

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH,
MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI M. BALAGANESH, AM

आयकर अपील सं/ I.T.A. No. 2261/Mum/2022

(निर्धारण वर्ष / Assessment Year: 1996-97)

Jainsons Estate Pvt Ltd. 1409 Maker Chambers, V Jamnalal Bajaj Marg, Nariman Point, Mumbai- 400021.	बनाम/ Vs.	ITO Range-3(2)(1) Aayakar Bhavan, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACJ1047R		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Mayur Makadia
Revenue by:	Shri Shambhu Yadav

सुनवाई की तारीख / Date of Hearing: 06/12/2022

घोषणा की तारीख /Date of Pronouncement: 31/01/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee company against the order of the Ld. Commissioner of Income Tax (Appeals)/NFAC, Delhi dated 15.07.2022 for assessment year 1996-97.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) confirming the action of the AO disallowing the claim of depreciation amounting to Rs.10,00,000/- on the leased assets (193 gas cylinders). Even though assessee has raised eight (8) grounds of appeal. Ground no. 1 to 6 are against the action of AO disallowing depreciation claimed by the assessee on gas cylinder leased to a semi Government Company.



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3. Brief facts of the case is that the assessee has filed return of income on 28.11.1996 declaring total income of Rs.61,310/-. Later, the case of the assessee was reopened u/s 147 of the Income Tax Act, 1961 (hereinafter “the Act”), after receipt of information from DDIT Unit-II (3) (vide letter dated 15.09.1999) wherein it was stated that the assessee had claimed 100% depreciation on purchase of bogus gas cylinder. According to the information after search operation was conducted on the premises of M/s. Gujarat Pipavave Port Ltd. (hereinafter in short “M/s. GPPL”) wherein it was noted that its sister concern (M/s. Montana Valves) had issued bogus sale bills of 100% depreciable assets ie. gas cylinder to M/s. Jain Sons Estate Pvt. Ltd. (assessee) amounting to Rs.10,00,000/- on which the assessee has claimed 100% depreciation for supply of the same to the M/s. GPPL. Therefore, according to the AO, there was escapement of income since the assessee’s income was understated to that extent. And therefore, he issued notice u/s 148 of the Act on 04.11.1999 and pursuant to which the assessee filed the return of income. Thereafter the AO issued statutory notices u/s 143(2) & 142(1) of the Act. And thereafter took note of the fact that during search and seizure action u/s 132 of the Act on M/s. GPPL and associated concern revealed that M/s. GPPL and its group concerns had issued bogus sale bills of 100% depreciable assets to various persons including assessee. And according to the AO, the group concerns includes the followings: -

1. M/s. Polcons
2. M/s. Blue Water Marine Industries
3. M/s. Spark Communication System



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4. M/s. Montana Vales and Compressors Ltd.
5. M/s. Modern Engineering Industries Ltd
6. M/s. A One Industries.

4. According to the DDIT report, the AO noted that the modus operandi followed by these group concerns were that they issued sale bill of 100% depreciation asset in the name of the lessor (including assessee); and the lessor leased the assets back to M/s. GPPL. According to the report, it was also found during the course of search that the group concerns were neither manufacturers nor in the business of trading in the asset (gas cylinder) for which sale bills have been issued by them. And also it was found that the supplies given on the bill was bogus. Thus, the conclusion that evolved was that the entire transaction relating to the lease of assets involving M/s. GPPL and its associated concern were only paper transactions and were not genuine. According to the AO, during the course of investigation, M/s. GPPL accepted the fact that these transaction are window dressing transaction only with the intention to raise the finance. The AO took note of the Investigation Wing report and also list of persons like assessee who all have taken benefit of the sham transaction by claiming 100% depreciation on such bogus assets. According to AO, the assessee's name was also figuring in (M/s. Jainsons Estate) the list forwarded by the DDIT. Therefore, the AO asked the assessee to prove the purchases of gas cylinders from M/s. Montano Valves & Compressors Pvt. Ltd. (hereinafter "M/s. Montano"). The assessee



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filed the following documents to substantiate the genuineness the purchase of gas cylinders: -

1. Copy of the sale bill from M/s. Montono evidencing sale of gas cylinder to M/s. Jainsons Estate
2. Copy of the purchase bill from whom M/s. Montono have purchased the said assets (gas cylinder)
3. Copy of a/c of M/s. Jainsons Estate in M/s. Montono's book.
4. Copy of a/c of persons (M/s. Spark Engineering) from whom M/s. Montano Valves has purchased the said assets
5. Details of the payment received for such purchases.

5. The AO noted certain discrepancy in the sales bill. According to the AO the bill of purchase/sale shows that gas cylinder were purchased on 24.09.1995 whereas the delivery challan supporting the purchase indicate that the delivery of goods was made on 04.09.1995 (i.e. 20 days before the sales bill was made). Further according to the AO, M/s. Montano Valves has shown the purchases of this item ie. 193 cylinder actron from M/s. Spark Engineers and had produced the copy of the bill and the delivery challan for the same. According to the AO on going through the sale bill of M/s. Spark Engineers it was seen that it was dated 24.09.1995 and the delivery challan of the goods shows that the same have been made to M/s. Montano Valves on 24.09.1995. Thus the AO concluded that the sale of this assets only took place on or after 24.09.1995. So he wondered as to how the cylinders could have been delivered on 04.09.1995. Thus the AO concluded that the gas cylinders leased by the assessee to M/s. GPPL on 18.09.1995 cannot be the gas cylinders/assets because M/s. Montano Valves (suppliers) themselves purchased and received delivery of goods only



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on 24.09.1995 i.e. six days after the alleged lease deed between M/s. GPPL and M/s. Jainsons Estate Pvt. Ltd. Further, the AO noted that from a perusal of the ledger account of M/s. Spark Engineers in the books of M/s. Montano reveal and confirm the fact that M/s. Montano had purchased the assets only on 24.09.1995 for which an advance of Rs Rs.7,98,000/- was received on 20.09.1995 i.e. after 19.09.1995. Thus, according to the AO, where the agreement/lease agreement was entered M/s. Jainsons Estate was not the owner of the gas cylinders (193 gas cylinders) on 19.09.1995. Therefore, according to the AO he issued notices to the M/s. Spark Engineers and also deputed inspector to inspect the premises who reported that M/s. Spark Engineers never existed at the premises/address. Therefore, according to the AO, the assessee's claim that the assessee received delivery of gas cylinder of 4.09.1995 was not supported by evidence on record. And therefore, he was pleased to hold that the depreciation u/s 32 of the Act could not have been claimed by the assessee. And therefore he disallowed the depreciation of Rs.10 Lakhs by passing the assessment dated 26.03.2002 u/s 143(3) r.w.s 147 of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who confirmed the action of AO vide order dated 20.03.2003 which was challenged before this Tribunal; and the Tribunal in the first round by order dated 27.08.2004 restored the appeal back to the file of Ld. CIT(A)-III to re-decide the same on merits. Thereafter, the Ld. CIT(A), has passed the impugned order dated 15.07.2022 wherein he confirmed the action of the AO by holding as under: -



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- a. The appellant was never the owner of the cylinders in question;
- b. The business of the appellant was that of finance, bill discounting and real estate and therefore there is no way gas cylinders could be put to use in such business.
- c. M/s Spark Engineers the original suppliers of the cylinders was not traceable. The fact was confronted to the appellant at the assessment stage. No new address was given by the appellant for of allege supplier of cylinder. The appellant never produced the supplier for recording of statement and his books of a/c. Even at appeal in stage no details has been submitted in nowhere about of suppliers or statements of books of a/c with bank account has been submitted during the appellate proceedings. The appellant has asked for the report of the inspector which relates to the conclusion of having no existence of supplier of the cylinders at the given address. An attempt was made to obtain the report from AO which could not been made as the same appears to be not readily available being a old matter. The appellant argument that inspector report has not been provided is nothing but a mere an argument for sake of taking stands without any leg. The report of the inspector simply says that the supplier M/s Spark Engineering who sold gas cylinders to M/s Mantana Valves from where the appellant claimed to made purchase, was not found at the given address and was not locatable and did not complied with summons. The facts mentioned in the Assesement order are clear to the extent that the supplier was not found at the given address which are conclusive in itself.
The finding of non-existent of supplier should have been rebutted by the appellant by producing the supplier or its related details such as payment made to him with date and mode and bank account. It Is pertinent to mention here that M/s Montana and the appellant are group concern, Even the lesse and lesser are group concern. Neither M/s Montana produced the supplying party nor the appellant who claimed to have ultimately supplied



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the gas cylinders. All the facts mentioned in the assessment order are in the knowledge of the appellant.

- d. Purchase bill is dated 24.9.1995 and agreement is dated 18.09.1995. From whom Montana Valves and Compressor Private Ltd. has shown purchased of cylinders that firm invoice/ challan is also dated 24.9.1995.
- e. No transport bill and bilty is ever filed by assessee to prove that actually material was transported to GPPL at Gujarat from Bombay and who had paid the transport bill.
- Assessee/appellant facts and submissions are perused and not found to be correct. When transaction of assessee is found to be sham/colourable, then assessee is not entitled to get any benefit. Since, assessee itself shown the income of Rs.2,19,867/- as lease rental, which is found to be non-genuine then entire income of Rs.2,19,867/- is to be treated as business income. Hence, action of assessing officer is hereby confirmed and ground taken by assessee is dismissed.
- From the above, it is clear that assessee cannot get away with sham transaction and sham transactions have no protection under law. Since assessee itself has shown the income of Rs.2,19,867/- as lease rental income, which is found non-genuine, sham transaction and colourable devise was used to give color to convert non-genuine transaction into genuine transaction. In the forgoing para it has been discussed in details. Hence, income of Rs.2,19,867/- is rightly been taxed in income tax on the concept of all income from any sources whether legal or illegal is taxed in income tax. Hence, action of assessing officer taxing Rs.2,19,867/- as business income is confirmed and ground of appeal taken by assessee is dismissed.”

7. We have heard both the parties and perused the records. We note that assessee is a private limited company engaged in the business



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of finance, leasing and bill discounting; and this is an Appeal for AY 1996-97. And the present appeal of assessee is against the disallowance of Depreciation claimed on certain assets (193 gas cylinders leased to M/s. GPPL) on the grounds that the same are bogus. As part of its business activities, the assessee during the year leased 193 gas cylinders to M/s. Gujarat Pipavav Port Ltd. (hereinafter M/s. GPPL), a semi-government company wherein the Gujarat Government was holding 25% stake. In this context it was brought to our notice that its (assessee's) sister concern M/s. Prime Constructions (P) Ltd. (hereinafter "PCPL") also leased 97 Gas Cylinders to M/s. GPPL and therefore a total of 290 gas cylinders were leased to M/s. GPPL. According to assessee, all the 290 cylinders were purchased from the same supplier called M/s. Montana Valves; and were transported through the same transporter namely M/s Nidhi Roadways directly by the Supplier to M/s. GPPL as per same lease deed executed on the same terms and same date. Thus it was brought to our notice that facts of purchasing gas cylinders and giving it on lease to M/s GPPL was identical except in number of gas cylinders. This fact could not be controverted by the Ld DR before us.

7. Coming back to the facts of assessee's case, the cost of 193 Gas Cylinders were capitalised by the assessee in its books and being eligible for 100% depreciation it claimed depreciation. Later, the AO received information from the Investigation Wing that certain entities were engaged in issuing bogus sale bills of depreciable assets and one



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such entity was M/s. Montana Valves from whom the assessee had purchased the gas cylinders. Accordingly, the assessee's case was reopened u/s 147 of the Act. When called upon by the AO to prove the genuineness of the claim of depreciation on the 193 gas cylinders leased out to M/s. GPPL, the assessee submitted that it had purchased 193 gas cylinder from M/s. Montono Valves; and the same was delivered by the suppliers of gas cylinder to M/s. Montono Valves directly to M/s GPPL i.e. M/s. Spark Engineering directly supplied gas cylinders to M/s. GPPL. In other words, assessee company in order to purchase and thereafter give it on lease 193 gas cylinders to M/s. GPPL had placed order (purchase order) of 193 gas cylinder to M/s. Montono Valves, which in-turn had to procure the same from M/s. Spark Engineers. And so, as per the direction of M/s. Montono Valves and assessee, 193 gas cylinders were directly delivered to M/s. GPPL by M/s Spark Engineering rather than first delivery to M/s. Montono Valves, then to assessee company and thereafter to M/s. GPPL. In order to prove the genuineness of the transaction in question the assessee filed before AO the following documents/details were furnished by the assessee.

- (a) Lease Agreement for lease of cylinders to GPPL. (PBK Pg. 25-39)
- (b) Purchase Invoice and Delivery Challan issued by Montana. (PBK Pg. 40)
- (c) Insurance Policy document for insurance of cylinders (PBK Pg. 42-45)



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- (d) Certificate of installation of cylinders issued by GPPL. (PBK Pg. 46)
- (e) Details of payment made for the purchase of cylinders. (PBK Pg. 47 - 48)

8. During the course of the assessment, it is noted that the AO issued summons u/s 131 to the supplier of goods to assessee, ie. M/s. Montana Valves which furnished the requisitioned information that was called for by AO. However, the AO was not satisfied with the same on the following grounds:

- (i) The goods were delivered by Montana on 14.09.95 but the invoice is dated 24.09.95.
- (ii) The source of the purchase by Montana could not be proved as Spark Engineers who had sold the cylinders to Montana could not be located.

9. Based on the aforesaid reason, the AO concluded that the entire transaction is sham and according to him there was no physical delivery of the assets i.e. 193 gas cylinders and therefore he disallowed the assessee's claim of depreciation on it, which action has been confirmed by Ld. CIT(A).

10. As noted (supra), the Ld. AR brought to our notice that similar issue also came up in the case of assessee's sister concern i.e. M/s. PCPL for AY 1996-97 . In this case also [M/s. PCPL] had also purchased 97 gas cylinders from M/s. Montana and leased them to M/s. GPPL. M/s. PCPL had also claimed 100% depreciation on it and



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the AO of M/s. PCPL had also disallowed the claim of depreciation on the very same ground that the purchase of cylinders were bogus and drew our attention to the assessment order of M/s. PCPL found placed Pg. 50-54. And both Ld. CIT (A) and the ITAT dismissed the quantum appeal of M/s. PCPL, and the matter ultimately traveled to the Hon'ble Bombay High Court.

11. When the quantum appeal of M/s PCPL was pending before the Hon'ble High Court, the AO levied penalty u/s 271(1)(c) on the assessee's sister concern (M/s. PCPL); and meanwhile the assessee as well as M/s. PCPL/lodged, a criminal complaint against the promoters of M/s. GPPL before the Ld. Chief Metropolitan Magistrate (CMM) for breach of trust and the Ld. CMM ordered an investigation u/s 156(3) of the Cr. PC. (Criminal Procedure Code). As part of the Police Investigation, the transporter who had delivered the cylinders was summoned to the Colaba Police Station on 04.09.2004 wherein he confirmed that he had picked up the 290 cylinders (97 of M/s. PCPL & 193 of assessee) from the godown of M/s. Spark Engineers under instructions of M/s Montana Valves and delivered them to M/s. GPPL under LR no. A-486 (PCPL) and A-487 (Assessee). He also admitted that the earlier statement was given to the department out of fear and was false and drew our attention to PB Pg. 56-66 to prove these facts.

12. It was brought to our notice that as part of investigation, the Police Inspector also visited the premises of M/s. GPPL at Pipavav



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Port and has discovered/found the gas cylinders in question i.e. 290 cylinders from the premises of M/s. GPPL. The SHO has in this regard prepared a detailed panchanama report dated 29.11.2004 which is found placed at PB Pg. 67-75.

13. When the penalty appeal of M/s. PCPL came up before the ITAT, these facts were brought to the notice of the Tribunal; and the Tribunal deleted the penalty holding that in the light of the development (supra), the genuineness of the lease transaction cannot be doubted and therefore gave relief to M/s PCPL. The ITAT Order is found placed at PB Pg. 76-81.

14. Thereafter the quantum appeal came up before the Hon'ble Bombay High Court and the Department's Counsel admitted that in view of the ITAT order in the penalty proceedings, the genuineness of the lease transaction has been accepted by the Revenue and the Hon'ble High Court accordingly allowed the appeal of M/s. PCPL and remanded the matter back to the ITAT. (refer PB Pg. 82-83). And the ITAT in turn set aside the matter to Ld. CIT (A) for de-novo adjudication with certain directions regarding verification of payment made to ascertain the cost of the asset (Refer Page 84-94 of PB). The Ld. CIT (A) called for remand report from the AO for carrying out the verification. And the AO forwarded the remand report wherein he confirmed that the depreciation claimed by M/s. PCPL was correct. In view of the categorical finding of the AO, the Ld. CIT (A) allowed the



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appeal of M/s. PCPL. (Refer Page 95 - 106 of PB) wherein the Ld. CIT(A) has noted the relevant fact and remand report of AO as under:

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“ 5.10 Now, as per directions issued by the Hon'ble Tribunal, the limited issue to be decided now is verification of the cost of the assets, keeping In view that under the provisions of section 32 of the Act two requisite conditions are required I.e.(i) that the depreciable asset is owned (w.e.f. 1-4-1997) wholly or partly by the assessee and (ii) that it is used for the purposes of assessee's business or profession. It is the observation of the Hon'ble Tribunal that “the alleged payment of Rs.3,99,000/- by the assessee to M/s. Montana Valves & Compressors Pvt. Ltd. has not been verified and that “it has also not been looked into as to how the sum of Rs.1,01,000/-, if paid by GPPL came to be paid by the lessee and not the assessee himself.”

5.11 During the appellate proceedings, the appellant has filed paper book in support of transactions vide letter dated 25/06/2019. The Paper book submitted by the appellant was forwarded to the AO vide letter dated 25.06.2019 to verify the correctness of the facts. The AO has submitted remand report vide letter dated 05/07/2019. The relevant extract of the remand report submitted by the AO vide letter no ITO-5(2)(4)/Remand Report 2019-20 dated 05/07/2019 is reproduced below : -

4 To establish the genuineness of the transactions this office has issued a summons u/s 131 of the IT Act to the assessee company on 27/06/2019. In response to Summons the AR for the assessee company Mr. Anil Kadam attended and provided the details. to prove the genuineness of the transactions which is enclosed herewith.



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5 In the remand proceedings, the assessee@ company has furnished the details which are discussed as under :

(a) The assessee's AR vide letter dated 05/07/2019 before the Assessing Officer, the assessee company filed the details of lease agreement, consignment note, invoices, bank statement, receipt of Rs. 3,99,000/- and Rs. 1,01,000 certificates, insurance policies and security deposits.

From the above facts and circumstances, it is found that the assessee has rightly claimed depreciation of Rs. 5,00,000/-.

5.12 The Additional CIT Range 5(2)(1), Mumbai has forwarded the above remand report vide letter no. Addl. CIT Rg. 5(2)/Remand Report/ 2019-20 dated 12/07/2019 with following remarks:

2 In view of the above caption subject, AO in Its report dated 05/07/2019 has stated that the case was reopened after making an addition of Rs. 5,00,000/- being depreciation disallowed. AO, in its report, has stated that the assessee has rightly claimed depreciation of Rs. 5,00,000/-. The AO has further stated that the appeal of the assessee company may be decided on merits accordingly.

3 in view of the above, the aforesaid issues have been examined by the AG and the report of the AO is accepted.

5.13 It is seen that the appellant has made a payment of Rs. 3,99,000/- to the supplier M/a Montana Valves & Compressors Pvt. Ltd. by cheque No. 737836 dated 18/09/1995 drawn on State Bank of India, Nariman Point Branch, Bombay for Rs. 3,99,000/- against Invoice No. MVCPL/6/95/96 dated 24/09/1995 issued by the supplier which is also acknowledged by the said supplier. The balance amount of Rs. 1,01,000/- was paid by Gujarat Pipavav Port Ltd. as per receipt issued by the supplier M/s Montana Valves & Compressors Pvt. Ltd. The payment has been made by the Gujarat Pipavav Port Ltd. against the security deposit of Rs. 50,000/- and installment of lease



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rentals for that first quarter amounting to Rs. 51,0004, as per request of the appellant. These transactions have been accepted by the AO in the remand report. The AO has further accepted in the remand report that “the assessee has rightly claimed depreciation of Rs. 5,00,000/-

5.14 Considering that the appellant has explained the source of payment of Rs. 5,00,000/- for purchase of 97 gas cylinders during the previous year relevant to AY 1996-97, It is held that the appellant entitled to claim depreciation on total consideration of Rs. 5.00 Lakhs used for purchase of 97 gas cylinders given on lease to Gujarat Pipavav Port Ltd.

5.15 The sum up

The amount of Rs.1,66,026/- credited as rental income to the profit and loss account for AY. 1996-97 and the amount of Rs.2,04,000/- credited as rental income to the profit and loss account for AY. 1997-98, on account of lease transaction is directed to assessed as lease rentals.

The claim of depreciation is directed to be allowed on total consideration of Rs.5.00 Lakhs used for purchase of 97 gas cylinders given on lease to Gujarat Pipavav Port Ltd. as permissible under the Act.”

15. Before us, the appellant submits that both the cases are interlinked as in both the cases the physical delivery of the cylinders purchased from the same party and transported through the same transporter on the same day to M/s. GPPL for the purpose of leasing them to M/s. GPPL was doubted. The entire lease transaction was questioned and was initially held to be not proved in the case of M/s. PCPL. However, thereafter pursuant to the police investigation, the transporter M/s. Nidhi Road Ways confirmed the delivery of 290



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cylinders (97 belonging to M/s. PCPL and 193 belonging to assessee/appellant) to M/s. GPPL. Furthermore, during the said police investigation, 290 cylinders were also physically found in the premises of M/s. GPPL and therefore the lease transaction was proved. The Department has accepted the lease of 97 cylinders by M/s. PCPL to M/s. GPPL as a genuine transaction. In view of the same the appellant submits that for the same reasons, the lease of the balance 193 cylinders by the appellant to M/s. GPPL must also be accepted. Once that is so, the disallowance of depreciation made by the AO ought to be deleted.

16. We find that the facts permeating in both the cases i.e. of M/s. PCPL (sister concern of assessee) and that of assessee in respect of Leasing of gas cylinder to M/s. GPPL are identical except that assessee purchased/leased 193 gas cylinders, whereas M/s. PCPL leased out 97 gas cylinders and claimed depreciation of 100% on it. Since the AO as noted in the case of M/s. PCPL has accepted the genuineness of the transaction, there is no reason to suspect the assessee's transaction which was also identical in every aspect. So we direct the AO to allow depreciation on total consideration of Rs.10 Lakhs used for purchased of 193 gas cylinder given on lease to M/s. GPPL as permissible under the Act.

17. Ground no. 7 & 8 are alternative ground. Since the grievance of assessee has been allowed, alternate grounds need no adjudication. Anyway the amount credited by the assessee rental income to the



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profit and loss account for AY. 1996-97 on account of lease transaction is directed to be assessed as lease rentals.

18. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on this 31/01/2023.

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 31/01/2023.
Vijay Pal Singh, (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai