic Decorators was the manufacturer of soft drink bottles.

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- Assessee was the 'lessor'.

- M/s Coolade Beverages Pvt. Ltd. was the 'lessee'.

4. During the relevant assessment year, the assessee carried on the business of trading in lamination machines & bind- H

ing and punching machines. In addition, it was also engaged in the leasing business. During the year in question, the assessee had bought 5,46,000 soft drink bottles from M/s Glass & Ceramic Decorators worth Rs. 19,54,953/-. The bottles were directly supplied to M/s Coolade Beverages Pvt. Ltd. ("M/s Coolade" for short) in terms of Lease dated 15.2.1991. Vide Assessment Order dated 28.3.1994, the AO found that M/s Coolade had received only 42,000 bottles out of the total of 5,46,000 bottles receivable by them from the assessee and that the remaining bottles stood received after 31.3.1991, i.e., between the period 3.4.1991 and 18.4.1991 and consequently, the AO restricted the depreciation only to 42,000 bottles and consequently dis-allowed the depreciation of Rs. 18,04,572/-. It may be mentioned that in Appeal the CIT(A) after formulating the "User Test" remanded the matter to the AO who on remand held that all 5,46,000 bottles stood paid for and dispatched before 31.3.1991 and, therefore, the assessee was entitled to 100% depreciation on all 5,46,000 bottles. This finding was given when the Appeal(s) was pending before the ITAT. However, till date the findings of the AO (on remand) has not been challenged. To complete the chronology of events, when the Appeal (s) came before the Tribunal, it was held that since the lease was not renewed and since the bottles were not returned on expiry the transaction in question was only a financial arrangement and not a Lease, hence, ITAT dis-allowed the depreciation claim of the assessee which finding stood confirmed by the impugned judgment, hence this Civil Appeal.

A B C D E F

5. At this stage, it may be noted that out of the total claim for depreciation of Rs. 1,80,30,489/- (in respect of both the transactions), as claimed by the assessee, the AO disallowed depreciation of Rs. 18,04,572/- in respect of the First Transaction and depreciation of Rs. 30,17,122 under the Second Transaction. In all, she disallowed depreciation of Rs. 48,21,694/- in the first round. In other words, the AO allowed depreciation in respect of both the transactions amounting to Rs. 1,32,08,795 as against the claim of Rs. ,80,30,489/-.

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A **Findings:**

6. In the case of Hukumchand Mills Ltd. v. CIT reported in (1967) 63 ITR 232 this Court has held that under Section 33(4) of the Income-tax Act, 1922 (equivalent to Section 254(1) of the 1961 Act), the Tribunal was not authorized to take back the ben-
B efit granted to the assessee by the AO. The Tribunal has no power to enhance the assessment. Applying the ratio of the said judgment to the present case, we are of the view that, in this case, the AO had granted depreciation in respect of 42,000 bottles out of the total number of bottles (5,46,000), by reason
C of the impugned judgment. That benefit is sought to be taken away by the Department, which is not permissible in law. This is the infirmity in the impugned judgment of the High Court and the Tribunal.

7. There is one more aspect which needs to be mentioned.
D According to the impugned judgments of the High Court and the Tribunal, the transaction dated 15.2.1991 was a financial transaction and not a lease. If depreciation is to be granted for 42,000 bottles under transaction dated 15.2.1991 then it can-
E not be said that 42,000 bottles came within the lease dated 15.2.1991 and the balance came within the so-called financial arrangement. In the circumstances, we hold that the benefit of depreciation given to the assessee by the AO in respect of 42,000 bottles out of 5,46,000 bottles cannot be withdrawn by the Department and to that extent alone the assessee succeeds
F in this civil appeal. Lastly, as stated above, in this case the CIT(A) had remitted the matter to the AO who on remand came to the conclusion that all 5,46,000 bottles stood sold before 31.3.1991. This finding of fact has become final. It has not been challenged. Hence, the Department has erred in disallowing depreciation of Rs. 18,04,572/-.
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(B) Facts Regarding Lease dated 15.3.1991 (Transaction No. II):

8. Before coming to the facts, the relationship of the par-
H ties, namely, stated:

- Assessee was the 'lessor'
- M/s Aravali Leasing Ltd. was the 'lessee'
- M/s Unikol Bottlers Ltd. was the 'sub-lessee'
- M/s Arizona Printers & Packers was the 'manufacturer' of the bottles

9. On 15.3.1991, lease was executed between the assessee as lessor and M/s Aravali Leasing as lessee whereas there was a sub-lease between M/s Aravali Leasing and M/s Unikol Bottlers dated 8.3.1991. The AO came to the conclusion that transaction dated 15.3.1991 was not proved. It was a sham. The reasons given by the AO were as follows. Firstly, none of the parties owed up the liability to pay transport charges though in terms of the lease the liability to pay transport charges was undertaken by M/s Aravali Leasing. Secondly, no evidence was brought on record as to who transported the bottles from the manufacturer, M/s Arizona Printers and Packers, to M/s Unikol Bottlers (sub-lessee). Lastly, the AO had doubted transaction dated 15.3.1991 on the ground that the sub-lease between M/s Aravali Leasing and M/s Unikol Bottlers stood dated 8.3.1991, i.e., before acquiring the rights to the said bottles (which right stood acquired by M/s Aravali Leasing only on 15.3.1991). Therefore, the AO came to the conclusion that the transaction was not proved by the assessee and, therefore, the assessee was not entitled to depreciation. Accordingly, the AO disallowed the depreciation amounting to Rs. 30,17,122/-. This finding has been accepted by the Tribunal and the High Court. It is a concurrent finding.

Findings:

10. It was argued vehemently on behalf of the assessee that the findings given by the AO were perverse. It was urged that the transport charges were, in fact, paid by M/s Unikol Bottlers, who could not produce evidence as there was a lock-out/ closure in its factory at the relevant time. According to the assessee, the evidence of the manufacturer, M/s Arizona Print-

A ers, clearly shows that bottles were manufactured before 31.3.1991 and they were delivered to M/s Unikol Bottlers directly by them. According to the said evidence of the manufacturer, the transport bills were supposed to be with M/s Unikol Bottlers, who were responsible for payment thereof. Learned
B counsel appearing for the assessee relied upon the evidence of M/s Arizona Printers at pp. 105-106 of the SLP paper book to show that, according to M/s Arizona Printers, the bottles were delivered directly to the sub-lessee, M/s Unikol Bottlers. Reliance was also placed on the "use certificate" furnished by M/s
C Unikol Bottlers to M/s Arizona Printers to show that the bottles stood dispatched prior to 31.3.1991. Further, on behalf of assessee reliance was placed on the evidence of M/s Khanna Goods Transport Co. (booking agent), who claimed to have received commission in cash for supply of trucks. In short, it was
D argued on behalf of the assessee that, the manufacture and dispatch of bottles from M/s Arizona Printers to M/s Unikol Bottlers, before 31.3.1991, stood proved by the evidence adduced by the assessee in the form of the statement of the manufacturer, the "Put to Use" Certificate given by M/s Unikol Bottlers, the statement of M/s Unikol Bottlers having accepted delivery
E of the bottles from M/s Arizona Printers and the receipt of commission by M/s Khanna Goods Transport Co.. Therefore, according to the assessee, the manufacture and dispatch of bottles and the receipt of bottles stood proved by the aforestated circumstances.

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11. We do not find any merit in the above arguments. In this case, we are concerned with the nature of transaction dated 15.3.1991. The question to be asked is - whether the assessee has proved the transaction dated 15.3.1991? The question of
G "appropriation" of the bottles to a particular contract is different from the concept relating to the nature of the transaction. In this case, the tell-tale circumstance against the assessee was that sub-lease is dated 8.3.1991. It is between M/s Aravali Leasing (lessee) and M/s Unikol Bottlers (sub- lessee). This sub-lease precedes the lease dated 15.3.1991 between the assessee

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(lessor) and M/s Aravali Leasing (lessee). As rightly questioned by the AO as to how M/s Aravali Leasing (lessee) could have entered into a sub-lease in favour of M/s Unikol bottlers on 8.3.1991 when it had not acquired leasehold rights till 15.3.1991 from the assessee as the lessor. Moreover, there is nothing in the alleged lease deed dated 15.3.1991 indicating commencement of the lease from a prior date. There is nothing in the so-called lease dated 15.3.1991 as to the arrangement between the parties prior to 15.3.1991. There is nothing in the so-called lease dated 15.3.1991 indicating any prior practice as submitted on behalf of assessee. On the contrary, the so-called lease dated 15.3.1991 recites that it shall commence only from 15.3.1991. Moreover, under the sub-lease between M/s Aravali Leasing and M/s Unikol Bottlers it is stated that M/s Aravali Leasing is the absolute owner of the bottles. Lastly, the so-called lease dated 15.3.1991 stipulated that the lessee, M/s Aravali Leasing, shall have no right, title or interest to create a sub-lease without the permission of the lessor. No such permission has been produced. For the aforestated reasons, we find no infirmity in the concurrent findings of fact recorded by the authorities below. We accordingly hold that transaction dated 15.3.1991 is not proved. Therefore, the AO was right in disallowing depreciation amounting to Rs. 30,17,122/-.

12. Before concluding, we may mention that an alternative submission was advanced on behalf of the assessee in the context of the second transaction that, if the said transaction was a financial arrangement, as held by the Department, even then the assessee could be taxed only on interest embedded in the amount of lease rentals received from the lessee, M/s Aravali Leasing. In this connection, it was submitted that the assessee had earned total income of Rs. 6,33,596/- over a period of 36 months commencing from 15.3.1991 to 14.3.1994. Therefore, the matter should be remitted for recalculation. We do not find any merit in this argument for the simple reason that the concurrent finding shows that transaction dated 15.3.1991 is a *sham*. The finding shows that the transaction had not been proved by

A the assessee. In the circumstances, there is no question of the matter being remitted, as prayed for. Consequently, the AO was right in coming to the conclusion that transaction dated 15.3.1991 was not proved and that the assessee was not entitled to claim depreciation of Rs. 30,17,122/- in respect of the B second transaction.

13. In conclusion, we delete the disallowance of depreciation of Rs. 18,04,572/- under the First Transaction but we disallow the depreciation of Rs. 30,17,122/- under the Second Transaction.

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14. Accordingly, the civil appeal filed by the assessee is partly allowed with no order as to costs.

K.K.T. Appeal party allowed.