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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision** : 21st February, 2012.

\+ ITA 254/2008
\+ ITA 255/2008
\+ ITA 261/2008
\+ ITA 282/2008

COMMISSIONER OF INCOME TAX ..... Appellant
Through Mr. Sanjeev Sabharwal, sr. standing counsel

versus

MOTOR & GENERAL FINANCE LTD. ..... Respondent
Through Mr. O S Bajpai, Sr. Adv. with Mr.V.N. Jha and Ms. Manasvini Bajpai, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

Vide order dated 11.9.2009, the following substantial questions of law were framed :

"(a) Whether the ITAT was correct in law in holding that

the Assessee is neither a financial company nor a credit institution in terms of Section 2(5B) of the Interest Tax Act, 1974 and as such was not a taxable entity for the purpose of Interest Tax Act, 1974?

(b) Whether the ITAT was correct in law in holding that for deciding principal business of a taxable entity under the Interest Tax Act, 1974 only receipt from business is the criteria and the other parameters as the turnover, capital employment, head-count of persons employed in each line of business activity etc. are not relevant?

(c) Whether the order of ITAT is perverse as it has ignored several factual aspects of the decisions relied upon by the CIT(A) in its order?"

2. These questions of law were disposed of by judgment dated 30.10.2009. For the sake of convenience paragraph 17 of the said judgment is reproduced below :

"17. For this, matter will have to be referred back to the AO as it is the AO who can, on the basis of material produced before him, can come to the conclusion as to whether the lease agreements entered into by the assessee with the lessee are financial leases or operational leases or both and in that case how much charges are to be apportioned as income from financial lease and how much is to be assigned as income from the operational lease. We may point out at this stage that Mr. Bajpai, learned senior counsel for the assessee, had pleaded that the assessee was engaged in operating lease business only and not the financial lease business and made a fervent plea that there

> is no necessity to refer back the matter to AO. However, in the absence of complete material before us, it would not be possible to undertake this exercise. In any case, this Court cannot assume the function of fact finding authority and it would be opposite if AO deals with such an aspect in the first instance. We, therefore, answer the questions as under:-
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> b) This question is decided in the negative, i.e., in favour of the Revenue and against the assessee.
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> a) & c)Since the ITAT did not apply the correct principle had based on its decision in ***Rajath Leasing & Finance Ltd.*** (supra), decision of the Tribunal is set aside. At the same time, it is not possible to conclusively determine, in these proceedings, as to whether the assessee company is a financial company or a credit institution or not. For this purpose matter is remitted back to the AO for fresh determination keeping in view correct criteria as stated in this order."

3. The respondent-assessee thereafter preferred a special leave to appeal which was admitted and Civil Appeal No.556-559/2009 were registered. The appeals were disposed of vide order dated 14th January, 2009. The Supreme Court, in its detailed order, noticed that several aspects arise for consideration. First aspect was whether the assessee was a financial company as defined in Section 2 (5B) of the

Interest Tax Act, 1974. This requires examination of two issues namely whether clauses (i) to (vi) of Section 2(5B) were applicable and what was the principal business of the respondent-assessee. The second aspect was whether the interest earned under the three heads namely, lease charges, hire purchase charges and bill discounting charges were chargeable to tax under Interest Tax Act, 1974. The second aspect is required to be answered only if the first aspect is held in affirmative i.e. against the assessee and in favour of the Revenue.

4. The Supreme Court in its decision dated 14th January, 2011 has stated that these questions i.e. whether the receipt from lease charges, hire purchase charges and bill discounting charges could be taxed under the Interest Tax Act, 1974 has not been examined.

5. We have heard the counsel for the parties at some length who have drawn our attention to the order passed by the CIT (Appeals) and the Tribunal. We notice that the order passed by the Assessing Officer was virtually ex-parte as details and information were not

available with him. The assessee had raised a preliminary objection regarding taxability under the Act and contested/objected to the jurisdiction of the Assessing Officer. The CIT (Appeals) went into various factual details. The CIT (Appeals) recorded a finding that the principal business undertaken by the assessee was hire purchase and bill discounting and therefore the assessee is a financing company under Section 2(5B) of the Act. He observed that hire purchase activity scores over the activity of leasing. The parameter to determine "principal" activity is not restricted to receipts but required examination of turnover, capital employment, head count in each line of business etc.

6. However, the CIT(Appeals) held that amount received under the hire purchase agreements were not in the nature of finance or in the nature of advance on loan and therefore cannot be brought to tax under the Act. Similarly, the lease charges cannot be brought to tax under the Act. He, however, held that the "interest" on bill discounting was taxable.

7. The assessee and the Revenue preferred cross-appeals before the Tribunal. The Tribunal in the cross-appeals examined the total receipts received under the head hire purchase charges, lease charges and bill discounting charges. We may note here that the tribunal in the impugned order has referred to the net receipt from hire purchase charges and not the gross receipts. Thereafter, on the basis of figures pointed out by the respondent-assessee, the tribunal held that the principal business of the respondent-assessee did not fall under any of the sub-clauses of Section 2(5B). The details of "other income" referred to in the order of the tribunal have not been stated.

8. As noticed above, the decision of the Division Bench dated 30th October, 2009 has made certain observations to the contrary and had remitted to the Assessing Officer to examine the factual aspect after drawing distinction between financial lease and the operating lease. The Supreme Court thereafter, has passed an order to remit to the High Court, with the following directions: -

"What we find from the judgment of the High Court is

that the High Court has not examined whether the transactions entered into by the assessee constituted financial transactions so as to attract the provisions of the 1974 Act. As stated above, the issues which arose before the authorities below covered a wide spectrum, namely, reopening of the proceedings, the nature of the business carried on by the assessee, whether the assessee was a credit institution as defined in Section 2(5A) of the 1974 Act and on the merits of the case whether the A.O. was right in taxing the hire-purchase charges, the lease and bill discounting charges. One more point may be mentioned. The dichotomy between the operating lease and financial lease was never raised by the Department. As stated above, the C.I.T. had examined the nature of the transactions entered into by the assessee and the three components of the receipt of the assessee under the 1974 Act. (see page 98 of the S.L.P. Paper Book).

As stated, several questions stood raised in the appeal(s) filed by the assessee as well as by the Department. Some of the findings are findings of fact, others are giving rise to substantial question of law. The main question which arose for determination in this case was "whether the receipt from lease charges, from net hire-purchase charges and bill discounting charges could be taxed under the 1974 Act. This is apart from the question as to whether the assessee which is a non-banking financial company is a credit institution under Section 2(5A) of the 1974 Act. We are of the view that the matter needs reconsideration in accordance with law. Needless to add that under Section 260A, the High Court has to frame questions which according to it are

substantial questions of law before answering them."

9. During the course of hearing before us on the aforesaid three questions as well as on the question of chargeability of tax on the three receipts, ld. counsel for the parties have drawn our attention to the factual findings recorded by the Tribunal. Counsel for both side state that the factual aspects require clarification and elucidation as they are not clear and are scanty. On the basis of the said findings, no legal opinion for or against any party can be given. Both of them submit that the matter may be remitted to the Tribunal for a fresh decision on the factual aspects and then the Tribunal may consider and apply the legal provisions after interpreting them.

10. We have considered the statement made by the counsel for the parties and also examined the order of the tribunal. We accept their prayer. Accordingly, an order of remit to the Tribunal is passed. The questions of law mentioned above are accordingly answered. We clarify that we have not expressed any opinion on the legal position in the absence of factual details. Tribunal will

independently apply its mind and decide the factual aspect and accordingly apply the legal provision after interpreting them. In order to cut short the delay, the parties shall appear before the Assistant Registrar, Tribunal on 26th March, 2012 when a date of hearing will be fixed. The appeals are disposed of. No costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

February 21, 2012/vld