Dgp Windsor (India) Ltd. vs Deputy Commissioner Of Income Tax on 17 April, 2001

Equivalent citations: [2003]84ITD641(MUM)

JUDGMENT

J.P. Bengra, Vice-President

1. This is an appeal by the assessee against the order of CIT(A), Central-VI, Mumbai, pertaining to block assessment for the period from 1st April, 1987, to 26th Sept., 1997. The assessee has raised the following grounds in this appeal :

> "1. The learned CIT(A) erred in holding that provisions of Section 158BC of the IT Act, 1961, are applicable in the case of the appellant-company.
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> 2. The learned CIT(A) further erred in confirming the action of the AO in computing undisclosed income of the appellant-company for the block period at Rs. 11,89,89,975 as against declared by the appellant-company for the block period at Rs. Nil.
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> 3(i) The learned GIT(A) further erred in confirming the action of the AO in computing undisclosed income on account of alleged payment to M/s National Plastic Industries Ltd. of Rs. 25 lakhs under Section 69C of the IT Act, 1961.
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> 3(ii) Without prejudice to the above, the learned CIT(A) further erred in holding that addition of alleged payment of Rs. 25 lakhs in cash to M/s National Plastic Industries Ltd. for procuring large order should be made under Section 69C of the IT Act and no deduction of the said amount which is paid on account of interest against excess advance and cash discount should be allowed under Section 37(1) of the IT Act.
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> 4(i) The learned CIT(A) further erred in confirming the action of the AO in computing undisclosed income on account of lease transactions with Punjab State Electricity Board (PSEB) and Rajasthan State Electricity Board (RSEB) at Rs. 11,64,89,975.
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> 4(ii) The learned CIT(A) further erred in holding that the lease transactions with Punjab State Electricity Board (PSEB) and Rajasthan State Electricity Board (RSEB) were of the nature of loan transactions with the assets purchased and leased back are mere security and the appellant was never the real owner of assets.
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> 4(iii) The learned CIT(A) further erred in heavily relying on the power of attorney issued in favour of PSEB and RSEB which authorises them to sell the leased asset to any intending purchaser at a price not less than fixed in the power of attorney on the

expiry of the lease period.

4(iv) The learned CIT(A) further erred in concluding that the appellant-company does not enjoy any right of ownership of the leased assets as per the lease agreement.

4(v) The learned CIT(A) further erred in concluding that the appeDant-company did not enjoy any claim on the possession of the leased assets. 4(vi) The learned CIT(A) further erred in heavily relying on the Circular No. 9 [R. Dis. No. 27(4)-IT/43] dt. 23rd March, 1943 issued by the CBDT which deal with the issue of depreciation on assets acquired under hire-purchase agreement.

4(vii) The learned GIT(A) further erred in concluding that the appellant-company did not assume any risk of ownership of the equipment purchased by them from PSEB/RSEB.

4(viii) The CIT(A) further erred in confirming the finding of the AO that all such sale and leaseback' transactions where the alleged owner does not assume any risk of ownership of the assets nor entitles himself to any reward of such ownership ensures his right to recoup his investment wholly or substantially over the period of lease, the asset is purchased from the lessee only to be given back to him on lease for a whole of the useful life of the asset, and the asset is finally transferred back to the lessee, at the end of the lease period, are categorised as 'finance lease, transactions as distinguished from 'operating leases', where the lessor takes all the risk of ownership of the lease asset and entitles himself to all the rewards of ownership and over the useful life of the asset gives it on lease to more than one lessee.

4(ix) The learned CIT(A) further erred in holding that lease transactions with PSEB/RSEB can at best be said to be an hire-purchase agreement with the lessee ultimately acquiring and equipment at the end of the lease period.

4(x) The learned CIT(A) further erred in holding that even in the case of three lease transactions with RSEB, wherein under two agreements the appeDant-company has acquired the equipment from Mafatlal Finance Go. Ltd. and Kotak Mahindra Ltd. on hire-purchase basis, the conclusion arrived for not allowing the claim of depreciation of the appellant-company is the same.

5. The learned CIT(A) further erred in holding that the appellant-company is liable for interest under Section 158BFA(1) of the IT Act.

6. The learned CIT(A) further erred in holding that surcharge is chargeable on the tax rate of 60 per cent on the undisclosed income computed for the block period,

7. The appellant-company craves leave to add to, alter or amend the above grounds which are without prejudice to each other, at the time of hearing."

2. The assessee is engaged in the business of injection mounding machinery. A survey was conducted under Section 133A(1) of the IT Act, 1961, on 26th Sept., 1997 at the corporate headquarters and the factory of the assessee-company at Thane. It is the case of the Revenue that simultaneously a search was also conducted under Section 132 of the Act at the address of the chairman of the assessee, viz. 88C, Old Prabhadevi Raod, Mumbai. During the course of the search at 88C, Old Prabhadevi Road, certain documents were seized showing the assessee's transactions with M/s National Plastic Industries Ltd. and other state of affairs of the assessee-company. On enquiry, it was submitted before the AO that the transactions are duly recorded in its books of account. During the course of survey under Section 133A(1) at the corporate headquarters and factory of the assessee-company at Thane, mark of identification was placed on certain important documents found. These documents were inventorised as Annexure 'A' to the survey report and copies were obtained which are listed in Annexure 'B' to the survey report. The assessee was asked to submit its explanation with respect to the documents and extracts. Of special relevance were the documents inventorised at Annexure 'A' and Sr. Nos. 6 to 10 of copies of documents in Annexure 'B1. The loose paper bundle containing 2 pages at serial No. 1 of Annexure 'A' is the same as pp 1 and 2 of the loose pages bundle containing 17 pages at Sr. No 10 of Annexure 'B'. These two pages contain reports marked 'Confidential' and are addressed to the executive director of the assessee-company. Both these pages marked as 'Confidential', contain details of the assessee's dealings with a concern by the name M/s National Plastics, (the full name of this concern is M/s National Plastic Industries Ltd. situated at village Dadra in the Union Territory of Dadra & Nagar Haveli). On the first page dt. 5th Sept, 1996, the details of six machines to be supplied by the assessee-company to M/s National Plastics are noted, showing the model number, list price, order price, the percentage discount the delivery plant and the status. This order from the party, as per the noting on this page, was finalised at the end of November, 1995. The said party was to pay Rs. 200 lakhs immediately. As regards these unaccounted transactions of supply of machines, two machines were delivered in the month of March, 1996, and the third machine had been billed in June, 1996, but was not delivered, (this machine was returned to the assessee after delivery and was kept in the godown of the assessee-company). Regarding the three balance machines, the status is noted as uncertain with the remarks "cancellation likely". As per the other notings on this page, M/s National Plastic Industries Ltd. had paid Rs. 200 lakhs at the end of December, 1995, from which the outstanding against the two machines supplied had been reduced, leaving a credit of Rs. 33,59 lakhs with the assessee. The important notings on this page are at the bottom and is highlighted below ;

> "Rs. 25 lakhs was as interest against excess advance as discount too. Approx of Rs 8 lacs as interest and Rs. 17 lacs as further discount (2.25 per cent). We will have to recover approx. Rs. 10 lacs (as discount adjustment)."

3. The AO concluded that the payment of Rs. 25 lacs was made to M/s National Plastic Industries Ltd., which included Rs. 8 lakhs as interest and Rs. 17 lacs as further discount at the rate of 2.25 per cent. The AO further noted that a recovery of Rs. 10 lacs would have to be made as discount adjustment because of cancellation of order for three machines. It is pointed out by the AO that p 2 reveals similar noting dt. 1st Oct., 1996 on the same subject as is mentioned in page No. 1, though containing additional information. This contains information about the details of six machines proposed to be supplied to M/s National Plastic Industries Ltd., an additional column of cash

discount at the rate of 2.25 per cent is also mentioned. The total discount shown in respect of the six machines is mentioned as Rs. 17 lacs. On the lower portion of the page, the fresh status as on 28th Sept., 1996 is noted in addition to the notings which were on page No. 1 as under :

> "Status : (28th Sept., 1996) Customer wants W1100 in February/March and is offering to keep advance of Rs. 10 lacs. Balance credit i e., Rs. 23.59 to be adjusted against SP800 (He will pay Rs. 71.05 lacs). We are however insisting for return of Rs. 7 lacs discount (already paid to him) for cancellation of W1600 & SP800."

4. During the course of the survey on 26th Sept., 1997, statement of Shri Ganesh Melatur, the then Dy. General Manager (Finance & Systems), working in the assessee's-company and having responsibilities of all accounts, finance and systems activities of the assessee-company, was recorded, in relation to these documents. The AO has pointed out that in response to question No. 27, Shri Melatur confirmed that the survey team had found the above-mentioned two papers from one of the files in the room occupied by the secretary and executive director, Shri Shantanu Aditya. He further mentioned that Shri Melatur had stated that these papers contained a statement showing the latest status of orders, sales, outstandings and other details in respect of supply of machines to their customer, M/s National Plastic Industries Ltd. given by their Ex. Dy. General Manager (Marketing) to their executive director, Shri Shantanu Aditya. When he was questioned about the payment of cash documents, he stated that the same needed to be verified from their records. Shri Shantanu Aditya, the then executive director of the assessee-company, was also questioned in respect of these documents and he stated that these papers pertained to the period prior to his taking over as executive director. In order to appreciate this evidence, the relevant statement is extracted below :

> "These two papers pertain to the period prior to my taking over as executive director. The then executive director was Shri R. Venkatachalam. He is now at Nasik. I will try to give you the contact address at the earliest. Regarding these 2 papers, I have had some discussions in the past with Shri Alok Tibrewala, who used to work as Dy. General Manager (Sales) in our company. Based on this I have to say that this seems to be the case of M/s National Plastics, who had agreed to purchase 6 machines worth Rs. 7.47 crores. As a special case discount as per discount column (on page Nos. 1 and 2) offered to them. The market conditions of the capital goods industry was extremely unfavourable and continues to be so. As the entire industry was also aping a liquidity crunch, the company was facing problems. National Plastics offered to give us Rs. 2 crores as advance. For this high advance, company offered then a cash discount. However, owing to poor market conditions, National Plastics did not honour their commitment and did not lift all the machines. In fact they lifted only 2 machines finally. The cost of these machines was adjusted against the advance and the balance, the amount is lying as credit balance in our account. As they did not honour their commitment, our company also did not offer the cash discount to them."

5. During the course of assessment proceedings, the assessee-company was again questioned in respect of these documents and it was submitted by the assessee that there are no entries of either the cash discount or any other payment made or received in its books of account, apart from the advance of Rs. 2 crores received and the sale of only two machines, which had been delivered as per the notes on these papers. It was put to the assessee that in view of the noting showing that the sum of Rs. 25 lakhs had already been received and because of the proposed cancellation, certain sums were to be recovered out of the payments made, it was proposed to treat the sum of Rs. 25 lakhs as unaccounted payment made by the assessee unless it was shown to have been recorded in the books of the assessee. The assessee, in reply, vide its letter dt. 24th Nov., 1999, submitted as under :

> "In response to your queries in connection with the above-mentioned assessment, we wish to state that our customer M/s National Plastics had placed a large order of six large machines, aggregating to approximately Rs. 6.20 crores. They also paid an advance of Rs. 7.00 crores against this order. Accordingly, we were in discussion with them to give some special discount in lieu of compensation for loss of interest on excess advance.
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> Ultimately, only two machines were supplied. A third machine was supplied but was subsequently returned. The remaining part of the order was cancelled by the party and hence the balance three machines were not supplied. Hence, the special discount offer was not given at all.
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> We have allowed them 20 per cent discount on list price. In general practice, we are allowing discounts ranging between 15 per cent to 20 per cent depending upon business relations with party, quantity and value of order, as well as the advance given by the party. For your perusal, we are enclosing photocopies of a few bills, which show similar discount given to other parties in the same period."

Vide letter dt. 26th Nov., 1999, the assessee further submitted as under :

> "The assessee-company has already explained the transaction with National Plastic Industries Ltd. vide their letter dt. 24th Nov., 1999, and also filed the copy of account as appearing in their books of accounts and the confirmation received from National Plastics Industries Ltd. in respect of the transactions with the assessee-company.
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> Regarding page Nos. 1 and 2 of the Bundle No. 10 of Annexure 'D' found at the time of survey it is submitted that they are in respect of large order of Rs. 7.47 crores received from National Plastic Industries Ltd. against which advance of Rs. 2 crores was also received. Accordingly, there was a discussion going on to grant interest against the excess advance received and special discount on account of the big order. However, no such Interest was granted and no special discount was given to the party as the party has ultimately purchased only two machines and returned back the third machine delivered to them and cancelled the order for the three remaining machines The regular discount allowed to the party is of 20 per cent from the list price which is

the general practice foDowed by the assessee-company to grant the discount ranging between 15 to 20 per cent depending on the business relation which party, quantity and value of the order as well as the amount of advance received from the party.

The assessee-company does not have any details in respect of remarks and status as on 28th Sept., 1996, given on page No. 2 of the paper. The two concerned persons namely Shri R. Venkatachalam and Shri Alok Tibrewala have already left the services of the assessee-company long back and, therefore, the assessee-company is unable to explain these remarks. We would, therefore, submit that whatever transactions taken place with National Plastic Industries Ltd. are duly recorded in the books of the accounts of the assessee-company and they are duly confirmed by National Plastic Industries Ltd."

The AO considered the contentions of the assesses vis-a-vis the documents found at the time of search and survey and came to the conclusion that the assessee could not explain the payment of Rs. 25 lakhs made outside the books of account. So he added the same to the total income in the block assessment under Section 69C of the Act for the detailed reasons given at para 5.6 of his order. 6. The above addition was challenged before the CIT(A), before whom the assessee gave written submissions in the form of a letter briefly stating the following facts :

"1. It is very clear from the facts that additional cash discount @ 2.25 per cent totalling to Rs. 17 lakhs was to be given to M/s National Plastic Industries Ltd. if they would have purchased 6 machines as per the order given.

2. It is very clear from the facts they have purchased only two machines and returned back the third machine delivered to them and cancelled the order for the remaining three machines. Therefore, only the regular discount was allowed to them as per mentioned in the paper and no extra cash discount was allowed to them.

3. The transactions with M/s National Plastic Industries Ltd, regarding the supply of the machines, payment received, etc. which are recorded in the books of account are duly confirmed by M/s National Plastic Industries Ltd. and the said confirmation is at page No. 44 of the compilation.

4. The AO has not examined M/s National Plastic Industries Ltd. whether they have received a sum of Rs. 25 lakhs in cash in the form of cash discount of Rs. 17 lakhs and interest of Rs. 8 lakhs on the advance paid, as alleged by the AO and the receipt of the same is also not confirmed by M/s National Plastic Industries Ltd, though they have confirmed all the transactions between the appellant-company and then as per their confirmation letter, which is already filed with the AO.

5. The AO has no evidence except some remark on these two loose papers on the basis of which it is concluded that the appellant-company has paid a sum of Rs. 25 lakhs in cash to M/s National Plastic Industries Ltd.

6. The AO has not examined Shri Alok Tibrewala, then Dy. General Manager (Sales) and Shri R. Venkatachalam, then executive director regarding these papers which pertain to the period when Shri Alok Tibrewala, the DGM (Sales) and Shri Venkatachalam, then ex.-director were looking after the business of the appellant-company.

7. Section 69C is applicable on expenses incurred which are not accounted for by the assessee-company in its books of account. It is strange to digest that a businessman will pay a sum of Rs. 25 lakhs as discount for getting large order during the course of business; but will not record the same in his books of account as if the same is recorded in the books of account, it will be allowed as business expenditure.

8. Without prejudice to the above, it is submitted that if at all the appellant-company had made the alleged payment of Rs. 25 lakhs in cash to National Plastics, which is not recorded in its books of account, the same should be considered as commission paid for getting large order of machines as held by the AO and, therefore, the same should be allowed as deduction on account of commission paid during the course of the business. Since the payment of the commission is not made from books of account, the deduction of the same shall set off against the addition made as undisclosed income.

9. We rely on the decision of the Supreme Court in the case of Kishinchand Chellaram v. CIT (1980) 125 ITR 723 (SC).

In this case, the assessee had an office in Bombay and one in Madras. On receiving information that a sum of Rs. 1,07,350 was remitted by the assessee by two telegraphic transfers from Madras to Mumbai through bank. The ITO wrote two letters to the manager of the bank and got the reply that 'T' an employee of the assessee remitted the amount from Madras and 'N' another employee received at Mumbai. It was held that from these two letters, it did not follow that the remittance was made at Madras and remittance was received at Mumbai on behalf of the assessee. The burden was on the Department to show that the money belonged to the assessee by bringing proper evidence on record and the assessee should not be expected to call these two employees in evidence to discharge the burden that lay upon it and hence, the addition was deleted.

10. Looking to the facts of this case in the light of the above Supreme Court judgment, your honour will find that neither National Plastic has confirmed receipt of Rs. 25 lakhs nor they were examined for the same. Further, the two officers namely Shri Alok Tibrewala and Shri R. Venkatachalam who were in charge of the business of the appellant-company at the relevant time were not examined by the AO. There is no evidence available with the AO regarding payment of Rs. 25 lakhs in cash by the appellant-company to M/s National Plastic. It is also submitted that no prudent businessman will incur the expenditure for getting large sales order and will not

record the same in the books of account as whatever expenditure are incurred for getting the sale order is to be allowed as business expenditure.

11. It is also submitted that the proviso included under Section 69C is applicable w.e.f. 1st April, 1999, which reads as under :

'Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.

12. Since this proviso is not applicable during the block period which ends on 26th Sept., 1997, the addition, if at all made under Section 69C, the deduction of the same should be allowed as business expenditure as the assessee is alleged to have paid cash to M/s National Plastic for getting large sales order from them."

Before the CIT(A) reliance was also placed on the following judgments :

(i) In the case of S.F. Wadia v. ITO (1987) 27 TTJ (Ahd) 437 : (1986) 19 ITD 306 (Ahd),

(ii) In the case of M.K. Mathivathanan v. ITO (1989) 31 ITD 114 (Mad);

(iii) In the case of Nissan Housing Development (P) Ltd. v. Asstt. CTT (1995) 52 ITD 103 (Pat): and

(iv) In the case of Sharma Associates v. Asstt. CIT (1996) 54 TTJ (Pune) (TM) 207 : (1995) 55 ITD 171 (Pune) (TM).

After considering the arguments of the learned counsel for the assessee and the case laws relied in this behalf, as mentioned above, the CIT(A) concurred with the view taken by the AO for the detailed reasons given at pp. 13 to 17 of his order. He has further mentioned that the assessee is not entitled to any deduction under Section 37(1) of the Act also.

7. The learned counsel for the assessee, in brief submitted that during the course of survey action it was clearly stated in the statement recorded of Shri Ganesh Melatur, Dy. General Manager (Finance) and Shri Shantanu Aditya, executive director, that these papers pertained to the earlier period when the executive director was one Shri R. Venkatachalam and the Dy. General Manager (Sales) was one Shri Ashok Tibrewala and since both of them are no longer in the service of the assessee-company as they have already left the employment of the assessee-company, they are not able to comment on the same. However, it is to be noted that the AO had not made any efforts to examine these persons. Instead, the two persons, viz., Shri Ganesh Melatur and Shri Shantanu Aditya, were examined. The alleged transactions do not pertain to the period of these two persons, whose evidence were taken in support of the addition under Section 69C of the Act. It is further pointed out that the AO had not examined any employee or director of M/s National Plastic

Industries Ltd. to establish whether they have received the sum of Rs. 25 lakhs in cash in the form of cash discount of Rs 17 lakhs and interest of Rs. 8 lakhs. The additional cash discount at the rate of 2.25 per cent amounting to Rs. 17 lakhs and interest of Rs. 8 lakhs were to be given to M/s National Plastic Industries Ltd. if they would have purchased all the six machines worth Rs. 7.74 crores. But, since they have purchased only two machines and returned back the third machine, no cash discount or interest was given to them. The AO had no evidence, except some remarks on these two loose papers on the basis of which it is concluded that the assessee-company had paid Rs. 25 lakhs out of the books in cash to M/s National Plastic Industries Ltd. The learned counsel for the assessee placed reliance on the decision of the Tribunal in the case of S.K. Gupta v. Dy. CTT (1999) 63 TTJ (Del) 532 for the proposition that if no corroborating evidence is brought on record to show the purchase and sale of properties had actually taken place, there is no question of any undisclosed investment or income as contemplated under Section 69C of the Act. Reliance was also placed on the decision of the Supreme Court in the case of Kishinchand Chellaiam v. CIT (1980) 125 ITR 713 (SC) and also on the decision of the Punjab & Haryana High Court in the case of ITO v. Mohanlal Vig and Anr. (1983) 139 ITR 681 (P&H) for the proposition that if the AO has relied on the two papers, he was bound to afford an opportunity to the assessee to controvert the contents therein. If no Explanation has been sought nor any opportunity is given, to controvert the same, the evidence could not be relied upon against the assessee. Alternatively, it was submitted that if at all the addition is to be confirmed as deemed income of the assessee under Section 69C of the Act, since it is an expenditure deduction of the same should be allowed to the assessee under Section 37(1) of the Act. It is pointed out that it is clear from these two papers that the alleged payment was made to M/s National Plastic Industries Ltd. on account of cash discount and interest on the advances received on large order. Reliance was also placed on the Tribunal decision in the case of S.F. Wadia (supra); M.K. Mathivathanan (supra); Nishan Housing Development (P) Ltd. (supra) and Sharma Associates (supra). It is also submitted that the proviso to Section 69C of the Act was inserted by the Finance Act, 1998, which is not applicable to the facts of the present case because the said proviso was brought on the statute book w.e.f. 1st April, 1999. The Circular No. 772, dt. 23rd Dec., 1998 clearly states that unexplained expenditure is treated as income under Section 69C. But there is no corresponding provision for disallowance of such expenditure as the taxpayers are claiming deduction of such expenses under Section 37(1) of the Act and in order to curb this practice the amendment is brought on the statute book from asst. yr. 1999-2000 and subsequent years. It is pointed out that in the case of the assessee the survey took place on 27th Sept., 1997, and the transactions recorded in these two papers found are of the year 1996. Hence, the said amendment, by way of insertion of the proviso, is not applicable to the facts of the case.

8. The learned Departmental Representative, on the other hand, heavily relied on the order of the CIT(A) and pointed out that Section 69C of the Act is applicable to the facts of the case because the seized materials have not been denied either by the assessee or by its employees. If the loose papers found are not in dispute, the transaction recorded therein from part of materials to arrive at the conclusion that the assessee had incurred the expenditure in cash out of the books. So it shall be deemed to be the income of the assessee under Section 69C of the Act.

9. We have considered the rival submissions of the assessee and have gone through the materials available on record. Section 69C of the Act reads as under : "69C. Where in any financial year an

assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof. or the explanation, if any, offered by him is not, in the opinion of the AO, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year :

> Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income".
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> [The proviso was inserted by Finance (No. 2) Act, 1998, w.e.f. 1st April, 1999] From the reading of this provision it is clear that if the assessee had incurred any expenditure for which he offers no explanation or the explanation offered is not satisfactory, the amount covered by such expenditure will be deemed to be the income of the assessee for such financial year in which the expenditure was incurred. In the present case, the documents found during the course of search reveal that Rs. 25 lakhs was already given to M/s National Plastic Industries Ltd. as interest against excess advance plus as discount too, The notes on the document state that approximately Rs. 8 lakhs represented the interest and Rs. 17 lakhs as discount at the rate of 2.25 per cent. This discount was for the purchase of six machines and as per the papers found, part of the money, given on account of discount (approximately Rs. 10 lakhs) was to be recovered as discount adjustment, since M/s National Plastic Industries Ltd. had cancelled order for three machines and had not lifted the third machine manufactured by the assessee. As per the documents found, the special payment/discount given to M/s National Plastic Industries Ltd. for the 6 machines had to be recovered in respect of 4 machines, which were either cancelled or not lifted by M/s National Industries Ltd. The basic argument of the learned counsel for the assessee that Shri R. Venkatachalam, the then executive director, and Shri Alok Tibrewala, the then Dy. General Manager (Sales), were not examined, since they have left the service of the assessee and the statements recorded of Shri Ganesh Malatur and Shri Shantanu Aditya clearly state that these papers pertained to earlier period when they were not in the service of the assessee-company. Under these circumstances it was argued that no opportunity was given to the assessee to controvert the documents or to adduce any evidence and, therefore, reliance cannot be placed on them. In this connection, the learned counsel for the assessee relied on the decision of the Tribunal in the case of S.K. Gupta (supra) and also on the decision of the Supreme Court in the case of Kishmchand Chellaram (supra). So far as this contention is concerned, it is true that the Hon'ble Supreme Court had laid down the principle that if an evidence has to be used against the assessee it is the duty of the AO to give opportunity to controvert the same to the assessee. But we have to bear in mind that this principle was laid down on the facts that the two letters of the bank manager were never brought on record and they were, at no time, (sic) to the assessee and even now the copies of these letters, which ought to have been brought on record by the Department, have not been produced before the Honble Supreme Court. Under the circumstances, the Hon'ble Supreme Court has laid down this principle.

However, the facts of the present case are distinguishable from the facts of the present case are distinguishable from the facts of the case before the Hon'ble Supreme Court. In this case loose papers were found during the course of search in which transactions with M/s National Plastic Industries Ltd. were found recorded. The assessee, at no point of time, has claimed that these papers do not belong to it or to the transaction entered into with M/s National Plastic Industries Ltd. It is also not the case of the assessee that M/s National Plastic Industries Ltd. had never placed any order for supply of six machines and the payment of Rs. 25 lakhs was not made to them. If these facts are not denied, the contents found recorded in the loose papers have to be read against the assessee. In the case of Chuharmal v. CTT (1988) 172 ITR 250 (SC), the Hon'ble Supreme Court has held that where a person was found in possession of anything the onus of proving that he was not its owner, was on that person. Therefore, the presumption laid down under s, 110 of the Evidence Act, 1872, could be attracted to a set of circumstances that satisfy its conditions and was applicable to taxation proceedings. It was further held that a legitimate inference could be drawn that the petitioner had income which he had invested in purchasing the wrist watches and could be held to be the owner of the wrist watches and their value could be deemed to be his income by virtue of Section 69A. Applying the said principle laid down by the Hon'ble Supreme Court, we are of the opinion that the transactions noted in the loose papers clearly stipulate that the assessee had made the payment of Rs. 25 lakhs to M/s National Plastic Industries Ltd. in cash out of the books against the expected orders for six machines to be placed on the assesses and the receipt of Rs. 2 crores as advance by the assessee, Rs. 8 lakhs as interest and Rs. 17 lakhs as cash discount.

10. The next question that arises is that if the addition is construed as deemed income of the assessee under Section 69C of the Act, whether the deduction of the same should be allowed on the basis of the same papers, under Section 37(1) of the Act as the expenditure had been found to have been incurred by the assessee in the form of cash discount and interest. Here the argument of the learned Departmental Representative was that the proviso to Section 69C of the Act was brought on the statute book, which could be considered to be retrospective in nature. So far as this contention of the Departmental Representative is concerned, we would like to mention that the Explanation to the section generally clarifies the scope of the section, but the proviso carves out an exception to the provision and the same rule cannot be applied in the case of the proviso. Even when the legislative intent implied that the Explanation is retrospective in nature, the wording is inserted to that effect by making it clanficatory. For example, such Explanation as in Section 263 or Section 37 started with wording "for the removal of doubts .....", In this case, no such wordings appear in the proviso. We would like to mention here that the controversy whether the proviso is retrospective or prospective will arise only when the section is ambiguous. In this context, we find that there was no ambiguity earlier. Therefore, it is incorrect to presume that the section was ambiguous. It is only for the purpose of denying such deduction, which otherwise was allowable earlier in view of Tribunal decisions, such proviso was introduced. So we do not subscribe to the view that this proviso was retrospective in nature and accordingly the expenditure which was found to have been incurred, should not be allowed, as claimed, under Section 37(1) of the Act. We would like to mention here

that we have to read the contents of the papers as a whole and cannot interpret the loose papers found during the search in a way that a portion which is favourable to the Department should be accepted and the portion which is not favourable to the Department should be rejected. The papers clearly state that the assessee had incurred unaccounted expenditure for the purposes of business. Therefore, if this amount is added as deemed income of the assessee under Section 69C of the Act, at the same time it should be allowed as a business expenditure under Section 37(1) of the Act. This is also clear from the circular of the Board bearing No. 772, dt. 23rd Dec., 1998, which made it clear that the amendment will take effect from 1st April, 1999, and will accordingly apply in relation to asst. yr. 1999-2000 and subsequent years. Under these circumstances, we are of the opinion that the expenditure of Rs. 25 lakhs is to be allowed to the assessee under Section 37(1) of the Act. Accordingly no addition on this count can be made. The addition is accordingly deleted.

11. By the next ground, the assessee has challenged the computation of undisclosed income on account of sale and lease-back transactions with Punjab State Electricity Board (PSEB) and Rajasthan State Electricity Board (RSEB) amounting to Rs. 11,64,89,975. During the course of survey, lease agreements entered into by the assessee with PSEB and RSEB were found and inventorised as Annexure 'A' to the survey report. Copies of these documents were also mentioned at serial Nos. 6 to 9 of Annexure 'B' to the survey report. The AO examined these lease agreements closely vis-a-vis the terms and status of the agreements entered into between the assessee and the PSEB and RSEB. The AO conducted enquiries by the Investigation Wing of the Department with both these Electricity Boards. The AO collected information and after regularising the terms and the surrounding circumstances, it was put to the assessee that the lease transactions entered into by it with these Electricity Boards were, in fact, in the nature of financial arrangements/loan transactions; that the assets alleged to have been purchased and leased back, acting merely as a security and that the assessee never owned these assets. It was also brought to the notice of the assessee that in view of these circumstances, the depreciation claimed by it in respect of these assets was not allowable and that out of the lease rental it was proposed to tax only the interest portion. The assessee was given opportunity to satisfy the doubts of the AO. The assessee vide its letter dt. 21st Nov., 1999, submitted that the lease transactions entered into by the assessee (given at p 43 of the compilation) were, in fact, real transactions with PSEB and RSEB. As per the details, the assessee had entered into one transaction with PSEB and three transactions with RSEB, out of the three transactions with RSEB in two transactions the assessee had purchased the machinery from Mafatlal Finance Co. Ltd. and Kotak Mahindra Finance Ltd. on hire-purchase, who in turn purchased these machines from RSEB. The lease agreement dt. 29th Sept., 1995, enterred into with PSEB is mentioned at pp 34 to 37 of the order of the AO, as per the submissions given by the assessee, which are quoted by the CIT(A) at p 37 of his order. The AO analysed the salient feature of the lease agreement in paras 6.1 to 6.3.19 of his order. Then the AO analysed the agreements entered into by the assessee with RSEB, dt. 27th March, 1995. The value of the equipment leased as per the three agreements was Rs. 2.15 crores; Rs. 2.5 crores and 4.37 crores. In the first two cases, the assessee had acquired the equipment from M/s Mafatlal Finance Go. Ltd. and M/s Kotak Mahindra Finance Ltd. respectively. The third equipment had been acquired from RSEB itself. Barring the differences on account of the value of the equipment and the mode of acquisition of the equipment, the terms of all the three agreements are identical, which are also identical to the lease agreement entered into with PSEB, in all material aspects. The AO, therefore, examined the direct sale and

lease back agreements entered into by the assessee with PSEB and RSEB, He analysed the agreements with RSEB in paras 6.4 to 6.4.6 of his order. In sum and substance, he held that the lease agreements entered into between the assessee-company and PSEB and RSEB are only loan transactions, the lease of the assets can, at best, be said to be a hire-purchase arrangement with the lessee ultimately acquiring the equipment at the end of the lease period. Under these circumstances, the assessee cannot be said to be the real owner of the leased equipment having the right to claim depreciation on the assets leased. Therefore, the depreciation claimed by the assessee on these assets was disallowed.

12. This was challenged before the CIT(A). The CIT(A), in fact, incorporated the order of the AO as well as the submissions of the assessee. A tabular chart was also furnished before the CIT(A). For the sake of convenience, the same is reproduced below :

Sr. No. Observation of AO Contention of appellant company Ownership of the Assets

1.

There was no genuine sale of equipments and several terms of the lease agreements are contrary to the claim of absolute ownership.

Sale and lease-back is one of the recognised and legally accepted modes of raising finance. By purchasing the assets from Electricity Boards and paying the agreed consideration, the assessee became the legal owner of the assets. The transactions were subjected to sales-tax assessment. All the legally recognised attributes of ownership vested with the assessee. The terms of the lease agreement, found by the AO to be contrary to the claim of absolute ownership were intended to protect the assets which in fact go to prove the absolute ownership of the assets by the assessee.

2. All the risks and rewards of ownership are vested in the lessees.

It was the assessee who enjoys the rewards of ownership by receiving the lease rentals. The risk of ownership was well protected by the assessee by making the lessee responsible to take proper care of the assets.

3. Sec. 26 of the Sale of Goods Act envisages that risks of ownership must pass with the property and in the instant case the purchasers of the equipment from SEBs had not assumed any risks of ownership. In fact, all losses in respect of the said equipment were to be borne by the lessee.

The provisions of s. 26 of the Sale of Goods Act applies at the time of sale of equipment by the SEBs to the assessee and the risks were passed on to the assessee after purchase of the assets. The lease agreement casts certain duties and liabilities on the lessee for use of the equipment as a bailee of the equipment which is as per the second proviso to s. 26 of the Sale of Goods Act. The transactions of the purchase of the assets by the assessee and leasing of the assets to the Electricity Boards are different transactions. The rights of ownership acquired by the assessee by means of purchasing the assets cannot be mixed up with the obligations cast on the lessees as per the lease agreement.

4. Owner must give warranty for At the time of purchase of the assets it the fitness, suitability, etc. of the equipment. In the instant case, however, the lease agreements stipulate that the lessor does not make any representation or warranty, was the Electricity Boards who gave warranty for the fitness, suitability, etc. of the equipment as they were the owners at that point of sale.

Immediately thereafter the assessee acquired ownership of the assets and leased them back to the Electricity Boards. Therefore, it was only an idle formality for the assessee to give warranty for the fitness, suitability, etc. of the assets. In any case, it was mentioned in the lease agreements that the lessees i.e. SEBs. were satisfied with regard to the fitness, suitability, etc. of the equipment leased.

5 Under s. 151 of the IndianContract Act, the hirer is only responsible for taking as much care of the goods hired by him as a man of ordinary prudence would under similar circumstances. However, in the instant case, any loss or damage to the equipment is to be borne by the lessee and in the event of total loss/damage, the lessees would have to replace the equipment at its own cost and the lease will continue.

A lease is a contract of bailment andthe parties to the contract are free to bind themselves in respect of rent, maintenance, risk on account of use, etc. as they deem fit. Accordingly, it will be appreciated that there are various terms in the lease agreement which deal with rent, maintenance, risk on account of use, etc. Sec- 152 of the Indian Contract Act provides that 'the bailee' in the absence of any special contract is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of its described in s. 151.' It will be appreciated that the lease agreement in this case is a special contract between the bailor and the bailee and accordingly, the provisions contained in the lease agreement with regard to rent, maintenance, risk on account of use. etc. would prevail.

True lease agreement or not 1 If any option to buy the equipment is given in the lease agreements.

the agreements would not be true lease agreement.

In this case no option to buy the leasedequipments is given to the lessee in the lease agreement. It is only a power of attorney given in favour of the Secretary, PSEB, authorising to negotiate and sell these equipments to any intending purchaser at a price not less than minimum mentioned in the power of attorney on the expiry of the lease period.

2 The AO has stated that a true transaction of hire or lease can be certained by three tests as observed by the Supreme Court in the case of Damodar Valley Corporation vs. State otBihai 12 STC 102 and Sundaram Finance Ltd, vs. State of Kerala 1976 AIR SC1176 It will be noted that the observations of the AO in respect of the three tests of a true lease agreement are not apparent in the decisions cited by the AO. Both the decisions of the Supreme Court deal with transactions of hire-purchase and hence the tests are not applicable to the appellant's transactions of lease.

3. The said transactions were transactions of loan of funds to the Electricity Boards against security of certain equipments since the lessor has a right to recover all amounts due under the lease

agreement in case of any default by the lessee The lessor had not taken any risk of ownership but had reserved the right to recoup the full investment In case of agreement with RSEB and PSEB the agreements specificallyprovide that the appellant is the owner of the assets (on pg. 7 of the agreement for RSEB and on p 3 for PSEB). It is reiterated on p 13 for RSEB and in cl. 7(a) for PSEB that in spite of lease agreements, the appellant continues to remain the owner of the assets. If there are no express stipulations as regards taking back of the assets, it could not be argued that rights of the owner have ceased.

It is always implied that once a person is owner of any asset, he can take it from any body to whom he has leased it. Therefore, besides the repossession of the asset, which is implied, a deterrent clause has been introduced to avoid any breach of terms of the lease by the lessee.

4. In order to construe the transactions one has to look to the substance or essence of it rather than its form.

The substance and essence of the agreement will clearly show that it is a genuine lease transaction. The parties to the transaction have acted accordingly and the other revenue implications like sales-tax and lease tax were and are being fulfilled.

5. In a true transaction of lease, in case of default, the lessor would have been entitled to terminate the lease, repossessthe assets and claim damages. However, in the instant case, the lessor does not make any attempt to Lease is a contract of bailment. Hence, the lessor gets the right to repossess the equipment at the end of the lease period or in a case of breach of terms, is entitled to recover damages as per lease agreement and also repossess the equipment. Hence, a provision to recover all the amounts due under the repossess the equipment but becomes entitled to recovery from the lessee all amounts due under the lease agreements in addition to his rights of damage, etc. lease agreement goes to ensure that the lessee does not commit any breach of the terms of the agreement. This right is a specific right, over and above the normal right of repossession given under the Contract Act.

Whether the transactions were loans

1. The substance of the arrangement is one of lending against security of fixed assets :

> A sale and lease-back transaction contemplates sale of assets by a person using the asset and in need of finance to a person who is willing to finance by purchase of the asset and the corresponding lease of same asset to the seller. Thus this transaction has several advantages :

2. SEBs were looking for availing of finance at cheap rates and since 100 per cent depreciable assets offer cheap finance, the same had been identified for use in sale and lease-back arrangement.

> (a) The existing owner of the asset is able to raise finance without disturbing his business activity since he is given the use of the asset; (b) The person willing to

provide the finance becomes the owner the equipment and thus is fully secured;

3. The SEBs issued mandate to the brokers for raising lease finance.

(c) The person willing to finance is able to earn a reasonable rate of return consequent to the lease of the said asset;

(d) Since the lease of the asset would amount to a contract of bailment, the lessor has absolute right over the asset.

4. The terms of finance were worked out independent of any specific equipment to be sold by SEBs. In fact, it isapparent that the transaction has been given the colour of lease by simply identifying the assets qualifying for 100 per cent depreciation valuing them arbitrarily to match the amount financed by each lessor Normally, the terms of finance are always worked independent of theequipment. Further, the assessee inspected the assets identified by the SEBs for the purpose of sale and lease back, obtained valuation report, negotiated the terms and purchased the aforesaid assets and then entered into the lease agreement. Accordingly, it will be appreciated that the said agreements were entered into in respect of specified identified asset.

It may be noted that as stated above, the agreements were entered into in respect of specified identified assets, a fact acknowledge by the AO in para 6.3 of his order.

However, the CIT(A) did not agree with the assessee and in sum and substance, concurred with the view taken by the AO for the detailed reasons given in his order, in which he has held that these agreements are, in fact, financial arrangements, which could be treated as loan and not a true lease. He, therefore, confirmed the disallowance.

13. The learned counsel for the assessee submitted that Expln. 4A to s, 43(1), which is introduced w.e.f. 1st Oct., 1996, recognizes the sale and lease-back transactions. The position becomes obvious from the Finance Minister's Budget Speech while introducing Finance (No. 2) Bill, 1996, in which it was stated as under .

> "The practice of sale and lease-back of the assets results in passing of very high depreciation to the leasing concerns. This practice needs to be curbed. Hence, 1 propose to provide in the IT Act that in case of sale and lease-back transaction, the WDV of the asset, in the hands of the lessee, who was the previous owner will be treated as cost in the hands of the lessor. The measure while not affecting bona fide transaction will prevent does making concerns from indulging in unhealthy trade of depreciation." (para 95 of the speech) Thus, it is clear that even prior to the amendment the lessors were entitled to depreciation on leased assets. The only

> difference that was brought in this amendment was that the cost of acquisition in the hands of the lessor was restricted w.e.f. 1st Oct., 1996, to the WDV in the hands of the previous owner, that is the lessee. The learned counsel for the assessee also invited our attention to Instruction No. 1978, dt. 31st Dec., 1999 [F.No. 225/190/98/IR(A-II)], according to which the Board has given guidelines for investigation in the finance lease agreements. He submitted that in the said circular it is maintained that instances have come to the notice of the Board that in some of the finance lease agreements leased assets had never existed or purchase price for the lease assets came back to the lessor by discounting the lease rental either directly from the lessee or through circuitous route from intermediaries and that the line of investigation is mentioned in that circular. It was also directed that field inquiries are to be made to identify and verify about the existence of the lease assets, the compliance of various provisions of the law relating to transfer of assets, such as payment of sales-tax, goods-tax, insurance, etc. It has also been directed to examine the books of account to see that the lease rentals are accounted for in conformity with the terms of the agreement. The said circular further directed to examine the applicability of Expln. 3 to Section 43 of the Act in the case of sale and lease-back transaction to determine the correct fair market value. It has also been directed to examine the applicability of Expln. 4A to Section 43(1) in case of sale and lease-back transaction. In the concluding para it was directed that if the finance lease transaction is found to be not genuine or fraudulent and the basic document like insurance papers and inspection report are found to be false, then in addition to the disallowance of the claim for depreciation, launching of prosecution should be considered.

14. In the light of the above circular, the learned counsel for the assessee submitted that in the case of the assessee the sale and lease-back transactions are entered into with PSEB and RSEB, which are Government bodies. The machines were identified and were in existence. Sales-tax was either paid or the Electricity Boards were exempted from payment of sales-tax. The purchase price for lease assets had not come back to the lessor. The lessor had declared the lease rentals in its books of account every year. The Electricity Boards have reduced the sale price of the assets from their block of assets. Expln. 3 to Section 43 is not applicable in the case of the assessee, as the purchase price was paid as per the valuation reports obtained from the registered valuer, which is not challenged. Expln. 4A to Section 43, which came into force w.e.f. 1st Oct., 1996, is not applicable and, therefore, the transactions entered into by the assessee are genuine, which had been confirmed by the lessee and the plant and machineries were identified and were in existence.

15. The learned counsel for the assessee further relied on the Circular No. 2 of 2001, dt. 9th Feb., 2001. which also mentioned the criteria laid down in Instruction No. 1978, dt. 31st Dec., 1999 regarding the examination of sale and lease-back transaction in view of the principle laid down by the Supreme Court in the case of McDowell & Co. Ltd. v. CTO (1985) 154 ITR 148 (SC). This circular also mentions that though the new accounting standard pronounced by the Institute of Chartered Accountants of India makes distinction between operating lease and finance lease and also requires capitalisation of assets by the lessee in financial lease transaction, but directed that the accounting

standard will have no implication on the allowance of depreciation on assets under the provisions of the IT Act. In view of this circular, it is submitted that none of the conditions mentioned in Instruction No. 1978, dt. 31st Dec.. 1999, are found in the lease transaction entered into by the assessee-company. It is also submitted that the applicability of the decision of the Supreme Court in the case of McDowell & Co. Ltd. (supra) is already examined by the Tribunal in a number of decisions. Further, it is very clear from the circular that the IT Act does not differentiate between operating lease and finance lease. 16. The learned counsel for the assessee next submitted that the issue of granting depreciation on sale and lease-back transactions has been considered by the Tribunal in a number of cases. It was pointed out that in the case of Unimed Technologies Ltd. v. Dy. CIT (2000) 69 TTJ (And) 25 - (2000) 73 ITD 150 (And), the issue was position with regard to the decision of the Tribunal in the case of Coronet Investments (P) Ltd. in ITA No. 2103/Mum/1999, dt. 7th March, 2001. Regarding the two decisions of the Supreme Court relied upon by the AO, i.e., in the case of Damodar Valley Corporation v. State of Bihar 12 STC 102 and in the case of Sundaiam Finance Ltd. v. State of Kerala 1966 AIR SC 1176, it was submitted that both these decisions were considered by the Hon'ble Bombay High Court in the case of Prakash Industries Ltd. in Appeal No. 12 of 1999, decided on 28th Jan., 1999. Therein the lessee, Prakash Industries Ltd., has taken several equipments on leave from the lessor Development Credit Bank. Upon failure in the matter of payment of rental, the lessor sought repossession of the leased assets. Based on the clauses in the agreement, the lessee contended that the substance of the agreement was a financial arrangement to which the ruling of the Supreme Court in the case of Sundaiam Finance Ltd. was applicable. In this ruling, based on facts, the hire-purchase agreement was regarded as financial transaction. The Bombay High Court first rejected the lessee's contentions, holding that the essential distinction between a lease and a financial transaction was a retention of title by the lessor. The lessee went in appeal before a Larger Bench of the High Court, where also the contentions of the lessee were rejected. The Special Leave Petition was also rejected by the Supreme Court on 11th May, 1999.

17. The learned Departmental Representative, on the other hand, relied on the orders of the Revenue authorities.

18. We have considered the rival submissions and have gone through the material available on record. We find that Expln. 4A to Section 43(1) was introduced w.e.f. 1st Oct., 1996, with a view to curb the practice of sale and lease back of the assets resulting m passing of very high depreciation to the leasing concerns. This amendment was brought into the statute book to restrict the depreciation in the hands of the lessor w.e.f. 1st Oct., 1996, on the written down value in the hands of the previous owner, i.e., the lessee. So the amendment by way of Expln. 4A to Section 43(1) has accepted the principle of sale and lease-back of assets to restrict the depreciation from cost of acquisition to written down value in the hands of the previous owner. The CBDT, vide its Instruction No. 1978, dt. 31st Dec., 1999, has pointed out that it has come to its notice that in some of the finance lease agreements, lease assets had never existed or purchase price for the lease assets came back to the lessor by drscounting the lease rental either directly from the lessee or through circuitous route from intermediaries. Under these circumstances, this circular was issued with a view to making inquiries to identify and verify about the existence of lease assets so that the fake transfer of assets on paper should be discouraged and depreciation should not be allowed to the unreal owner. But that instruction is not applicable to the facts of the present case because the transactions have been

entered into between the assessee and the two State Government undertakings and there is no finding of any authority that no such agreements were ever entered into between the parties and consequently the machinery was never purchased and leased back by such agreements. It will be pertinent to mention here that the PSEB and RSEB have removed these assets from their balance sheets and are now appearing in the balance sheet of the assessee. So the unreal transaction, which is mentioned in the circular, does not at all find place in the case of the assessee. It is not the case of the AO that the purchase price of lease assets had come back to the lessor. Rather, we find that the lessor had declared the lease rental in its books of account in every year. The Electricity Boards have reduced the sale price of the assets from their block of assets. It will also be pertinent to mention here that in the present case, the purchase price was paid as per the valuation report obtained from a registered valuer, which had not been challenged or found false by any investigating authority or by the AO. Therefore, Expln. 4A to Section 43(1) is not applicable and the transactions entered into by the assessee are all genuine.

19. The Circular No. 2 of 2001 dt. 9th Feb., 2001, referred to above and on which the assessee has relied on, mentions that though the new accounting standard pronounced by the Institute of Chartered Accountants of India makes distinction between operating lease and finance lease and also requires capitalisation of assets by the lessee in financial lease transactions, but directed that the accounting standard would have no implication on the allowance of depreciation on assets under the provisions of the IT Act. In view of the above circular, none of the conditions mentioned in the Instruction No. 1978, dt. 31st Dec., 1999, are found in the impugned transactions entered into by the assessee-company. It will be pertinent to mention here that the AO has recorded the statement of all concerned authorities of the two Electricity Boards, who have confirmed the existence of sale and lease-back of assets. It is also found that no depreciation had been claimed by PSEB and RSEB on these assets. Under these circumstances, it cannot be treated as a sham transaction of lease for the purpose of claiming depreciation. We find that the Tribunal has considered the question of granting depreciation in sale of lease-back transaction in the case of Unimed Technologies Ltd. (supra). That was a case where the assessee has purchased an asset on hire-purchase agreement for which consideration was paid by ITC to RSEB on the execution of the agreement for sale. The Tribunal has held that unless it is established that the sale and lease-back transaction was not genuine and it was found that the lease agreement is at arms length with the Government of Ra]asthan, the claim for depreciation cannot be disallowed. Similar view was expressed by the Mumbai Bench of the Tribunal in the case of Coronet Investments (P) Ltd in ITA No. 2103/Mum/1999 decided on 7th March, 2001, wherein the Tribunal, following its order in the case of Berlia Chemicals & Traders (P) Ltd. in ITA No. 7510/Bom/1993, dt. 25th Oct., 1999, had allowed the claim of the assessee. The facts of these cases are identical to the facts of the present case. Similar view was also taken in the cases of;

(i) Karam Chand Thaper & Bros. v. Dy. CTT (1998) 61 TTJ (Cal) 576 :(1998) 66 ITD 39 (Cal);

(ii) New Deal Finance & Investment Ltd. v. Dy. CIT (2000) 69 TTJ (Mad) 410 :

(2000) 74 ITD 469 (Mad):

(iii) Oriental Leasing Company v. Dy. CTT (1996) 55 TTJ (Del) 294;

(iv) Amar Structures (P) Ltd. v. Asstt. CTT (1997) 51 TTJ (And) 508;

(v) Peacock Chemicals (P) Ltd. v. Dy. CTT (1995) 51 TTJ (Del) 264;

and

(vi) Accu Dress v. Asstt. CIT (1998) 62 TTJ (And) 755.

We find that the AO has relied on the two decisions of the Supreme Court in the case of Sundaram Finance Ltd. (supra) and in the case of Damodar Valley Corporation (supra). But these decisions were considered by the Bombay High Court in the case of Piakash Industries Ltd. in Appeal No. 12 of 1999, decided on 28th Jan., 1999, in Notice of Motion No. 2343 of 1998 in Suit No. 3196 of 1998. We find that the Special Leave Petition against this order of the Bombay High Court has been rejected by the Hon'ble Supreme Court on 11th May, 1999. The Hon'ble Bombay High Court, in principle, has accepted the sale and lease-back of property, though in different context, and it was observed that the ownership had passed on to the respondent. Taking into consideration the facts and circumstances of the case and the evidence on record, we are of the opinion that the assessee is the owner of the assets on buying the same and is entitled to claim depreciation. This ground of the assessee is accordingly allowed.

20. The next grievance of the assessee in this appeal is that GIT(A) erred in holding that the assessee-company is liable for interest under Section 158BFA of the IT Act. In this ground the assessee has challenged the charging of interest under Section 158BFA of the Act. The CIT(A) has discussed the same on pp 65 and 66 of his order and held that though the extension was granted by the AO of 30 days vide his letter, dt. 25th Nov., 1997, but the same is without jurisdiction. As per the CIT(A), the return is to be filed within a period not exceeding 45 days from the date of service of notice. We find that the CIT(A) has missed the factual aspect of the matter that in this case the notice was dt. 7th Oct., 1997, which was served on the assessee on 14th Oct., 1997, as would be clear from the copy of the notice placed at p 27 of the paper book. If we calculate 45 days from 14th Oct., 1997, the period of 45 days will expire on 28th Nov., 1997, The assessee has filed the return on 28th Nov., 1997, itself. Therefore, from this factual aspect of the matter, the return filed by the assessee is within the time and, therefore, the assessee is not liable for any interest under Section 158BFA of the Act. The order of the CIT(A) on this issue is set aside and the AO is directed to delete the interest. This ground of the assessee is accordingly allowed.

21. The next grievance of the assessee is that the CIT(A) erred in holding that surcharge is leviable on the rate of 60 per cent on the undisclosed income computed for the block period. The AO has charged income-tax at the rate of 60 per cent and surcharge also at the rate of 7.5 per cent. As per the provisions of Section 113, tax on the undisclosed income for the block period is chargeable at the rate of 60 per cent. The CIT(A) was of the view that the first proviso to Section 2 of the Finance Act, 1997, provides for levy of surcharge on the amount of income-tax computed under ss, 112 and 113. Part I of the First Schedule of the Finance Act, 1997, provides the rates of income-tax and which also

provides the levy of surcharge at the rate of 7.5 per cent of income-tax even on the income-tax levied as per the provisions of Section 113 also, which comes to 4.5 per cent. However, it is to be remembered that the rates prescribed in the said Part I are applicable for asst. yr. 1997-98. Part III of the First Schedule prescribes the rate of income-tax for asst. yr. 1998-99 and in that Schedule the surcharge is not provided. Therefore, in the asst. yr. 1998-99 no surcharge is leviable because in the instant case the search has taken place on 26th Sept., 1997. Therefore, the relevant assessment year is 1998-99 for which no surcharge is leviable as per the provisions of Part III of the First Schedule of Finance Act, 1997. Accordingly, the order of the CIT(A) on this issue is set aside and the AO is directed to delete the surcharge levied. This ground of the assessee is, therefore, allowed.

22. Ground No. 1, quoted above, was not pressed at the time of hearing. It is accordingly rejected.

23. Ground No. 2 is general in nature and in view of our findings as above, it needs no discussion.

24. In the result, the appeal is partly allowed.