

9 SCOB [2017] HCD 1**High Court Division
(Special Original Jurisdiction)**

I.T. Ref: Application No. 39 of 2011

**International Leasing and Financial
Services Limited****Vs.****The Commissioner of Taxes, Taxes
Zone-LTU, Dhaka**

Mr. Abdus Salam Mamun, Adv.

...For the Assessee-applicant.

Mr. Saikat Basu, AAG with

Ms. Nasrin Parvin, AAG

...For I.T. Department.

Heard on: 07.09.2014, 10.9.2014 &
12.11.2014

And

Judgment on: 11.12.2014

Present:**Justice A.F.M. Abdur Rahman****And****Justice Md. Emdadul Haque Azad****Income Tax Ordinance 1984****Article 5A of the 3rd Schedule:**

It appears that the leasing company being the owner of the leased out asset, used the asset for the purpose of business, i.e. leased out the property using the same as business assets and as such attracted by the provision of Article 5A of the 3rd Schedule of the Income Tax Ordinance 1984.

It appears that the first appellate authority did not consider as to the ownership of the vehicle remaining with lessor and not with the lessee and further that the lessor deals in the business of leasing out the vehicle to the lessee who operates the vehicle for his business. But the business of the lessor remains in the status of using the vehicle for the purpose of business of lease. Therefore these two pre-condition having been fulfilled in the instant case, the Assessee-applicant is entitled to the normal depreciation allowance and the initial depreciation allowance on the vehicle it has leased out to different lessee, being their customer.

... (Para 13 & 14)**Judgment****A.F.M. Abdur Rahman, J:**

1. Failing to impress the Taxes Appellate Tribunal as to the entitlement of the assessee-applicant to depreciation of the vehicle put on lease, under the provision of 3rd Schedule of the Income Tax Ordinance 1984, the Assessee-applicant, International Leasing and Financial Services Limited, preferred the instant Income Tax Reference Application, under the provision of section 160(1) of the Income Tax Ordinance 1984 challenging the legality & propriety of the order passed by the Taxes Appellate Tribunal with the following formulated question;

A. Whether on the facts and in the circumstances the amendment of the Ordinance No. XXVI of 1984 (i.e. the Income Tax Ordinance, 1984) made by the Finance Ordinance, 2007 and came into force from the 1st day of July, 2007 inserting

the paragraph (4) after the paragraph (3) in the Third Schedule providing: “(4) No allowance under this paragraph shall be made for a leasing company on such machinery, plant, vehicle or furniture given to any lease on financial Lease” is applicable in the instant return whose income year has commenced from the 1st day of January, 2006 and completed on the 31st day of December, 2006 and the business carried on according to the provisions of the Finance Act 2006.

B. On the facts and in the circumstances whether the applicant is entitled to the initial and normal depreciation allowances as were admitted to it under the Finance Act 2006.

C. Whether on the facts and in the circumstances the Taxes Appellate Tribunal, Division Bench-5, Dhaka, is justified to dispose of the appeal of the applicant without entering into the merit and without considering the legal aspect of the case especially without deciding as to whether the Finance Ordinance, 2007 that has come into force from 01.07.2007 is applicable in the instant case and affirming those of the commissioner of Taxes (Appeal), i.e. the appellate authority who dismissed the appeal on wrong interpretation of law.

2. Facts of the case:

It has been asserted in the instant Income Tax Reference Application that the Assessee-applicant being admittedly a leasing company leased out different machineries and vehicles to its customers and derives income from the lease money, obtained from the lessees and is a regular income tax payer, holding TIN. 210-200-5100/Audit wing, Dhaka. In course of business, the Assessee-applicant submitted its income tax return for the assessment year 2007-2008 under the provision of Self Assessment Scheme, as provided in section 82BB of the Income Tax Ordinance 1984, showing a net loss of Tk. 8,06,01,364.00 and obtained the deemed assessment order. But the said return was selected for audit purpose by the National Board of Revenue, under the provision of section 82BB(3) of the Income Tax Ordinance 1984. The DCT concerned upon audit and further assessment enhanced the income of the Assessee-applicant at an amount of Tk. 18,70,54,662.00, against which the Assessee-applicant preferred appeal before the 1st Appellate Authority, being BuLi Bf̄mf̄æ ew-253,263/Hm̄VCE/2008-2009, which having been failed, the Assessee-applicant preferred second appeal before the Taxes Appellate Tribunal, being ITA No. 1095 of 2009-2010. The Taxes Appellate Tribunal upon hearing and disposing of the Appeal remanded the tax case to the first appellate authority to dispose off the same on three specific points. The first appellate authority upon receiving the said remand order, registered the same as BuLi Bf̄mf̄æ ew-17/Hm̄VCE/2009-2010(̄lj̄ä), but did not allow the relief to the Assessee-applicant for which the Assessee-applicant preferred further appeal to the Taxes Appellate Tribunal, being I.T.A. No. 91 of 2010-2011, which having been failed substantially, the Assessee-applicant preferred the instant Income Tax Reference Application with the formulated question as aforementioned.

3. Claim of the Taxes Department:

Upon service of the notice of the instant Income Tax Reference Application, the learned Assistant Attorney General Ms. Nasrin Parvin along with the learned Assistant Attorney General Mr. Saikat Basu, appeared on behalf of the Taxes Department and filed affidavit-in-reply, wherein it has been claimed that the Taxes Appellate Tribunal was legally justified in law in upholding the order of the DCT concern and the CT(Appeal) regarding grant of normal depreciation and initial depreciation. Because, the change made to depreciation allowance by the Finance Ordinance 2007, was certainly applicable for the assessment year 2007-2008. The said Finance Act 2007 has not been applicable retrospectively, but

prospectively on the assessment year 2007-2008 and therefore the instant Income Tax Reference Application is not maintainable.

4. The learned Advocate Mr. Abdus Salam Mamun, represented the Assessee-applicant, while the learned Assistant Attorney General Mr. Saikat Basu argued on behalf of the Taxes Department at the time of hearing of the Income Tax Reference Application.

5. Argument of the Parties:

These three questions brought before this court seeking opinion, appears to be of the same issue, whether the Finance Act 2007, which came into force from 1st day of July, 2007, inserting Paragraph-4 after Paragraph-3 in the 3rd Schedule of the Income Tax Ordinance 1984, is applicable to the Assessee-applicant for the assessment year 2007-2008, with further issue that even if the same is applicable whether the amended provision of law can be applied in the case of the Assessee-applicant company, which is admittedly a leasing company.

6. The learned Advocate Mr. Abdus Salam Mamun, appearing on behalf of the Assessee-applicant argued that the income year of the assessee-applicant relating to the assessment year 2007-2008 having been concluded on 31.12.2006, it was entitled to the initial depreciation of Tk. 38,36,304.00 and normal depreciation of Tk. 69,03,42,203.00 on the vehicle it has leased out to different lessee, under the provision of prevailing law of the period. But that being not considered by the audit team which dealt the audit at the initial stage, upon which the DCT concern disallowed the depreciation to the Assessee-applicant, was taken to the first appellate authority, which since failed to grant any relief to the Assessee-applicant the same issue was taken to the Taxes Appellate Tribunal, which directed the First Appellate Authority to dispose off the issue on specific points, upon which the First Appellate Authority in BuLl Bffmfœ ew-17/HmWCE/09-10(1j ä) decided as 1 ew BfŠ relating to the said issue which is totally erroneous. But the Taxes Appellate Tribunal without considering the error in the impugned order, mechanically passed an order for which the assessee-applicant is highly prejudiced for which all the question as have been formulated in the instant Income Tax Reference Applications are required to be answered in negative and in favour of the assessee-applicant.

7. On the other hand the leaned Assistant Attorney General Mr. Saikat Basu argued that the assessee-applicant is not entitled to the initial depreciation since the machineries and the vehicle leased out by the assessee-applicant are not used by itself for the purpose of its business and as such the Taxes Appellate Tribunal did not commit any illegality for which the questions formulated herein, is not required to be answered in negative and in favour of the Assessee-applicant.

8. Deliberation of the Court.

The issue of entitlement of the assessee-applicant to initial and normal depreciation on the plant, machinery and vehicle leased out by the assessee-applicant leasing company has been dealt with by the 1st appellate authority in the following manner;

“1 ew BfŠx For that the DCT erred in law as well as in facts in No. 1 allowing depreciation on leased assets claimed in the Income year ended on 31.12.2006 corresponding to the assessment year 2007-2008 as under.

<i>Initial Depreciation</i>	<i>Tk. 38,36,304.00</i>
<i>Normal Depreciation</i>	<i>Tk.69,03,42,203.00</i>

করদাতা কোম্পানী কর্তৃক লীজ হিসাবে প্রদত্ত বিভিন্ন প্রকার স্থায়ী সম্পদের উপর *initial depreciation* Hh Normal depreciation অনুমোদন না করার বিরুদ্ধে। নথি পরীক্ষা করে দেখা যায় যে, উপক। Lj nejl করদাতার নিজস্ব স্থায়ী সম্পদের উপর অবচয় অনুমোদন করলেও লীজ দেওয়া সম্পদের ক্ষেত্রে করদাতার দাখিলকৃত *computation sheet H cjhfla initial hj normal* অবচয় অনুমোদন করে নাই। তৃতীয় তফসীলের ৫এ অনুচ্ছেদে *initial depreciation allowance* এর ক্ষেত্রে উল্লেখ করা হয়েছে---*in which such building, machinery or plant is used by the assessee---*” এবং ২(১) অনুচ্ছেদে *normal depreciation* এর ক্ষেত্রে বলা হয়েছে “---*provided in respect of any building, machinery, plant or furniture owned by an assessee and used for the purpose of business or profession carried a by him pøljw mES ØfØaC fEje LIj Assets* এর ক্ষেত্রে অবচয় প্রদান আইনানুগ নয়। কারণ করদাতা লীজ হিসাবে প্রদত্ত *Assets* নিজের ব্যবসার জন্য ব্যবহার করেন না, লীজ গ্রহীতা করে। লীজদাতা লীজ এ্যাসেট এর মূল্যের উপর *instalment (Interest+Principal)* গ্রহন করে। অতএব এক্ষেত্রে ডিসিটির গৃহীত কার্যক্রম আইনানুগ ও যৌক্তিক হওয়ায় তা বহাল রাখা হলো।”

9. This opinion of the first appellate authority was mechanically affirmed by the Taxes Appellate Tribunal in ITA No. 91 of 2010-2011, without examining as to its legality and propriety. The language of disposal of the issue by the Taxes Appellate Tribunal reads as follows;

“Heard both the parties and gone through the assessment order, appeal order and examined the records. We have also considered the argument as put forward by the ld. A.R. The ld. C.T(A) aptly described the reason for not allowing depreciation on leased properties in his order. Considering these the order of the ld. C.T(A) is fair and reasonable. So we have no valid ground to interfere with the order of the ld. C.T(A) and the same is upheld.”

10. But it appears that the opinion of the first appellate authority is a total misconception of law since the first appellate authority did not consider the aspect of lease wherein the title of the lessor in the leased out assets has not been transferred to the lessee, so long the lease is in existence, which is a pre-condition of allowing the normal depreciation and initial depreciation as well. The provision of Article-2(1) of the 3rd Schedule of the Income Tax Ordinance 1984, prevailing during the period, deals in with the matter of allowing depreciation, which reads as follows;

11. Income Tax Ordinance 1984

Article-2(1): Allowance for depreciation.—

(1) In computing profits and gains from business or profession, an allowance for depreciation shall be made in the manner hereinafter provided in respect of any building, machinery, plant or furniture owned by an assessee [or bridge or road or fly over of physical infrastructure undertaking] and used for the purposes of business or profession carried on by him.

(Highlighted by us)

12. The aforesaid provision says about ownership of the assets should lie with the assessee in order to grant the depreciation. In case of any lease, the ownership is always lying with the lessor, herein the leasing company, the assessee-applicant holding the ownership. Similarly, the provision of Article 5A of the 3rd Schedule of the Income Tax Ordinance 1984 provides that the ‘user’ is the prime consideration to allow the depreciation of the assets. The provision of Article 5(A) of the 3rd Schedule of the Income Tax Ordinance 1984 reproduced below for better appreciation;

Income Tax Ordinance 1984

Article-5A: Initial depreciation allowance.—

(1) Where any building has been newly constructed or any machinery or plant has been installed in Bangladesh after the thirtieth day of June, 2002, an amount by way of initial depreciation allowance in respect of the year of construction or installation or the year in which such building, machinery or plant is used by the assessee for the first time for the purpose of his business or profession or the year in which commercial production is commenced, whichever is the later, shall be allowed at the following rates, namely:--

(a) In the case of building – ten per cent of the cost thereof to the assessee;

(b) In the case of machinery or plant other than ships or motor vehicles not plying for hire– twenty-five percent of the cost thereof to the assessee.

(2) Nothing contained in sub-paragraph (1) shall apply in the case of—

(a) Any motor vehicle not plying for hire, and

(b) Any machinery or plant which has previously been used in Bangladesh.

(3) The provisions of paragraph 2 and 3 shall, so far as may be, apply to this paragraph as they apply to the said paragraph.

(underlined by us)

13. It appears that the leasing company being the owner of the leased out asset, used the asset for the purpose of business, i.e. leased out the property using the same as business assets and as such attracted by the provision of Article 5A of the 3rd Schedule of the Income Tax Ordinance 1984.

14. It appears that the first appellate authority did not consider as to the ownership of the vehicle remaining with lessor and not with the lessee and further that the lessor deals in the business of leasing out the vehicle to the lessee who operates the vehicle for his business. But the business of the lessor remains in the status of using the vehicle for the purpose of business of lease. Therefore these two pre-condition having been fulfilled in the instant case, the Assessee-applicant is entitled to the normal depreciation allowance and the initial depreciation allowance on the vehicle it has leased out to different lessee, being their customer. This aspect being a legal aspects were required to be considered by the Taxes Appellate Tribunal independently which having failed, this court is inclined to answer the formulated question in negative and in favour of the Assessee-applicant.

15. In the result, the instant Income Tax Reference Application is allowed.

16. The questions as have been formulated by the Assessee-applicant in the Income Tax Reference Applications are answered in negative and in favour of the Assessee-applicant.

17. However, there shall be no order as to cost.