IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA No. 164/2004

Reserved on: 19th May, 2006

Date of Decision: September 22, 2006

M/s Indian Management Advisors and Leasing Pvt. Ltd.
(Now known as Spicecorp Pvt. Ltd.98, Nehru Place,
New Delhi -19) ... Appellant

! Through : Mr. Ajay Vohra with Ms. Kavita Jha, Advocates.

versus

$ The Commissioner of Income Tax, N. Delhi. ... Respondent.

^ Through : Mr. R.D.Jolly, Advocate

• CORAM:
HONBLE MR. JUSTICE T.S. THAKUR
JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment? ✓
2. To be referred to the Reporter or not? ✓
3. Whether the judgment should be reported in the Digest? ✓

: SHIV NARAYAN DHINGRA, J

1. This is an appeal under section 261A of the Income Tax Act filed by the appellant against the ITAT, Delhi order dated 23.9.2003 in respect of assessment year 1991-92.

2. The undisputed facts are that the Assessee/ petitioner filed its Income Tax return for the assessment year 1990-91. By this return assessee claimed 100% depreciation on the soft drink bottles which the assessee had purchased from M/s Glass & Ceramics Decorators, Bombay (herein after called manufacturer) and leased out to M/s Coolade Beverages Pvt. Ltd. Ghaziabad (hereinafter called lessee). The purchase of bottles numbering 5,46,000 was made

vide 30 invoices from the period 28.3.91 to 30.3.91. Under the directions of the assessee, these bottles were to be directly supplied by manufacturer to the lessee. The lease agreement for the soft drink bottles between the assessee and lessee was entered into on 15.2.91. The Assessing Officer allowed the claim of the assessee for 100% depreciation only on 42,000 soft drink bottles out of 5,46,000 bottles which were leased out to the lessee on the ground that only 42,000 bottles were received by the lessee and put in use before 31.3.1991. There was another claim of depreciation made by the assessee in respect of soft drink bottles leased out to M/s Aravali Leasing Limited. The assessee had shown purchase of soft drink bottles from M/s Arizona Printers & Packers Limited, Greater Kailash, New Delhi for Rs.30,70,122/- and allegedly leased out the same to M/s Aravali Leasing Limited vide lease agreement dated 15.3.1991. M/s Aravali Leasing Limited, according to the assessee, had sub-leased these bottles to M/s Unikol Bottlers Limited. The assessee filed a certificate from M/s Unikol Bottlers Limited stating that these bottles were put to use during the financial year ending 31.3.1991. The Assessing Officer considered all facts and called for the records from the assessee, lessee and sub-lessee. The Assessing Officer found that while the leasing agreement for soft drink bottles between the assessee and M/s Aravali Leasing Limited, was entered on 15.3.1991, M/s Aravali Leasing Limited, for these very bottles, entered into a sub-lease agreement seven days before this agreement i.e on 8.3.1991 with M/s Unikol Bottlers Limited. However, record of delivery of the

bottles show that these bottles were dispatched to M/s Unikol Bottlers Limited between 10.12.1990 and 16.3.1991. It was alleged that these goods were transported from Tapovan i.e the place of manufacturer to Shahibabad where M/s Unikol Bottlers Limited was situated, by Khanna Goods Transport Company. Assessee took the stand that transportation charges were to be paid by the M/s Aravali Leasing Limited who was the lessee. M/s Aravali Leasing Limited took the stand that transportation charges were to be paid by M/s Unikol Bottlers Limited and M/s Unikol Bottlers Limited took the stand that they had not paid the transportation charges as same were to be paid by M/s Aravali Leasing Limited. Khanna Goods Transport Company took the stand that no octroi charges were paid by them and they had not received any claim for freight or octroi charges and freight should have been collected by truck drivers. After considering all the facts and documents, Assessing Officer came to the conclusion that the lease agreement between the assessee and M/s Aravali Leasing Limited and sub-lessees between M/s Aravali Leasing Limited and M/s Unikol Bottlers Limited were colourable transactions. He considered that the lease agreement and sub-lease agreement were paper transactions and disallowed the claim of depreciation of Rs.30,70,122/ -.

3. Aggrieved by the order of the Assessing Officer, assessee filed appeal before CIT (A). CIT (A) observed that in order to allow depreciation in respect of soft drink bottles leased by the assessee to M/s Coolade Beverages Pvt. Ltd., the crucial question was on what

point of time the assessee, in the case of assets involved i.e bottles, which were directly passed by the manufacturer to the lessee, can be said to have become the owner of the assets. The assessee could not be said to have become owner of the bottles till these bottles had parted the ownership of manufacturer i.e M/s Glass & Ceramics Decorators, Bombay. The assessee can be said to have become owner only if these soft drink bottles, in the relevant previous years, were dispatched by the manufacturer before 31.3.91. He, therefore, referred back the question of depreciation in respect of bottles leased to M/s Coolade Beverages Pvt. Ltd. and directed the Assessing Officer to call for the evidence and make inquiry to ascertain how many of the remaining bottles i.e excluding 42,000 bottles were dispatched before 31.3.91. He observed that appellant would be entitled to depreciation in respect of those bottles which were dispatched by the previous owner i.e manufacturer on or before 31.3.91. As far as the lease in respect of soft drink bottles between the assessee and M/s Aravali Leasing Limited was concerned, the CIT (A) agreed with the conclusion arrived at by the Assessing Officer that it was only a paper transaction and upheld the order of Assessing officer by not allowing depreciation claim. The assessee preferred an appeal against the order of CIT (A) to ITAT. Revenue also preferred an appeal against the order of CIT (A) regarding first lease to ITAT. Vide impugned order ITAT allowed the appeal of the department and dismissed the appeal of the assessee holding that the lease agreement was a financial arrangement between the assessee and lessee and also upheld the

order of CIT (A) of not allowing the depreciation on bottles allegedly leased to M/s Aravali Leasing Limited

4. The Tribunal analysed the contents of the lease agreement entered into between the assessee and lessee in respect of both the transactions and came to conclusion that the lease agreements entered into between the assessee and the two lessees in respect of both the transactions was a financial arrangement and in fact the assessee had made available finance to the so called lessee for purchasing bottles but parties tried to give it a shape of a lease transaction to claim 100% depreciation on the bottles, besides earning considerable rate of interest. The Tribunal observed that assessee was not the absolute owner of the bottles which it allegedly put to use before the end of financial year to claim depreciation. Tribunal rejected the appeal of the assessee and allowed the appeal of department.

5. The appellant/assessee has challenged the order of the Tribunal inter alia on the ground that Tribunal erred in holding that the transaction with M/s Coolade Beverages Pvt. Ltd. was in nature of a financial transaction and that assessee was not absolute owner of bottles and assessee was not entitled to the depreciation in respect of either of the transaction. It is argued by the counsel for the appellant that Tribunal exceeded its jurisdiction going beyond the ground of disallowing depreciation by the Assessing Officer and CIT (A). Tribunal had no jurisdiction to look into the nature of transaction and to adjudicate whether it was a lease or a financial

transaction as no such question was raised before the Tribunal by either of parties. The Tribunal disregarded the fact that the Assessing Officer had already accepted the transaction to be a lease and allowed the claim of the depreciation in part, which finding had become final.

6. We have heard counsel for the parties at length and perused the record.

7. We shall first deal with arguments of the appellant that Tribunal had no jurisdiction to examine the lease deed and arrive at a conclusion different from the Assessing Officer. Section 254 (1) which empowers the Tribunal to hear the appeals reads as under:-

> " 254(1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit."

8. This section does not put any fetters on the power of Tribunal to consider the issue which may arise in an appeal. When an appeal comes before the Tribunal for hearing and appellate Tribunal finds that some documents have been relied upon by the assessee, which are on record and the document are crucial to allow or refuse the claim made by the assessee, even if the Assessing Officer and CIT (A) had not gone into the contents of the document and had not bothered to find out the real nature of the document, the appellate Tribunal cannot close its eyes to the real nature of the document and is not helpless in coming to a different conclusion than Assessing Officer and CIT (A) about the true meaning & nature of document. Even otherwise there is no prohibition on the power of the Tribunal to entertain an additional ground which, according to the Tribunal, arises in the matter and for just decision of the case is necessary. In

CIT Vs. Bhopal Sagar (1977) 93 Taxman 558 (MP), it was held by the Madhya Pradesh High Court that there was no prohibition on the power of Tribunal to entertain a new ground which according to Tribunal arises in the matter and was necessary to be considered for just decision of the case. The assessee therein although did not claim bonus to the agricultural staff as deduction before the Assessing Officer and made the claim for the first time before the Commissioner and same was not entertained. Court held that since the Tribunal had found that the claim of bonus by the assessee was justified, Tribunal was justified in allowing the claim of bonus in respect of agricultural staff also. In CIT Vs. Geer William Son Assam- 223 ITR 310 the Court held that merely because a ground was not taken in the memo of appeal, the parties should not suffer. The Tribunal was justified in taking additional ground if it was necessary and proper for adjudication of the matter. Section 254 empowers the Tribunal to pass an order after giving opportunity of being heard to both the parties. In Orissa Cement Limited Vs. CIT- 250 ITR 856 this court held that undoubtedly the Tribunal will have the discretion to allow or not to allow a new ground to be raised, but where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings, there is no reason as to why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of the assessee. Keeping in view this principle, Tribunal was not right in refusing the assessee permission to raise new

grounds on the ground that claim in question had not been put forward before Assistant Assessing Officer.

9. In this case the Tribunal was called upon to decide whether the claim of the assessee of 100% depreciation on the soft drink bottles, which assessee allegedly leased out, was allowable or not ? The assessee had relied upon the lease agreement entered into by the assessee with the lessees to claim the depreciation, claiming that assessee was a leasing company. In order to appreciate the claim of the assessee, it was necessary for the Tribunal and for that matter any adjudicating body to go into the different clauses of the lease agreement. If the Assessing Officer or CIT (A) had not looked into lease agreement and considered the claim of assessee only on the face of it, no fault can be found with the Tribunal for analysing the lease agreement by looking into its different clauses and finding the true import of the lease agreement. We, therefore, consider that there is no force in this argument of the appellant/assessee. No question of law arises for our consideration.

10. The next issue raised is that order of Tribunal in not allowing the depreciation is illegal and the assessee was entitled for 100% depreciation on the leased bottles. The contention of the assessee is that the leasing of assets was one of the business of the assessee and assessee was entitled to depreciation once assessee puts the stocks in his business.

11. The argument advanced is that in case of M/s Coolade Beverages Pvt. Ltd, the

assessee had entered into a lease agreement with the lessee on 15.2.1991 and the equipment i.e bottles had become the property of the assessee before 31.3.1991 and once the assessee had become the owner of the assets which the assessee has to put into the use of leasing, the assessee became entitled for depreciation. As per the bills/ documents/ invoices the bottles were purchased by the assessee between 28.3.1991 to 30.3.1991. The assessee therefore had become the owner of the bottles in the financial year ending 31st March, 1997. The assessee was entitled for depreciation since by ownership, stock was put in use of leasing business. It is also argued that whether or not lessee had put the bottles in use, would have no bearing on the claim of the depreciation because assessee's claim was not dependent on the use of the bottles by the lessee. Once the assessee had made the asset ready for the use in the business of leasing, the assessee was entitled to claim depreciation. He, therefore, submitted that depreciation was wrongly disallowed by ITAT and the order of the CIT (A) giving directions to the Assessing Officer for taking evidence as to when the bottles came into the ownership of assessee was legally correct. On the other hand counsel for the revenue, argued that the entire transaction between the assessee and the lessee was colourable transaction. It was not a transaction of lease but a transaction of finance as observed by the Tribunal. Therefore, assessee was not entitled to any depreciation.

12. Whether or not the relationship between the assessee and M/s Coolade Beverage

P. Ltd. was that of a lessee & lesser depends upon the intention of the parties and this intention has to be inferred from the factual matrix of the transaction. The intention of the assessee cannot be known only by a self serving statement made in return of income or from a self serving lease agreement. It is to be seen whether the lease agreement was a camouflage to evade tax. Where the terms and conditions of a document are confusing, the surrounding circumstances and the conduct of the parties has also to be borne in the mind for ascertaining real relationship of the parties. In this case the lease agreement relied upon by the assessee was executed between the parties on 15.2.1991. This lease was executed in advance in respect of bottles which were yet to be manufactured. The period of lease was stated to be three years and could be extended on such terms and conditions as may be agreed between the parties. Regarding commencement of the lease, it was stated that it shall commence from the date of delivery of bottles or from the date of the payment made by the assessee for the bottles to the manufacturer whichever was earlier. It was provided in Clause 4 that glass bottles would be supplied directly by supplier i.e manufacturer to the location specified by the lessee and the lessor will not be responsible for any damage prior to delivery or during the delivery. It was lessee who was to pay all charges in respect of delivery from the supplier to the lessee. In written arguments filed by assessee, it is contended that lessor was liable for any loss or breakage during transportation and to take out transit insurance. This argument runs contrary to admitted facts and Clause 4 of the lease. The

next clause shows that all rental i.e lease amount was payable from the commencement date shown in the schedule and subsequent rentals payable on the first date of the month as specified in the schedule annexed from time to time. An analysis of above clause would show that argument of the assessee that the lease commenced from the date of delivery of bottles to the lessee was contrary to terms of lease as lease commenced from the date of payment made by the lessor to the manufacturer or from 28.2.91 whichever was earlier. It is clear from this clause that moment lessor i.e assessee paid money to the manufacturer, the lessee became liable for making payment of lease rent to the assessee, irrespective of the fact whether bottles were in existence or not. Thus, it was a lease in vacuum. It is admitted case of the assessee that lease rent started from 28.2.1991 and bottles were manufactured thereafter and purchased by the assessee between 28.3.91 and 30.3.1991. Thus lease rent commenced more than one month before the manufacturing of the bottles. Secondly the supply of the bottles was to be made directly to lessee by the manufacturer and all responsibility about the breakage of bottles even prior to delivery or during delivery was that of the lessee and lessor had not to do anything except to pay money to the manufacturer and the rent started from the payment of money or before, irrespective of the fact that the bottles for which the lease was executed had come into existence or not. The total costs of bottles for which the depreciation has been claimed is Rs.19,54,953/-. The lease value for bottles has been stated to be Rs.25,87,200/- which is receivable by the assessee in a period of

three years. The difference between the lease value and value of the bottles comes to around Rs. 6,32,247/-. Thus the amount of profit /interest of Rs.6,32,247/- was payable by the lessee within a period of three years to the assessee on investment of Rs. 19,54,953/- seemed to be the arrangement. The lease rental has been structured @ 33.65 per 1000 bottles per month, payable monthly in advance, so as to recover the entire lease value within the period of three years. The residential value of the assets has been shown as 2% and renewal option has been @ 50 paisa per 1000 per month.

13. During the argument, learned counsel for the appellant was specifically asked if the renewal option was exercised after three years in 1994 and we were informed that no renewal option was exercised. We were also told that bottles were not called back by the assessee after expiry of lease period despite non-renewal of lease. The assessee took the plea that the bottles had lived their life and it was worthless to recall them as they were useless for the assessee. Their life span itself was hardly three years and the cost of calling them back would have been more than the value of the bottles. All these facts point out to only one thing that it was not a lease arrangement but a finance arrangement.

14. In Damodar Corporation Vally Vs. State of Bihar- 12 STC 120 (SC), Supreme Court laid down two tests to determine the question whether a particular contract was a contract of mere hiring or whether it was a contract of purchase of a system on deferred payment

of purchase price (1) Whether there is any binding obligation on the hirer to purchase the goods (2) whether there is right reserved to the hirer to return the goods at any time during the subsistence of the contract.

15. In the present case the lease agreement was for a period of three years, after which the hirer was supposed to return the articles but the articles i.e. bottles were never returned nor the stock was called back by the assessee, neither lease agreement was renewed even at the nominal lease money of 50 paise per 1000 bottles. This shows the real intention of the parties. Although the document provided for renewal of lease and calling back the stock in case of non renewal, but in fact there was no right reserved by the assessee to get goods back at the termination of the lease agreement and lease agreement was merely a camouflage to evade tax payment. The lease agreement which has been executed is a proforma lease agreement which is normally executed in respect of industrial machinery, vehicle and equipment etc. A reading of the lease agreement shows that lease agreement was not meant for hiring of the bottles as there are clauses which are inconsistent with the hiring of the bottles. One clauses provides that a plate or a mark shall be fixed on the property indicating that lessor was the owner of the equipment which was neither complied nor possible. Soft drink bottles are supplied to the retailers and then go to the consumer. However, the lease deed provided that lessee shall keep the equipment i.e bottles all the time in its possession and control. Another clause provides that

lessee shall operate and maintain the equipment in accordance with all laws and shall pay license and registration fee for the equipment. Lessee shall permit lessor to inspect the equipment at any time and keep it in first class condition and repair at lessee's expenses. Obviously, these clauses could not be applicable in case of soft drink bottles. Lessor had also reserved right of inspection, at all reasonable times, of the equipment i.e soft drink bottles. This clause also could not have been applicable on soft drink bottles which go to retailers and customers. Another clause provides that all parts replacement, attachments (including tyres and parts) shall be the property of the lessor. This squarely shows that this lease agreement was not meant for bottles and a proforma of motor vehicle lease agreement was just used. Lease agreement provides that the lessee has inspected the equipment and got itself satisfied about its fitness. The lease agreement was executed on 15.2.1991when the equipment i.e. bottles were not in existence, but the document provided that the lessee has inspected the bottles. The expiration clause provides that in case after the expiry of the lease, lessee fails to deliver equipment as per direction of the lessor, it shall be deemed that lessee had elected to hire the equipment at the same terms and conditions and such tenancy shall be terminable by the lessor on payment of default by serving a seven days notice.

16. All the above clause and many more in the lease agreement are contrary to what actually transpired between the parties. It is apparent that the lease agreement was merely meant

for consumption of Income Tax Department to claim depreciation. Fact is that neither bottles were recalled by the assessee nor lease was renewed and the bottles became the property of the lessee after three years.

17. The entire conduct of the parties in relation to the bottles is contrary to the provisions contained in the lease agreement entered into between the parties. It is clear from the conduct of the parties that the intention of the parties was not to lease and the lease agreement was executed not to be implemented and actually it was a financial arrangement between the assessee & the lessee and the lessee paid the amount back to the assessee along with market rate of interest spread over quarterly installment in three years starting from 28.2.1991 irrespective of the fact that no bottles were delivered on 28.2.1991.

18. Same is the fate of other lease agreement entered into between the assessee and the M/s Aravali Leasing Limited. There the facts are more strange. Before Aravalli Leasing Ltd. became lessee of the assets, it executed another lease deed with M/s Unikol Bottlers Limited in respect of the some bottles. In the lease executed between M/s Aravali Leasing Limited and M/s Unikol Bottlers Limited, M/s Aravali Leasing Limited claimed itself to be the absolute owner of the bottles. It is the case of the assessee that M/s Aravali Leasing Limited executed a sub-lease but the tone and tenor of this sub lease is that of a first lease. The terms and conditions are also the same as between the assessee and Aravali and both have claimed to be the

owner.

19. We have considered all aspects of the transaction between the assessee and the lessee and carefully scrutinized the documents/lease deeds. We consider that Tribunal rightly came to the conclusion that transaction between the assessee and the lessees were not transactions of lease but that of financial arrangements, given color of a lease to claim 100% depreciation. In the annexure to the lease itself the rate of depreciation is shown to be 100% and this certainly was meant for consumption of the income tax officer as it had nothing to do with the lessee.

20. We find no substantial question of law arises. Whether or not there was a lease between the Assessee and other parties is question of fact. The Tribunal has correctly come to conclusion that there was no lease between the parties and it was a financial arrangement.

21. Accordingly, the petition is hereby dismissed.

SHIV NARAYAN DHINGRA, J

T.S. THAKUR J.

September 22,2006
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