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

*Reserved on: 18th October, 2012*
**%** *Date of Decision: 5th December, 2012*

\+ **ITA 475/2006**

COMMISSIONER OF INCOME TAX .....Appellant
Through: Mr. Sanjeev Sabharwal, Sr. Standing Counsel with Ms. Gayatri Verma, Advocate.

Versus

M/S. GANAPATI FINANCE LTD. .....Respondent
Through: Mr. Salil Kapoor with Mr. Ankit Gupta, Mr. Vikas Jain and Mr. Sanat Kapoor, Advocates.

**CORAM:**
**MR. JUSTICE S. RAVINDRA BHAT**
**MR. JUSTICE R.V. EASWAR**

**R.V. EASWAR, J.:**

This is an appeal by the CIT under section 260A of the Income Tax Act, 1961 and the following substantial questions of law were framed on 30.7.2007: -

> "*1. Whether the IncomeTax Appellate Tribunal was correct in law in allowing depreciation of ₹30,00,37/- to the assessee on leased out LPG cyclinders?*
>
> *2. Whether the Income Tax Appellate Tribunal was correct in allowing depreciation of ₹19,99,440/- to the assessee on leased out Air Jet Spindle Assembly and Positar Disc?*"

The figure of ₹30,00,37/- in question No.1 should actually read as "₹30,00,000". The question shall stand amended accordingly.

2. The appeal relates to the assessment year 1995-96. The respondent-assessee is a company engaged in financing business. In the return of income filed by it, it claimed the above two sums being claims for depreciation on the leased out assets described in the questions. Apparently its claim was that these assets were owned by it and were leased out in the course of its business and therefore the twin conditions of

ownership and use for the purposes of the business laid down in section 32 fulfilled. Documentary evidence was adduced to show that the LPG cylinders were purchased from M/s. Aravalli Cylinders Pvt. Ltd ("Aravalli") and leased to M/s. Janta Gases Pvt Ltd ("Janta"). Evidence was also adduced to show similarly that the air jet spindle assembly and positar disc were purchased from M/s. Rajaji Electronics Pvt. Ltd ("Rajaji") and leased to M/s. Maruti Syntex (India) Ltd. ("Maruti").

3. The evidence was rejected by the AO who formed the view that paper-work created merely to support the claim and that in truth and reality the assessee never became the owner of the assets, but merely financed the transaction of purchase by Janta and Maruti, who had dealt with the manufacturers directly. It was, according to the AO, a case of a colourable device or subterfuge adopted by the assessee to reduce its taxable income by claiming depreciation on the assets at the rate of 100% without becoming the owner of the assets; the assessee merely financed the transactions for compensation by way of interest and was hence not entitled to any depreciation. This, in short, is the case of the AO; he has, however, discussed the issue in considerable detail after examining the entire documentation that was put through by the parties, recording statements of witnesses etc. These will be adverted to at the appropriate juncture.

4. The claim of depreciation having been disallowed by the AO, the assessee filed an appeal to the CIT (A). He accepted the contentions of the assessee and held that there was no tax avoidance measure or subterfuge adopted by the assessee, and that the adverse statements recorded by the AO were not put to the assessee for cross-examination, that there was nothing to disbelieve the authenticity and genuineness of the documentary evidence in support of the claim for depreciation and thus allowed the appeal.

5. The revenue preferred an appeal to the Tribunal in ITA No.5133/Del/1998. After examining the issue in considerable detail and after referring to the entire evidence, the Tribunal concluded, agreeing with the assessee and the CIT (A), that there was nothing to hold that the assessee adopted a colourable device to reduce its taxable income, that the documentary evidence amply established the claim for depreciation, that the AO did not effectively confront the assessee with evidence adverse to it or did he afford adequate opportunity to cross-examine his witnesses, that

the AO ignored material evidence that was in favour of the assessee without assigning any valid reason, and that in these circumstances there was no merit in the appeal of the revenue. The Tribunal dismissed the appeal.

6. The revenue is in appeal before us. Prima facie it would appear that the case is essentially one of fact and the findings of fact which are concurrent should not be easily tampered with unless the findings are perverse or are so unreasonable or irrational that no reasonable person, properly apprised of the facts and legal position, would have come to record such findings; further, the record should disclose that the appellate authorities overlooked relevant material or took note of irrelevant material in reaching those findings. If these considerations are not present, it would not be proper for the court in an appeal under section 260A which can be granted only on a substantial question of law, to disturb the findings of fact, particularly when two appellate authorities have reached concurrent findings of fact. It is in this light that we have examined the present case.

7. A preliminary objection was raised on behalf of the assessee to the effect that the question whether the lease in the present case is a financial lease or an operational lease – argued on behalf of the revenue – does not arise since that was not the way the case proceeded before the revenue authorities. It was contended that examination of such a question would require fresh findings of fact which exercise cannot be undertaken in an appeal under section 260A. We find merit in the preliminary objection. At no point of time did the AO or the CIT (A), who has conterminous powers over the assessment, approach the case from that angle and an examination of the question whether the lease was an operational lease or merely a financial lease would certainly involve an enquiry into the factual position, the intention of the parties and so on; that exercise not having been undertaken by the revenue authorities, we uphold the preliminary objection.

8. It is however open to us to consider whether the findings of fact recorded concurrently by the CIT (A) and the Tribunal are reasonable or they were recorded ignoring relevant evidence or material or whether they are such that no reasonable person, properly posted about the facts and the law, would have arrived.

9. We may first take up the depreciation claim on LPG cylinders. Arav undisputedly a manufacturer of cylinders. It is also agreed that the manufacture of such cylinders are strictly controlled and regulated, having regard to the safety aspects etc. The AO has referred to the relevant regulations (under the Explosives Act and Gas Cylinders rules) which stipulate that a manufacturer of LPG cylinders cannot manufacture the cylinders unless an order has been placed on it by a person who (a) has the licence to fill the gas cylinders, i.e., known as a "parallel manufacturer"; (b) supplied the manufacturer with the drawings duly approved by the department of explosives and the Bureau of Indian Standards and (c) supplied the manufacturer a "logo" to be affixed on the cylinder after the manufacture of the cylinders. Janta is the parallel manufacturer. It placed an order with Aravalli by letters dated 05.09.1994 and 17.12.1994 for the supply of the cylinders. It was not the assessee which placed the order as it would be expected of it if it were to become the owner of the cylinders so that it can lease them to Janta. It was only on 22.03.1995 that Janta claimed to have written to Aravalli authorising the latter to sell and raise the invoice against the assessee. This letter was improperly addressed and did not reach the Aravalli. In the statement of Ratan Mahipal, director of Aravalli, recorded on 06.12.1997 by the AO he denied having sold the cylinders to the assessee and affirmed having sold them to Janta. He stated that the cylinders cannot be sold to the assessee because it did not have the requisite permission to bottle the gas or the approval from the Department of Explosives. He stated that the assessee did not supply the drawings or the logo as required by the regulations to enable Aravalli to sell the cylinders to it. He also affirmed that the order was placed by Janta who supplied the logo, specifications and the drawings; that Aravalli has been manufacturing cylinders for Janta earlier also.

9. The AO specifically put the letter dated 22.03.1995 allegedly written by Janta to Aravalli authorising it to sell the cylinders to the assessee, to Aravalli for its response. Aravalli by its letter dated 26.03.1998 addressed to the AO denied having received any such authorisation from Janta. It may be noted that the address given in the letter allegedly written by Janta to Aravalli was "M/s. Aravalli Cylinders, opposite Turkman Gate, Delhi". Janta did not produce any proof that the letter was received by Aravalli, such as acknowledgement card of the postal authorities or certificate of posting or any other evidence.

10. Janta, expectedly, asked for cross-examination of RatanMahipal. Th managed to produce one M.P. Mahipal, the managing director of Aravalli, on 04.03.1998 and offering him for cross-examination to the assessee. The assessee refused to do so on the ground that the statement was given by RatanMahipal and not by M.P. Mahipal. The AO seems to have recorded a statement from M.P. Mahipal on the aforesaid date. In that statement, M.P. Mahipal stated that he was appearing in the place of Ratan Mahipal who was indisposed, that he was entitled to appear in his capacity as managing director of Aravalli, that even Ratan Mahipal gave the statement only on behalf of Aravalli and not in his own behalf, that he (M.P. Mahipal) stood by whatever RatanMahipal had stated in the statement and that the representative of the assessee refused to cross-examine him for "reasons best known to him". A copy of the statement of M.P. Mahipal was given to the assessee on 18.03.1998.

11. The AO also collected evidence from the principal officer of Janta which had placed the order on Aravalli for the manufacture of the cylinders. A show-cause notice was issued on 19.01.1998 asking it to clarify whether (a) it can purchase cylinders for parallel marketing as per governmental guidelines from the assessee which has not manufactured the cylinders as per the approved drawings and (b) how it can claim that the cylinders were sold by Aravalli to the assessee, when the order was placed by it (Janta) on Aravalli and not by the assessee. No satisfactory reply was furnished by Janta to these pointed queries except reiterating that the assessee was the lessor, being rightful owner of the cylinders and it (Janta) was only a bailee.

12. In the above state of evidence, with respect, we are unable to hold that the findings recorded concurrently by the CIT (A) and the Tribunal are reasonable and rational, and could have been reached by any person duly posted of the facts and the legal position. The inferences drawn are unreasonable. The order is placed by Janta on Aravalli; that was sometime in September and December, 1994. All of a sudden – and without any reason or explanation – Janta claims to have authorised Aravalli to sell the cylinders to the assessee. The receipt of the letter allegedly written by Janta to Aravalli was denied by the latter; the fact that the letter bore an incomplete address of Aravalli lends support to its claim of non-receipt of the letter. Janta had no evidence to show that the letter had actually been received by Aravalli. If the letter was not received by Aravalli, there was no other basis upon which it would have looked upon the assessee

as the owner of the cylinders, to have them delivered to it. That in turn would that there was no privity of contract between Aravalli and the assessee for the sale of the cylinders. The assessee could not have therefore become, by any standards, the owner of the cylinders. No motive can be, and was in fact, attributed to Aravalli when it denied the receipt of the letter.

13. As for the payment, even Aravalli admits that it received the money from the assessee. That alone does not however constitute the assessee as the owner of the cylinders. In the absence of the authority letter from Janta, the cylinders would have certainly been delivered only to Janta. There is no evidence led by Janta to show that it wanted to ascertain whether its request had been accepted by Aravalli. On the other hand, the fact that Janta wrote to Aravalli only on 22.03.1995 after a long lapse of time from the date it placed the order (4-6 months), and that too towards the close of the accounting year, sends different signals. Till that date, the assessee obviously was not in the picture at all; the contract was between Janta and Aravalli. The assessee's name crops up only on 22.03.1995 by which date the assessee would have had a clear picture of its profits. The significance of this fact should be kept in mind. The lease agreement between the assessee and Janta was also entered into three days later, i.e., on 25.03.1995.

14. The cumulative effect of the facts as noted above and the surrounding circumstances strongly indicate that it is only a case of the assessee financing the purchase of the cylinders; the lease rent constituting the compensation for the financing by the assessee of the transaction of purchase of the cylinders by Janta from Aravalli.

15. The fact that the assessee was not afforded an opportunity to cross examine Ratan Mahipal does not derogate from the evidentiary value of the other facts and the inferences appropriately to be drawn from them. The surrounding circumstances, such as the entering into of the lease arrangement at the fag end of the financial year and the failed attempt of Janta to show that it wrote to Aravalli authorising it to sell the cylinders to the assessee, are all pointers to an after-thought to give what was essentially a financing transaction a colour of a lease so as to entitle the assessee to claim the benefit of depreciation.RatanMahipal, as pointed out by M.P. Mahipal, gave his statement to the AO only on behalf of the company Aravalli, of which he was a

director. If he could not appear on 04.03.1998, the date on which the assesse invited to cross-examine him on account of indisposition, the assessee could still have availed of the opportunity to cross-examine M.P. Mahipal, who was Aravalli's managing director. The strict rules of the Evidence Act are not applicable to proceedings under the Income Tax Act; but the basic principles such as rules of natural justice are incorporated into the proceedings by the statute (Income Tax Act) and it was in this spirit that the AO offered M.P. Mahipal for cross-examination to the assessee. The assessee chose not to avail of it; that was at its own risk. We are inclined to believe that if Janta had written to Aravalli on 22.03.1995 that the cylinders should be sold to the assessee and if on the same day the assessee had entered into the lease agreement with Janta, it could not have been possible without prior arrangement between the assessee and Janta, and in that case there would have been some verification or cross-checking by the assessee with Aravalli whether Aravalli is in the know of the arrangement. In that case, such knowledge on the part of Aravalli could have been brought out during the cross-examination of M.P. Mahipal. At any rate, the assessee could have revealed its cards to Aravalli to belie the latter's claim that it was not aware that the assessee has been, by an arrangement between it and Janta, constituted the owner of the cylinders. The assessee, however, took a technical and obstinate position that it was only RatanMahipal, who gave the original statement, who would be cross-examined and not M.P. Mahipal. The conduct of the assessee – taking a technical and prudish stand – was obviously untenable; it leads to an inference that it had nothing to gain by availing of the opportunity afforded by the AO.

16. The Tribunal has dealt with the issue in paragraph 10 of its order. It is reproduced below: -

> "*10. We have considered the rival submissions. As far as the transaction with regard to purchase of cylinders by the assessee from MACPL are concerned, it is seen that as per the provisions of LPG Regular and supply and Distribution Amendment order 1994 a copy of which is placed at page 61 of assessee's paper book, there is a prohibition for sale of LPG cylinders except to parallel marketer or to a person authorised by the Government Oil Company or to consumer. It is not in dispute that MJGPL a parallel marketer within the meaning of the LPG Regulations. A letter dated 22.3.95 had been written by MJGPL, MACPL. In this letter as parallel marketer they have authorised the manufacturer to sell and raise the invoice in favour of the assessee for empty gas cylinders worth about ₹30 lakhs. They have*

*also mentioned in this letter that they are entering into a lease agreement with the assessee for getting empty LPG gas cylinders. They have also confirmed the fact that the gas cylinders will be used by them as parallel marketer. The Assessing Officer seems to have highlighted the fact that this letter of MJGPL had been denied by MACPL. This denial in our view is not very material in view of the documents viz.. the invoice of MACPL as well as the copy of the ledger account of the assessee in the books of MACPL whereby they have recognized the fact that the purchaser of these cylinders is only the assessee. It is also further noticed that prior to entering into lease transactions MJGPL had duly passed a resolution authorising the transaction. A lease agreement had also been entered into between the assessee and MJGPL. In respect of default committed by MJHPL, the assessee has also initiated criminal proceedings. In the light of these documents the findings of the Assessing Officer that the transactions were only a colourable device can not be sustained. Apart from the above the evidence of Rattan Mahipal in our view is not of important evidentiary value for the reason that he had not been subjected to any cross examination by the assessee. The fact that Rattan Mahipal did not turn up for cross examination can only lead to the conclusions that whatever evidence given by him to the Assessing Officer can not be accepted. The Assessing Officer has completely overlooked the bulk of evidence filed on behalf of the assessee to prove the transaction of lease. CIT (A) was therefore justified in his conclusions.*"

17. The Tribunal has opined that the denial by Aravalli of the receipt of the letter allegedly written on 22.03.1995 by Janta is not material, because Aravalli raised the invoice on the assessee in whose name there was an account in its ledger. In that case it is difficult to see why the assessee chose not to confront M.P. Mahipal with these facts when he was offered by the AO for cross-examination on 04.03.1998. After RatanMahipal stated before the AO that the cylinders were sold only to Janta vide Bill Nos.110-112 and the assessee only financed the sale, a show-cause notice was issued to the assessee as to why it should not be treated as only a financier and not an owner-lessor. The assessment order does not show that the assessee took the plea that Aravalli had raised the invoice in its name and that there was a ledger account in its name in the books of Aravalli and therefore the assessee should be treated as the owner-lessor. Further, M.P. Mahipal had stated that he stood by the statement of Ratan Mahipal; even when M.P. Mahipal was offered for cross-examination, the assessee could have confronted him with the invoices if they had been raised in its name. He could have been asked to produce the books of account in order to prove the claim that Aravalli's ledger contained an account in the name of the assessee. The assessee

however declined the offer on a technical plea. Before the CIT (A) it was submit the assessee in the written submissions that a copy of its account in the ledger of Aravalli was filed with the AO on 09.03.1998 and that Aravalli in its "payment discharge receipt" confirmed the sale to the assessee and supply of the cylinders to Janta, saying that the receipt is in "the acknowledgement of sale consideration towards supply of empty LPG cylinders on your behalf to M/s. Janta Gases Pvt. Ltd. vide Bill No.110, 111, 112". The CIT (A), in an order that contained no independent reasons except a reproduction of the written submissions of the assessee, merely concluded as follows:

> "*2.6 Having considered the arguments made with regards to the case of the LPG Cylinders, the AR has pointed out 10 instances of basic facts as quoted above which have been ignored by the AO. Hence, when basic facts were not appreciated, quite obviously, erroneous conclusions have been drawn by the AO. The detailed explanation given above lends credence to the case of the appellant company and the objections raised by the AO are ill-founded. I, therefore, hold that the claim of depreciation as made by the appellant company is correct and should be allowed.*"

18. It is rather unfortunate that the first appellate authority, who has been held by the Supreme Court in *CIT v. Kanpur Coal Syndicate*, (1964) 53 ITR 225 to have conterminous powers over the assessment and who could do what the assessing authority can do and could also do what the assessing authority failed to do, took no pains to dispose of the appeal in the spirit of section 250(6), under which he is bound to state the points for determination, the decision and the reasons for the decision. With respect, it seems to us that he made no effort to examine the evidence marshalled by the AO; he appears to have merely accepted the submissions of the assessee, taking them to be sacrosanct.

19. The main ground on which the Tribunal accepted the assessee's claim was that the denial by Aravalli of the receipt of Janta's letter dated 25-3-1995 was not material in the light of the fact that the invoices were raised on the assessee and there was a ledger account in the name of the assessee in Aravalli's books. The Tribunal ought to have appreciated that the assessee's case need not necessarily be genuine or true merely because there was documentary evidence in its support. Firstly, the assessee did not place the order with Aravalli for the supply of cylinders. The order was admittedly placed by Janta as parallel manufacturer; the assessee could not have,

under the relevant statutory regulations/rules, placed any order for the supply o cylinders. Secondly, there is no evidence to show that the letter allegedly written by Janta on 22.03.1995 to Aravalli authorising the latter to sell and raise the invoice on the assessee was received by Aravalli; in fact, Aravalli's denial of the receipt stands uncontroverted. Aravalli had nothing to gain or lose by the denial, unless it was the truth. Thirdly, the assessee did not avail of the opportunity to confront Aravalli's managing director M.P. Mahipal with all the documentary evidence which it (the assessee) claimed to possess, such as the invoices drawn on it and the ledger account in its name in Aravalli's books. That was the best opportunity the assessee had to prove its case that it was the owner of the cylinders which it leased to Janta. Fourthly, the discharge receipt issued by Aravalli to the assessee acknowledges the receipt of the three cheques, all dated 20.03.1995, even prior to the authorisation claimed to have been issued by Janta to Aravalli. The discharge receipt no doubt says that the cheques were received "towards supply of empty cylinders on your behalf to M/s. Janta Gases Pvt. Ltd. vide Bill Nos.110, 111 & 112", but that by itself does not prove that the relationship between the assessee and Janta is that of lessor-lessee. The receipt does not show the nature of relationship that existed between the assessee and Janta. All that the receipt says is that the cylinders were supplied to Janta on behalf of the assessee. That would have been the position even if the assessee had merely acted as financier. Above all, RatanMahipal's statement is categorical and clear, as evident from the following answer to a question posed by the AO: -

> "*Question: In view of the above how the Gas Cylinders vide Bill Nos.110, 111 and 112 were sold to M/s. Ganpati Finance Ltd.*
>
> *Answer: These Gas Cylinders as evidenced vide Bill Nos.110, 111 and 112 have been sold to M/s. Janta Gases Pvt. Ltd. and M/s. Ganpati Finance Ltd. has only financed the cost of these cylinders. These cylinders cannot be sold to M/s. Ganpati Finance Ltd. Since a manufacturer of empty gas cylinders a can sell Gas cylinders only to a person who has got the Licence for Bottling Plant, as approved by the Explosives Deptt. Since M/s. Ganpati Finance Ltd. does not have any Bottling Plant Permission and approval of Explosive Department, the gas cylinders have not been sold to them.*

*Question: Being the manufacturers of Gas Cylinders can you sell Gas cylinders to anybody who has not supplied you Drawing approved by the Explosive Department and their logo.*

*Answer: No, we cannot sell Gas Cylinders to anybody who have not supplied us the Drawings approved by the Explosive Deptt. and their logo.*

*Question: Has M/s. Ganpati Finance Ltd. Supplied you with their approved Drawings and their Logo.*

*Answer: No, they have not supplied any Drawing and Logo.*

*Question: In view of the above, how it is claimed by you and M/s. Ganpati Finance Ltd. That the Gas Cylinders have not been sold by you to M/s. Ganpati Finance Ltd.*

*Answer: As stated earlier, we again stress that these Gas cylinders cannot be sold and have not been sold to M/s. Ganpati Finance Ltd. These gas cylinders bear the Logo of "Indojam" and hence can only be sold to M/s. Janta Gases Pvt. Ltd. M/s. Ganpati Finance Ltd. Has only financed this deal.*"

20. That is precisely why the AO concluded, and in our opinion correctly, as follows:

"*Thus, it is very clear that the gas cylinders were being manufactured for and on behalf as per the orders of Janta Gases and were being supplied to them on a regular basis and only at the end of the financial year some of these cylinders have been shown as sales to M/s. Ganpati Finance who in turn have leased them to M/s. Janta Gases only to allow M/s. Ganpati Finance to avail 100% depreciation. In fact M/s. Ganpati Finance has only financed the deal and its role is that of a financer and not that of the owner of the cylinder.*"

21. So far as the air jet spindles and 'positar disc' are concerned, the claim of the assessee was that it purchased them from Rajaji Electronics Pvt. Ltd. ("Rajaji") and leased them to Maruti Syntex (India) Ltd. ("Maruti"). Despite repeated issue of summons and also commission to the SHO of Sarojini Nagar Police Station, the director of Rajaji, one M.M. Sharma, did not appear in response to the query raised by the AO to furnish the particulars relating to the sale of the assets to the assessee and produce the books of account. Finally a letter dated 09.01.1998 was received by the

AO from Rajaji that it sold the assets to the assessee and was also assessed to tax. In the sales bill No.167/15.03.1995, however, no sales-tax was found to have been charged. No particulars were furnished to show from whom the assets were purchased. The assessee could not produce the director of Rajaji. The AO thereafter focussed his attention on Maruti to whom the assessee claimed to have leased the assets. He called upon Maruti to produce the copies of the goods inwards register/fixed assets register to show receipt of the goods in its factory and the details of the vehicles by which they were brought. Maruti confessed that they were unable to produce the registers, but stated that they goods were brought to their factory by their own vehicles, such as Maruti-800 car, Ambassador car, Premier Padmini NE car and a Contessa car. No log book was however maintained for the movement of these cars. In view of this, the AO concluded as follows:

"*To sum up:*

*a)* *The director of M/s. Rajaji Electronics absconding and is deliberately avoiding to produce its books of accounts to prove the sales of the air spindles to M/s. Ganpati Finance and to furnish evidence regarding its purchase and from whom it has been purchased. This is despite two summons served on his personally and arrest warrants served on the local police twice. The assessee was also requested to produce him but it failed to do so.*

*b)* *M/s. Rajaji Electronics is not assessed to tax and is not filings its income tax return. It has only obtained a PAN. On an enquiry from the Computer Operation Wing of the dept. it has been informed that the particulars of assessment has not been filled up in the PAN from M/s. Rajaji Electronics. It has claimed to be a sales tax assessee but has not shown whether it has paid sales tax on this sales made to M/s. Ganpati Finance Ltd. In fact, in the bill No.167 dated 15.3.95 raised by M/s. Rajaji Electronics Ltd. To M/s. Ganpati Finance Ltd. in respect of the sales of air jets etc. no sales tax have been charged. Hence, the fact that M/s. Rajaji Electronics is a sales tax assessee is of no consequence if it is unable to prove that the sales made to M/s. Ganpati Finance have been entered in its books and it has paid sales tax on this sale.*

*c)* *M/s. Maruti Syntex Ltd. could not produce evidence in the way of goods inwards and stock register regarding the fact that the goods have in fact been received by them at their factory premises.*

*d) No acceptable explanation have been given regarding the manner of transport of these machineries.*

*In view of the above the assessee has not been able to produce sufficient evidence to prove its claim that it had purchased airjets and spindles from M/s. Rajaji Electronics. In view of this the 100% depreciation amounting to ₹19,99,440/- is being disallowed.*"

22. The CIT (A), as in the case of LPG cylinders, merely reproduced the written submissions of the assessee and cryptically concluded as under:

"*2.7 Likewise, in the case of Airjet Spindle Assembly, and Positar Disc, the arguments given on behalf of the appellant company have shed a lot of light on the actual conduct of affairs. here also, after a careful consideration, of all the evidence, I hold that the claim of depreciation of the appellant co., should be allowed.*"

23. The Tribunal, to which the revenue carried the matter in appeal, confirmed the conclusion of the CIT (A) in paragraph 11 of its order in the following manner: -

"*11. As far as the purchase of Airjet Spindle Assembly and Positar Disc from M/s. Rajaji Electronics P. Ltd. is concerned, we are of the view that the fact that the Assessing Officer was not able to procure the presence of the Director of the said company can not lead to the conclusion that the said company was non-existent. Admittedly there was a letter written by M/s. Rajaji Electronics to the Assessing Officer admitting the transaction between them and the assessee. This evidence has conveniently been overlooked by the Assessing Officer. Apart from the above assessee has filed documents viz., lease agreement, Insurance policy to show that the equipments were insured in the name of the assessee, statement of accounts of Rajaji Electronics in the books of the assessee. Further evidence in the form of lease viz., M/s. Rajaji Electronics offering shares as security, the facts that legal notices were issued to them for their failure to pay hire installments, the fact that shares offered as security were sold for adjustment of dues by M/s. Maruti Syntex India P. Ltd. etc. In the light of this overwhelming evidence available on record there was no basis for the CIT (A) to have come to the conclusion that the purchase of Airjet Spindle Assembly and Positar Disc by the assessee had not been proved. We are therefore of the view that the CIT (A) was fully justified in coming to the conclusion that the findings of the Assessing Officer in disallowing the claim for 100% depreciation claimed by the assessee were not sustainable. We find no grounds to interfere with the orders of the CIT (A) and this appeal by the Revenue is dismissed.*"

24. It seems to us that in coming to the above conclusion, the Tribunal overlooked that the burden was squarely upon the assessee to prove both ownership of the assets and user for the purpose of its business in order to claim depreciation under Section

32. The assessee was unable to prove the purchase of the assets from Rajaji, nc Rajaji able to furnish the details of the sale of the assets to the assessee. While in the case of LPG cylinders the AO did not doubt the existence of the assets but took the view that the nature of the transaction between the assessee and Janta was one of a financing and not that of lease, in the case of airjet spindile and positar disc the very existence of the assets, and consequently the claim of ownership of the assets, is suspected. There was no reason why Rajaji, from whom the assessee claims to have purchased the assets, should not furnish the relevant particulars and chose to evade the notices/summons issued by the AO. It ultimately furnished only skeletal particulars – a mere affirmation of the sale, that too, without charging sales-tax as the copy of the invoice showed. Its sales-tax registration number and income-tax PAN number were not capable of proper verification, leading to the very existence of Rajaji coming under grave suspicion. The AO acted fairly by asking Maruti, to whom the assets were claimed to have been leased by the assessee, to produce the relevant assets inward register and explain the mode by which they were transported to its factory. This evoked a response which cannot be countenanced – that no such registers were being maintained by Maruti, and a very unusual or strange plea that the assets were transported by their own cars, which are passenger cars and not goods vehicles; even then, the AO was fair enough to ask them to show their log books showing the movement of the cars, which could not be produced as they were not maintained. There was thus precious little material before the AO from which he could accept the plea of ownership or even the existence of the assets for the purpose of claiming depreciation.

25. The CIT (A) did no better than the assessee as the quoted paragraph from his order would show. The Tribunal proceeded to view the paper-work as sacrosanct even when there was enough material to excite its suspicion. The fact that there was a lease document, insurance policy, accounting entries in the books of the assessee, security offered by Maruti, issue of legal notices on Maruti for default in the payment of lease instalments and so on, described by the Tribunal as "overwhelming evidence", are all facts which are neutral and would have to necessarily exist in support of the claim for depreciation. The question before the Tribunal really was whether the assessee can be said to have discharged its burden of proving ownership over the assets in the light of

the inability of Rajaji to explain the supply of the assets and the complete la material in the records of Maruti, the alleged lessee, to show the receipt of the assets into its factory. It seems to us, with respect, that the Tribunal failed to probe the transaction and look beyond the documentation and to apply the standard of proof required of the assessee to prove ownership of the assets, even when there was no real evidence worth the name in favour of the assessee.

26. It appears to us that this is a case where the principles set down by the Supreme Court in *CIT v. Durga Prasad More*, (1971) 82 ITR 540 and *CIT v. Sumati Dayal*, (1995) 214 ITR 801 apply; the Tribunal ought to have applied these judgments to test the evidence adduced by the assessee in the light of the material gathered by the AO, the conduct of the parties and other surrounding circumstances. The Tribunal, with respect, seems to have proceeded merely on the basis of the documentary evidence without putting it to rigorous examination in the light of the above aspects highlighted by the AO. In the case of LPG cylinders, the transaction was only a financing transaction and was not a lease as there is no material to show that the assessee became the owner of the cylinders and leased them to Janta; in the case of airjet spindles and positar disc, the very existence of the assets and the genuineness of the purchase of the assets by the assessee was not proved. In both the cases, therefore, the assessee was not entitled to depreciation.

27. In the result, both the substantial questions of law are answered in the negative, in favour of the revenue and against the assessee. The appeal of the revenue is accordingly allowed with costs of ₹25,000/-.

**(R.V. EASWAR)**
**JUDGE**

**(S. RAVINDRA BHAT)**
**JUDGE**

**DECEMBER 05, 2012**
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