

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH AHMEDABAD**

**BEFORE
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA NO. 522/AHD/2015
AY : 2002-03**

**ITA NO. 523/AHD/2015
AY : 2003-04**

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| Gujarat State Financial Corporation, Block No. 10, Sector 11, Udhyog Bhavan, Gandhinagar. | vs | ACIT, Circle-4, Ahmedabad. |
| (Appellant) | | (Respondent) |

Appellant by: Shri P.F. Jain, AR

Respondent by: Shri S.K. Dev, Sr. DR

Date of hearing : 24.06.2019

Date of pronouncement: 01.10.2019

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.:

These two appeals are filed by the assessee and involve identical issues. ITA No. 522/Ahd/2015 pertains to assessment 2002-03 and ITA No. 523/Ahd/2015 pertains to assessment year 2003-04. Both the appeals were heard together and they are being disposed of by this common order for the sake of convenience.

2.0 Brief facts of the case are that the assessee is a Finance Corporation and it had started lease financing activity in the year 1994-95. The assessee corporation purchases machineries on behalf of the loanees and the plant and machinery were installed at the premises of various loanees. It has been claimed by the assessee that the ownership of the plant and machinery has always remained with the assessee corporation. The assessee corporation had claimed depreciation on such plant and machinery leased out to the borrowers and depreciation had been allowed as deduction since the year 1994-95. However, the leasing and loaning activity was shut down since October, 2001 and there were no new machineries given on lease in assessment years 2002-03, 2003-04 and even in earlier three years. It is also the assessee's claim that there was no buy-back agreement entered into with any of the borrowers and the transaction between the assessee corporation and the borrowers was a simple lease transaction.

2.1 In assessment year 2002-03 the return of income was filed declaring a loss of Rs. 79,71,58,470/- and the scrutiny assessment was completed u/s 143(3) of the Income Tax Act 1961 (hereinafter called 'the Act') after making certain

disallowances which included disallowance on account of depreciation on leased assets to the tune of Rs. 69,98,367/-. The assessee preferred first appeal before the Ld. CIT (Appeals) and the matter was further taken to the ITAT on the issue of depreciation on leased assets. The ITAT set aside the issue of depreciation to the file of the Assessing Officer (AO) to determine as to whether the lease was finance lease or operating lease vide order dated 12.10.2012 in ITA No. 481/Ahd/2011.

2.2 In the set aside proceedings, the AO held that the nature of lease agreement was a finance lease agreement and, therefore, no depreciation was to be allowed to the assessee. Accordingly, the depreciation on leased assets to the tune of Rs. 69,98,367/- was again disallowed.

2.3 Similarly, in assessment year 2003-04 the quantum of depreciation under dispute amounted to Rs. 52,48,755/- and the dispute relating to this disallowance travelled up to the ITAT and the ITAT set aside this issue to the file of the AO with similar directions for determining as to whether the lease was a finance lease or operating lease vide order dated 12.10.2012 in ITA No. 482/Ahd/2011.

2.4 In set-aside proceedings for assessment year 2003-04 the AO again held that the nature of lease was finance lease and proceeded to again disallow depreciation to the tune of Rs. 52,48,755/-.

2.5 The assessee's appeals before the Ld. CIT (A) for both the years under consideration were dismissed and now the assessee is before this Tribunal again challenging the action of the lower authorities in treating the transaction as a finance lease transaction.

3.0 The Ld. Authorised Representative (AR) submitted that the lower authorities had wrongly treated the transaction as a sale and a finance lease transaction because this was a wrong conclusion reached by the lower authorities. It was further submitted that in earlier years and subsequent years no such disallowance has been made on account of depreciation on leased out assets. It was submitted that the assessee was regularly showing income from lease and the profit and loss accounts also reflected income from lease. He drew our attention to the profit and loss account to demonstrate the same.

3.1 It was further submitted that the two ingredients viz. 'ownership of assets' and 'put to use' both were satisfied in

the case of assessee. Our attention was also drawn to the various clauses of the lease agreement to demonstrate that the ownership continued to vest with the owner-lessor i.e. the assessee corporation.

3.2 The Ld. AR further submitted that reliance was being placed on Circular No. 2/2001 issued by the Central Board of Direct Taxes dated 9.2.2001 wherein it had been provided that under the provisions of Income Tax Act, in all leasing transactions, the owner of the assets was entitled to depreciation if the same was used in business u/s 32 of the Income Tax Act. It was further submitted that the said Circular provided that the ownership of the assets was to be determined by the terms of the contract between the lessor and lessee.

3.3 The Ld. AR placed reliance on judgment of Hon'ble Apex Court in the case of ICDS Ltd. vs. CIT Mysore (2013) reported in 350 ITR 527 (SC) wherein the Hon'ble Apex Court has held that section 32 of the Act required use of asset for the purpose of business and it did not mandate usage of asset by the assessee itself. It was submitted that in this case the Hon'ble Apex Court has held that even though motor vehicles were

registered in the name of the lessee, the lessor would be entitled to depreciation.

3.4 The Ld. AR also submitted that the reliance by the Department in the case of Asea Brown Boveri Ltd. vs International Finance Corporation of India reported in 2006 154 Taxman512 (SC) was misplaced as no issue of depreciation was involved in this case and, therefore, the same had been wrongly relied upon by the lower authorities.

4.0 In response the Ld. Sr. DR placed heavy reliance on the findings and observations of the Ld. CIT (A). The Ld. Sr. DR vehemently argued that the Ld. CIT (A) had correctly arrived at the conclusion that the impugned transaction was in the nature of a finance lease and depreciation could not be claimed on such leased out assets. Ld. Sr. DR also submitted that the Ld. CIT (A) had duly considered the ratio of judgment in the case of ICDC Ltd. vs CIT (supra) and Asea Brown Boveri Ltd. vs IFCI (supra) and had, thereafter, arrived at the conclusion which was both factually as well as legally correct. The Ld. SR. DR prayed that the assessee's appeals be dismissed.

5.0 We have heard the rival submissions and have also perused the material on record and the only question to be

determined by us in both the years under consideration is as to whether on the facts of the case, depreciation on leased out assets is allowable to the assessee or not. It has been the assessee's contention that the impugned transaction is a lease transaction simpliciter and the ownership of the assets continued to vest with the assessee throughout the period of lease and, therefore, the assessee was entitled to the claim of depreciation on the same. On the other hand, it is the department's contention that the impugned transaction is a sale and buy-back transaction or a finance lease and, therefore, no depreciation is allowable on such assets.

5.1 Although the lower authorities have taken a view that the impugned transaction is a finance lease transaction, we are not in agreement with the same due to the following reasons :-

- (1) We have perused a copy of the lease arrangement between the assessee and M/s. Add-Life Pharma Ltd. and it is seen that the agreement provides that the assets are owned by the assessee corporation and after the period of expiry of lease, the leased assets are restored to the lessor. It is also seen that the insurance policies are taken in the name of lessor by the lessee

and the lessee is also required to affix a sign on the assets indicating that assets belong to the lessor.

- (2) It is further seen that the lessee uses the equipment leased out to it for business purpose which is mandatory condition for allowance of claim of depreciation.
- (3) A perusal of the lease agreement also shows that the lessee is required to keep the leased out assets in its possession all the time and is not permitted to remove the same without prior written permission of the lessor.
- (4) The lease agreement also provides that the lessee has to hold the equipment as the bailor of the lessor and is not entitled to claim any title or invest in the assets and that the lessor would be the sole and exclusive owner of the assets.

5.2 Thus a perusal of the above mentioned covenants would clearly go to establish that the lessor i.e. the assessee is the sole and exclusive owner of the leased out assets. Although the department has reached the conclusion that the impugned

transaction is in the nature of the finance lease, the facts indicate otherwise.

5.3 The judgment of the Hon'ble Apex Court in the case of ICDS Ltd. vs. CIT, Mysore (supra) also comes to the aid of the assessee for advancing the assessee's claim of depreciation in as much as in this case the Hon'ble Apex Court has held that Section 32 of the Act requires that for the purpose of claiming depreciation the assessee must use the assets for the purpose of business and the same does not mandate usage of assets by the assessee itself. The Hon'ble Apex Court went on to hold that as long as the assets were utilised for the purpose of business, the requirement of section 32 would stand satisfied notwithstanding the non usage of the assets by the assessee. In this case the assessee was a leasing company which leased out trucks that it purchased and the Hon'ble Apex Court held that the income derived from leasing of the trucks would be business income and, therefore, the requirement of section 32 i.e. the assets must be used in the course of business stood fulfilled. In the present case also it is undisputed that the assessee is earning income from leasing activities and the leased out assets are being used by the lessees for their business purposes. A perusal of the profit and

loss account also shows that the assessee has been earning income from lease business.

5.4 We further note that Circular No. 2/2001 issued by the CBDT on 9.2.2011 explicitly provides that under the Income Tax Act, in all leasing transactions, the owner of the assets is entitled to depreciation if the same is used in the business.

5.5 We also duly take note of the fact that the assessee was being allowed the benefit of depreciation prior to the two assessment years under consideration. Copies of assessment orders for assessment years 2004-05 and 2005-06 also show that the assessee's claim with respect to depreciation was allowed. Thus, it is apparent that there has been no change in the facts and circumstances of the case and, therefore, there is no cogent reason for the department to deviate from its earlier stand. Although it is settled law that principle of *res judicata* does not apply to income tax proceedings, it is also settled law that without a change in circumstances and facts the accepted position by both the department as well as the assessee should not be disturbed.

5.6 We also note that the department's reliance on the judgment of the Hon'ble Apex Court in the case of Asea Brown

Boveri Ltd. (supra) is misplaced in as much as the issue under consideration in that case was the challenge to the direction to hand over the possession of certain 56 cars to the custodians which has been so directed by the said court.

5.7 Therefore, for the reasons cited above, we find ourselves unable to persuade ourselves to agree to the conclusions reached by the lower authorities and, therefore, for both the years under consideration, we set aside the order of Ld. CIT (A) and direct the AO to allow the benefit of depreciation to the assessee corporation.

6.0 In the final result, both the appeals of the assessee stands allowed.

Order pronounced in open court on 01.10.2019

Sd/-

**(AMARJIT SINGH)
ACCOUNTANT MEMBER**

Sd/-

**(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER**

DATED: 01st October, 2019

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Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

By Order

Asstt. Registrar
ITAT, New Delhi