

Karlmjee (P.) Ltd. Vs. Ito

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Mar-28-2007

Judge : G Gupta, K Boliya

Appellant : Karlmjee (P.) Ltd.

Respondent : ito

Judgement :

1. The cross appeals for the assessment year 2001-02 and the assessee's appeal for the same year against levy of penalty under Section 271(l)(c), which involved common facts are disposed off by this common order as under: 2. The common issue in the quantum appeals by the assessee and the F department pertains to allowance of depreciation on windmills acquired by the assessee on hire purchase basis. On this issue the assessee has raised the following grounds: 1. The learned Commissioner of Income-tax (A)-XXX(Commissioner (Appeals)) erred in failing to properly appreciate the terms of the hire purchase agreement and the transaction of the appellant in acquisition of the windmills and erred in holding that the transactions amounted to Gsale transactions with deferred payment terms.

2. The learned Commissioner (Appeals) ought to have allowed depreciation on windmills A as claimed in view inter alia CBDT's Circular No. 9, dated 23-3-1943.

3. The learned Commissioner of Income-tax (A) erred in directing the assessing officer (assessing officer) to grant depreciation on 3 windmills based on cost of Rs. 1,75,41,750. He ought to have directed the assessing officer to allow the said

depreciation at the rate of 100 per cent based on cost of Rs. 2,85,00,000. B 4. The learned Commissioner (Appeals) erred in not correctly interpreting the provision of Section 43(1) of the Income Tax Act and therefore erred in altering the cost to the appellant for the purpose of depreciation allowance claim.

5. The learned Commissioner (Appeals) erred in making various baseless erroneous and improper remarks to the effect that the appellant had entered into transactions and/or had inflated certain items to improperly reduce profits and/or claim higher depreciation.

3. Under letter dated 12-2-2007, the assessee has raised the following additional ground of appeal : The learned Commissioner of Income-tax(A)-XXX(Commissioner (Appeals)) failed to appreciate that his direction to grant depreciation on three windmills based on cost of Rs. 1,75,41,750 is beyond his jurisdiction and otherwise contrary to law.

4. It is stated that though this dispute is already covered in the original grounds raised by the assessee, the additional ground is being raised as a matter of abundant precaution. The additional ground arises from the same facts and is, therefore, admitted. As a matter of fact, the issue raised in the additional ground is already covered in Ground No. 3 of the original grounds of appeal.

1. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in holding that the assessee is entitled for part depreciation on the actual cost of Rs. 2,20,00,000 + Rs. 1,75,41,750 of the windmills.

1b. On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in granting part depreciation after concluding that the Hire Purchase Agreement under which the depreciation at the rate of 100 per cent was claimed was a non-genuine agreement.

5. We have heard both the sides at length and have gone through the relevant facts. The assessee-company derives income from exports and local sales, lease rent and finance charges. During the previous year relevant to the assessment

year under appeal the assessee has commenced a new activity Le., generation of power from wind energy by acquiring and operating wind electricity generators, popularly known as windmills. For this purpose the assessee acquired 5 windmills as per hire purchase agreement dated 7-9-2000 with M/s. Subuthi Finance Ltd. (SFL) at the total cost of Rs. 5.05 crores. As per the terms and conditions of the agreement a sum of Rs. 85 lakhs was paid by the assessee on execution of the agreement. A further sum of Rs. 8.92 crores was payable in annual instalments over a period of 11 years and the last instalment was payable on 6-9-2011. Thus the total consideration for the 5 windmills was Rs. 9.77 crores. Out of this amount a sum of Rs. 5.05 crores was allocated to the cost of the windmills and the remaining amount was claimed as revenue expenditure on account of interest/finance charges payable every year for 11 assessment years. The assessee claimed 100 per cent depreciation which is the prescribed rate for windmills. The assessing officer examined the assessee's claim for deduction of depreciation and recorded a finding that the hire purchase agreement cannot be considered a genuine agreement and that the assessee deliberately resorted to a device to avoid tax on the capital gain of Rs. 5,17,81,778 earned by the assessee during the present assessment year by setting off the depreciation of Rs. 5.05 crores against the aforesaid income. The hire-purchase agreement was entered by the assessee on 7-9-2000 and on the same day, the assessee entered into another agreement with S.G.M. Wind Farms P.Ltd. (SGMW) under which the operation and maintenance of the 5 windmills was assigned to SGMW. The assessing officer was of the view that the entire transaction was in the nature of dubious or colourable device aimed at avoidance of tax and therefore, the ITAT, Mumbai Special Bench's decision in the case of Mid East Portfolio Management Ltd. v. Dy. CIT (2003) 87 ITD 535, was applicable. The assessing officer accordingly called upon the assessee to explain why the depreciation should not be disallowed.

6. The assessee contended before the assessing officer that the facts of Mid East Portfolio Management Ltd. (supra) related to sale and lease back (SLB) transaction whereas the facts of its case were totally different. It was submitted that the transaction was genuine and depreciation was clearly admissible in the light of Board's Circular No. 9, dated 23-3-1943.

7. The assessing officer considered the submissions made before him and he referred to the terms and conditions of the hire-purchase agreement at pages 3 and 4 of his order. The relevant part may be reproduced below : I. The equipments given on hire (5 windmills) are the absolute property of SFL. Any addition made by the assessee at the assessee's own expenses shall be deemed to be sole and absolute property of SFL (Clause 1).

II. Contract shall end at the end of the hire period of 11 years, and the equipments at the 1 option of the assessee shall become its absolute property on payment of the option money. The option money will "be Re. 1 per windmill (clause 4(fe)).

III. The agreement can only be terminated by SFL. If SFL terminates A the agreement, any additions and replacements to the equipments shall be deemed to be the absolute property of the SFL (Clause 7a).

IV. The assessee does not have any right to place the credit of SFL for any repairs, replacements, supplies or additions.

V. The assessee does not have any authority to sale assign, transfer, mortgage, pledge, hypothecate or part with the possession of the equipments or to create any interest in the said property in favour g of the third party (Clause 7g.) VI. The assessee does not have any authority to remove; the equipments out of the declared place without the express written prior permission of SFL (Clause 7h).

VII. SFL empowers the assessee to enter into an Operation and Maintenance contract for the hired equipments (Clause 7).

VIII. The assessee holds the equipment as hirer and bailee of SFL and q does not hold any right, title or interest as purchaser thereof (Clause 8).

IX. SFL may terminate the Agreement by giving a 14 days written notice and forthwith retake and recover possession of the hire equipments (Clause 10).

X. They shall keep the equipment insured during the period of hiring against any loss or damage under the comprehensive policy with _ the insurance company approved by SFL and the policy shall be in the name of SFL only (Clause 15).

XI. SFL may also get the equipment insured and keep the insurance policy in force by getting it renewed from time to time and also to recover from the assessee the premium and other payment made by them to the Insurance Company for the said purpose (Clause 15).

8. The assessing officer also considered the operation and maintenance agreement dated 7-9-2000 entered by the assessee-company E, with SGMW. At page 4 of his order he has referred to the salient features of this agreement as under : I. SGMW shall operate, run and maintain the windmills brought on here on behalf of the assessee-company.

II. The assessee would permit SGMW to apply to the Electricity Board for transfer of the electric meter in their name. On expiry/ termination of this Agreement the Operator shall immediately F comply to the Electricity Board for transfer of the electric meter to the assessee or its nominee (Clause 5).

III. SGMW will undertake to maintain the windmills, generate electricity and sell power to the Electricity Board or eligible consumers, recovery of sale proceeds and pay the same to the Company on payment of OMC charges at average Rs. 50,000 per machine per year (Clause 7).

IV. SGMW shall hold the windmills of the company and not claim any right, title or interest in the said windmills (Clause 20).

V. SGMW shall not transfer, assign or otherwise dispose of the assessee's right or interest in the said windmills (Clause 21).

9. The assessing officer concluded that the entire transaction was only for the purpose of reducing tax liability by claiming 100 per cent depreciation. The assessee was never engaged in the business of electricity in the past and even during this year there was no intention to carry on the business of generation of electricity. The assessing officer also held that in terms of the hire purchase agreement the assessee never became real and absolute owner of the windmills and the windmills continued to remain under the undisputed ownership and control of SFL. Insurance was also taken in the name of SFL. The assessing officer

referred to the Supreme Court decision in the case of CIT v. Podar Cement (P.) Ltd. . However, the assessing officer held that the assessee entered into a hire-purchase agreement and therefore, the transaction cannot be termed as a mere finance transaction. The assessing officer, therefore, held that even though depreciation is to be disallowed the hiring income earned by the assessee and shown in the Profit and Loss Account is to be assessed as income from other sources (sic).

10. When the matter came up before the learned Commissioner (Appeals) he examined the facts in great detail. The assessee also made elaborate submissions before the learned Commissioner (Appeals) in support of the claim for depreciation and relied on the Board's Circular No. 9, dated 23-3-1943 which was duly considered by the ITAT Calcutta Bench in the case of Tirrihannah Co. Ltd. v. Dy. CIT (2002) 253 ITR (AT) 56. It was contended that the assessee's case was fully covered by the Board's Circular and the above mentioned Tribunal's order. The assessee further contended that there is no merit in the assessing officer's objection that the assessee was not the absolute owner of the windmills. It was pointed out that in a hire-purchase agreement the assessee can never be the owner and the depreciation has been claimed and is allowable in view of the Board's circular. It was also pointed out that SFL never claimed any depreciation. Regarding the genuineness of the agreement the assessee made the following submissions before the learned Commissioner (Appeals).

(a) That existence and/or running and operation of the windmills are not in doubt; it is not the claim of the assessing officer that the windmills do not exist; he has made inquiries during the course of hearing, with his counterparts in Tamilnadu and confirmed their existence and operation; (b) That even today, they are existing, they are producing power and they are being distributed; it is yielding revenue; in the subject year in appeal, power was supplied to Ganapathy & Co. Limited and later it is supplied to the Tamilnadu Power Corporation also.

(c) Regular bills are raised in the name of the company; revenue is to the A coffers of the appellant company; (d) Since the company lacked, initial expertise and recognition with the State Power Corporations, it engaged services of an operator

who is maintaining and operating the units; a copy of the Operation and Management agreement has been placed on your records. Outsourcing is the order of the day. department cannot shut its eyes to such facts, it cannot be gainsaid that all operations of the plant g shall be conducted by the owner to claim expenses and allowances and that no activity could be outsourced. Concept of outsourcing is triggering wide expansions of business all over the world and bringing about economic growth and expansions.

(e) The Company had initially paid Rs. 85 lakhs and the balance was structured to pay out of the revenue over a period of 11 years - the hire-purchase tenure.

(f) Neither the owner Subuthi Finance Limited nor the Operator has claimed any depreciation on the assets. Documents relating thereto are placed on records.

(g) The legal documents are cilso made which are valid and subsisting.

11. Regarding the allegation that the hire-purchase agreement was entered by the assessee to off set depreciation against capital gain, it was brought to the notice of the learned Commissioner (Appeals) that the flat was sold on 28-3-2001 whereas hire-purchase agreement was dated 9-9-2000. It was also contended that even if it is assumed that the assessee-company entered into the transaction to reduce tax payable, it was legally permissible to do so within the four corners of law as observed by the ITAT, Mumbai Bench in the case of Bombay Burmah Trading Corpn. Ltd. v. Asstt. CIT(2002) 82 ITD 531. It was also pointed out that the cost of the windmills was adopted as estimated by the registered valuers. It was also submitted that the windmills were insured at Rs. 4.8 crores ^ which is also supportive of the cost price of Rs. 5.05 crores. The assessee further brought to the notice of the learned Commissioner (Appeals) that SFL, its directors or shareholders are not in any way related to the assessee-company, its directors or shareholders and therefore, the entire transaction was at arm's length.

12. The learned Commissioner (Appeals) called for the assessment records to ascertain the relevant facts. He has observed that M/s. SFL vide its letter dated F 10-2-2004 informed the assessing officer that 3 windmills were sold by M/s. Indowind Energy Limited (IWEL) to M/s.

Karimjee Pvt. Ltd. and the remaining two windmills were bought by M/s.

SFL on 18-5- 2000 for Rs. 1.80 crores and thereafter sold to M/s.

Karimjee Pvt. Ltd. by way of hire-purchase for a consideration of Rs. 2.2 crores. SFL disclosed the profit of Rs. 40 lakhs in their return of income as "other income".

13. The learned Commissioner (Appeals) recorded the following findings : (a) Two windmills were sold to the assessee by SFL under hire-purchase agreement and this transaction was fully covered by the Board's Circular No. 9.

(b) IWEL directly sold 3 windmills to the assessee-company by raising invoices in the name of the assessee-company on A/c. M/s.

S.G.M. Windfarms Pvt. Ltd. and M/s. SFL has only financed this direct purchase of windmills by the assessee.

(c) Only such assets can be given under hire-purchase agreement which are owned by the seller. On the contrary the 3 windmills were not owned by SFL.

(d) As per the Board's circular the hire-purchase should be spread over evenly during the period of hire purchase, whereas in the present case there is upward increase in these charges.

(e) By entering into the hire purchase agreement, the assessee is paying Cinterest rate of 17% to SFL. Further SFL purchased two windmills at Rs. 1.8 crores and sold to the assessee at Rs. 2.2 crores thereby already earning a profit of Rs. 40 lakhs. If this is also considered the interest rate would increase to 21% whereas the assessee could have easily raised loans at interest rates ranging between 12.5 to 14.5%.

(f) The purchase cost of windmills is inflated with a view to claim more depreciation.

14. On the basis of these findings the learned Commissioner (Appeals) held that the assessee would be entitled to depreciation on the full cost of two windmills being Rs. 2.2 crores. In respect of the other 3 windmills purchased from M/s.

IWEL, he held that the cost price of Rs. 2.85 crores was inflated as these windmills were old and already put to use for 5 years. The learned Commissioner (Appeals) held that Explanations 3 and 4A of Section 43(1) would be applicable in this case. He referred to Appendix 1A of the Income-tax Rules wherein depreciation rate on windmills is 7.69% per annum of the original cost.

The learned Commissioner (Appeals) calculated wear and tear at this rate for the period during which the 3 windmills were already put to use and on this basis he estimated the fair market value at Rs. 1,75,41,750. He held that depreciation at 100% would be admissible on this cost only.

15. The learned counsel appearing for the assessee reiterated the arguments already raised before the revenue authorities. He contended that depreciation under Section 43(1) is admissible on actual cost. He argued that Explanations 3 and 4A are not at all applicable in the present case and the Commissioner (Appeals) has no power to determine the fair market value as against the actual cost to the assessee. It is submitted that the entire transaction is perfectly genuine as the same is being actually acted upon by the concerned parties. The assessee is paying regularly the annual instalments to SFL and the income earned by operating the windmills is also being regularly offered for tax. At the end of the period of hire-purchase, the assessee has an option to acquire the windmills. It is argued that the case is fully covered by the Board's Circular. The learned counsel also contended that the ITAT Special Bench decision in the case of Mid East Portfolio (supra) is not applicable at all as this is not a case of sale and lease back.

Even in that case the Tribunal observed that genuineness is to be determined after considering the facts and circumstances of each case.

16. The learned DR strongly supported the order of the assessing officer contended that having recorded a finding that the hire purchase agreement was not genuine, the learned Commissioner (Appeals) was not justified in allowing depreciation.

17. We have carefully gone through the material facts having bearing on this issue. In our view there is no basis whatsoever for doubting the genuineness of

the hire purchase agreement. The assessing officer has merely assumed that the hire purchase agreement has been entered into by the assessee to set off depreciation against the capital gain. As a matter of fact, the assessee did acquire 5 windmills under the hire purchase agreement. These 5 windmills were leased to SGMW under another agreement for operation and maintenance. These agreements have been actually acted upon by the concerned parties during the preceding several years. The assessee is regularly paying the hire-purchase charges as per terms and conditions of the agreement and is also receiving income from generation of power. The income is being regularly assessed in the hands of the assessee and the assessee is getting deduction for the hire charges paid. The determination of cost at Rs. 5.05 crores is duly supported by the valuation reports of Government registered valuer and these reports are placed at pages 32 and 33 of the Paper Book. In our view there is hardly any basis for the assumption that this cost has been inflated. As already mentioned by us above, the total payment to be made by the assessee for the 5 windmills stands at Rs. 9.77 crores. Out of this Rs. 5.05 crores has been allocated towards the cost and the remaining amount has been treated as finance charges and spread over a period of 11 years. The assessee would be entitled to depreciation on the cost and the finance charges would be allowable as revenue expenditure. If the cost is reduced, as done by the learned Commissioner (Appeals), the finance charges will have to be correspondingly increased and will have to be allowed as revenue expenditure. Interestingly the learned Commissioner (Appeals) has already recorded a finding that the finance cost is much higher than the prevailing interest rates which means that the cost of the windmills has been reasonably estimated. If the cost is reduced and finance charges are correspondingly increased, the interest rate would further go up. It is also notable that the windmills have been insured at Rs. 4.8 crores which is about 95% of the cost of Rs. 5.05 crores. Further in our view Explanations 3 and 4A are not applicable at all in the present case. As per Section 43(1) "actual cost" means the actual cost of the assets to the assessee. In the present case the actual cost to the assessee as mentioned above is Rs. 5.05 crores. This actual cost can be varied if permissible under any of the Explanations under Section 43(1). The learned Commissioner (Appeals) has invoked Explanation 3 and Explanation 4A which may be reproduced below :

Explanation 3.-Where, before the date of acquisition by the assessee, the assets were at any time used by any other person for the purposes of his business or profession and the assessing officer is satisfied that the main purpose of the transfer of such assets, directly or indirectly to the assessee, was the reduction of a liability to income-tax (by claiming depreciation with reference to an enhanced cost), the actual cost to the assessee shall be such an amount as the assessing officer may, with the previous approval of the Joint Commissioner, determine having regard to all the circumstances of the case.

Explanation 4A.-Where before the date of acquisition by the assessee (hereinafter referred to as the first mentioned person), the assets were at any time used by any other person (hereinafter referred to as the second mentioned person) for the purposes of his business or profession and depreciation allowance has been claimed in respect of such assets in the case of the second mentioned person and such person acquires on lease, hire or otherwise assets from the first mentioned person, then, notwithstanding anything contained in Explanation 3, the actual cost of the transferred assets, in the case of first mentioned person, shall be the same as the written down value of the said assets at the time of transfer thereof by the second mentioned person.

18. The assessing officer has never invoked Explanation 3. Actually this Explanation can be invoked with the previous approval of the Joint Commissioner. Explanation 4A is applicable only in the case of sale and lease back transactions. In our view, the learned Commissioner (Appeals) has exceeded his jurisdiction in scaling down the cost of 3 windmills. We, therefore, hold that the actual cost has to be taken at Rs. 5.05 crores.

19. Coming to the assessee's claim for depreciation on the aforesaid cost of windmills, we have already observed above that the hire-purchase agreement cannot be treated as not genuine. Under a hire-purchase agreement the person who hires is never vested with ownership rights till the stipulated period is over and he exercises the option to acquire the assets. Therefore, we see no merit in the assessing officer's observation that depreciation is not admissible to the assessee because the assessee is not the owner of the assets. As a matter of fact, the

assessee claimed depreciation by virtue of the Board's Circular No. 9, dated 23-3-1943. This Circular may be reproduced below : The following instructions are issued for dealing with cases in which an asset is being acquired under on what is known as, hire-purchase agreement: (i) In every case of payment purporting to be for hire-purchase, production of the agreement under which the payment is made should be insisted on.

(ii) Where the effect of an agreement is that the ownership of the subject is at once transferred to the lessee (e.g. where the lessor obtains a right to sue for arrear instalments but no right to recovery A of the asset), the transaction should be regarded as one of purchase by instalments and no deduction in respect of hire should be made. Depreciation should be allowed to the lessee on the entire purchase price as per the agreement.

(iii) Where the terms of the agreement provide that the equipment shall eventually become the property of the hirer or confer on the hirer an option to purchase the equipment, the transaction should be regarded as one of hire-purchase. In such cases the periodical payments made by the hirer should for tax purposes be regarded as made up of : (A) consideration for hire, to be allowed as a deduction in the assessment; and (B) payment on account of purchase to be treated as capital outlay, depreciation being allowed to the lease on the initial value (i.e.

the amount for which the hired subject would have been sold C for cash at the date of agreement).

The allowance to be made in respect of hire should be the difference between the aggregate amount of the periodical payments under the agreement and the initial value (as described above), the amount of this allowance being spread evenly over the term of the agreement.

If, however, the agreement was terminated either by the outright purchase of equipment or of its return to the owner the deduction should cease as from the date of the termination.

An assessee claiming this deduction should be asked to furnish a certificate from the vendor or other satisfactory evidence, of the initial value (as described above). Where no certificate or satisfactory evidence is forthcoming, the initial value should be arrived at by computing the present value of the amount payable under the agreement at an appropriate rate per centum; in doubtful cases, the facts should be reported to the Board.

20. The case of the assessee would fall under para (Hi) of the aforesaid circular as under the agreement the assessee has option to purchase the assets. This circular has been explained in detail by the ITAT Calcutta Bench in the case of Tirrihanah Co. Ltd. (supra) and it would be appropriate to reproduce below the facts and the ratio of this case from the head-note : A plain reading of Circular No. 9, dated 23-3-1943, shows that it visualises two situations. The first situation is when ownership is transferred at once and the lessor has the right to sue for arrears of instalments but not for recovery of the leased asset and the second situation is when the terms of the agreement provide that the equipment shall eventually become the property of the hirer or confer on the hirer an option to purchase the equipment. These conditions mentioned at paragraph (ii) and paragraph (Hi) of the circular are mutually exclusive and they envisage different treatments for the purpose of depreciation. In the first case, according to the Central Board of Direct Taxes circular, the transaction is required to be treated as that of purchase by instalments and depreciation is to be computed on the entire purchase price as per the agreement. In the second case, the transaction is required to be treated as one of hire-purchase and the periodical payment made by the hirer is regarded as made up of consideration for hire, to be allowed as deduction in the assessment, and payment on account of purchase, to be treated as capital outlay, depreciation being allowed to the lessee on the initial value. Further, the allowance to be made in respect of hire should be the difference between the agreement amount of the periodic payments under the agreement and the initial value, the amount of this allowance being spread evenly over the terms of the agreement.

Depreciation is to be allowed on the assets purchased on hire-purchase basis. Addl. CIT v. General Industries Corporation The claim of the assessee for

depreciation on plant and machinery acquired on hire-purchase from the Tea Board in the previous years relevant to the assessment years 1991-92, 1992-93 and 1993-94 was allowed in assessments under Section 143 (3) of the Act and assessment for 1994-95 was completed under Section 143(l)(a) of the Income Tax Act, 1961. On these facts, the Commissioner assumed jurisdiction under Section 263 on the ground that the orders passed by the assessing officer allowing depreciation on plant and machinery acquired on hire-purchase basis from the Tea Board were erroneous and prejudicial to the interests of the revenue. In response to the notice, the assessee submitted that in view of Circular No. 9, he was entitled to depreciation and the terms of the agreement provided that the equipment shall become the property of the hirer or conferred on the hirer an option to purchase the equipment but the Commissioner disagreeing with this view held that the hire-purchase agreement with the Tea Board clearly provided that the actual and absolute ownership of the machinery would remain with the Tea Board and concluded that the assessee, not being the owner of the plant and machinery, was not entitled to depreciation. On appeal : Held, that since the two situations mentioned in Circular No. 9 were mutually exclusive and depreciation on assets purchased under the hire- purchase agreement with the Tea Board was clearly covered by paragraph (Hi) of the circular, there was no legal infirmity in the orders of the assessing officer granting depreciation on the assets which were neither Ferroneous nor prejudicial to the interests of the revenue.

21. In our view, the assessee's case is fully covered by the aforesaid decision of the Tribunal. We do not see any merit in the observations made by the learned Commissioner (Appeals) that the Board's circular will not apply in the case of the assessee as the hire-purchase/finance charges payable annually have not been evenly spread over. In our view such spreading over depends upon the mutual convenience and agreement between the G parties and there cannot be any mandatory condition that such charges should be evenly spread. Considering the entire facts and circumstances A and the legal position, we hold that the assessee is entitled to depreciation at the rate of 10096 on the cost of the windmills being Rs. 5.05 crores. The assessing officer is accordingly directed to allow depreciation. This disposes of the departmental appeal and the various grounds of appeal raised by the assessee in the appeal filed by it.

22. We now take up the remaining grounds of the assessee's appeal.

Ground No. 6 is as under : The learned Commissioner (Appeals) erred in disallowing hire charges incurred or suffered by the appellant on acquisition of the windmills.

23. This ground has not been pressed by the learned counsel for the assessee and therefore, the same stands rejected as not pressed.

The learned Commissioner (Appeals) erred in holding that the carried forward depreciation of the earlier years could not be set off against the long-term capital gains of the current year.

25. We have heard both the sides and we find that the assessing officer has already set off the brought forward depreciation against the business income during this year. This is in consonance with the provisions of Section 32(2) as applicable to the present assessment year. We, therefore, confirm the order of the learned Commissioner (Appeals) on this issue.

The learned Commissioner (Appeals) erred in upholding the working of book profits by the assessing officer of Rs. 5,21,82,642 under Section 115 JB of the Income Tax Act, 1961.

27. The only grievance of the assessee is addition of capital gain to the book profit for the purpose of Section 115JB. The learned counsel submitted that this issue is squarely covered in assessee's favour by the following decisions rendered by various Benches of ITAT :^ 1. M/s. Sanatan Textile Pvt. Ltd. Assessment Year 1998-99, ITA Mo.

1510/Mum./2002.

2. Swadee Chemicals Pvt. Ltd., assessment year 1998-99, ITA No. 1446/Mum./2002.

3. Shruti Trading Pvt. Ltd., assessment year 1998-99, ITA No. 1511/Mum./2002.F 4. M/s. Ranjana Traders Pvt. Ltd., assessment year 1998-99, ITA No. 4749/Mum./2003.

5. M/s. Dainty Investments & Leasing Pvt. Ltd., assessment year 1998-99, ITA No. 1793/Mum./2002.
6. M/s. Vasishtha Tradecom Pvt. Ltd., assessment year 1998-99, ITA No. 1449/Mum./2002.
7. M/s. Rachana Merchandise Pvt. Ltd., assessment year 1998-99, ITA No. 1114/Mum./2002.
8. M/s. Orson Trading Pvt. Ltd., assessment year 1998-99, ITA No. 1389/Mum./2002.
9. M/s. Maxwell Dyes & Chemicals Pvt. Ltd., assessment year 1998-99, ITA No. 1390/Mum./2002.
10. M/s. Agni Investment & Trading Pvt. Ltd., assessment year 1998-99, BITA No. 1822/Mum./2002.
11. M/s. Rhino Bags Ltd., assessment year 1998-99, ITA No. 1047/ Mum./2002.
12. M/s. Guruvas Textiles Pvt. Ltd., assessment year 1998-99, ITA No. 1789/Mum./2002.
13. M/s. Lazor Syntex Ltd., assessment year 1998-99, ITA No. 1809/ CMum./2002.
14. M/s. Kunjvan Texfab Pvt. Ltd., assessment year 1998-99, ITA No. 1112/Mum./2002.

28. Copies of these orders have been compiled at pages 1 to 58 of the Paper Book. We find that in these orders various High Courts and Supreme Court decisions have been duly considered including Supreme Court decision in the case of Apollo Tyres Ltd. v. CIT and Bombay High Court decision in the case of CIT v. Veekaylal Investment Co. (P.) Ltd. . It has been consistently held by various Benches of the Tribunal that the book profit cannot be increased by adding capital gain. Since the issue is squarely covered as mentioned above, we direct the assessing officer to exclude capital gain from the book profit for the purpose of

Section 115JB.29. This is assessee's appeal against levy of penalty of Rs. 1,08,21,394 under Section 271(1)(c) which has been confirmed by the learned Commissioner (Appeals).

30. We have heard both the sides. The penalty is entirely based upon the additions made by the assessing officer on account of disallowance of depreciation on windmills and addition of capital gain to the book profit. These additions have already been deleted by us and, therefore, levy of penalty does not survive. Accordingly, we direct the assessing officer to delete the penalty.

31. In the result, ITA No. 8521 is partly allowed, ITA No. 715 is dismissed and ITA No. 7147 is allowed.

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