IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 988 OF 2014

M/s. Pebble Investment & Finance Ltd. .. Appellant.
v/s.
Income Tax Officer 4(2)(1) .. Respondent.

Mr. R. M. Haridas, for the Appellant.
Mr. A. R. Malhotra with Mr. N. A. Kazi, for the Respondent.

CORAM: M.S.SANKLECHA, &
A.K.MENON, JJ.
DATE : 17th JANUARY, 2017.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 18th December, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 18th December, 2013 is in respect of Assessment Year 1996-97.

2 The basic issue urged by the Revenue for our consideration, is as under:

> *" Whether the Tribunal was justified in upholding the order of the lower authorities deleting the claim for depreciation on Flameless Furnace as the purchase and lease was as sham on the basis of a statement of the Director of the lessee u/s. 133 of the Act and ignoring the various documents like the tri-parte Agreement, lease Agreement, invoices of the supplier, delivery challan of the supplier, payment made from the Bank i.e. copies of the Bank statements?"*

3 The Appellant is engaged in the business of financing and Leasing. In the subject Assessment Year, the Appellant-Assessee claimed depreciation on Flameless Furnace (Furnace) at 100% of its cost. The furnace was leased to one M/s. Omega Steel Industries Pvt. Ltd., Chhenai (M/s. Omega). During the Assessment Proceedings, the Assessing Officer relied upon the statement of Director of M/s. Omega made under Section 133A of the Act to the effect that no machinery was taken on lease by them as in fact, no machinery had been purchased by the Appellant-Assessee. This statement was made available to the Appellant during the Assessment Proceedings and not disputed. Consequently, a claim of depreciation of Rs.23.30 lakhs was disallowed in the Assessment Order dated 31st March, 1999.

4 Being aggrieved, the Appellant-Assessee carried the issue in Appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 2nd December, 1999, the CIT(A) set aside the order of the Assessing Officer in respect of issue of claim for depreciation and restore the issue to the Assessing Officer to pass as fresh order.

5 In the second round of proceedings, the Appellant-Assessee was asked to produce the lesssee. However, that was not possible, as according to Appellant, the whereabouts of the lessee was not known. Nor documents evidencing octroi, transportation, insurance etc, where available to be produced. However, the Appellant did file bank statement, copy of invoice, copy of lease agreement and delivery chalans, evidencing the delivery of the machinery to the lessee. However, the Appellant-Assessee could not furnish confirmation from the lessee – M/s. Omega of the aforesaid transaction. The Appellant-Assessee was not able to contact

M/s. Omega and its Directors, so as to bring evidence on record to substantiate the transaction. This was due to the fact that the whereabouts of the lessee was not known due to lapse of time. Nevertheless, the Appellant-Assessee sought cross examination of the Director of M/s. Omega. However, the Assessing Officer on consideration of the evidence before him, including the statement of the Director of leasee, concluded against Appellant-Assessee and denied the claim for depreciation.

6 Being aggrieved, the Appellant-Assessee filed Appeal to the CIT(A). The CIT(A) in its order, recorded the fact that the various documents called for could not be furnished by the Appellant-Assessee. Further, it records the fact that the Appellant-Assessee was not able to explain even the whereabouts of the Furnace which is alleged to be owned by it even after such a long period. Consequently, on consideration of evidence on record including the statement of the Director of M/s. Omega, the order of the Assessing Officer was upheld.

7 On further Appeal by the Appellant-Assessee, the Tribunal by the impugned order, on consideration of the facts and evidence before it including the statement of the Director of M/s. Omega, upheld the order of the CIT(A).

8 The grievance of the Assessee is that the documents which were furnished during the proceedings should have been considered by the authorities and this would have by itself led to the conclusion that the machinery was, in fact, given on lease to M/s. Omega. Further, it is submitted that the statement of Director of M/s. Omega was a statement made under Section 133A of the Act. Therefore, it could not be relied

upon, as it had no evidentary value.

9 We note that a statement made under Section 133A of the Act is not bereft of any evidentary value. The same may not be conclusive but in the absence of any contrary evidence or explanation as to why the statement made under Section 133A of the Act is not credible, it can be acted upon. The decision of Madras High Court in ***CIT v/s. S. Khader Khan Son*** reported in ***300 ITR 157*** as upheld by the Apex Court, is not of any assistance to the Appellant. In the facts before the Court in S. Khader Khan (supra), the person who made the statement under Section 133A of the Act had retracted it before the Assessment Order was passed. Moreover, in the absence of the the Appellant-Assessee offering any explanation as to why the statement cannot be relied upon, no fault can be found on the reliance upon the statement of the Director of M/s. Omega. Further, so far as request for cross examination is concerned, we find that Appellant-Assessee, during the first round of proceedings before the Assessing Officer did not raise any such issue. At that point of time, the person who make the statement, could have been produced by the Assessing Officer. It was only in the second round of proceedings when the Appellant-Assessee was not able to contact the Director of M/s. Omega, that they came up with a request for his cross examination. Therefore, the submission on part of the Appellant that the delay has led to it being unable to produce evidence is of no avail as the delay was in seeking cross examination by it. Further, the documents which were produced were considered along with and/or the facts viz: non-production of vital documents. This coupled with the fact that the owner of the Furnace i.e. Appellant did not have any knowledge about its whereabouts at the time of adjudication.

10 In the above view, the consistent view taken by the authorities under the Act including the Tribunal, is on the facts a possible view. Thus, no substantial question of law arises for our consideration.

11 Accordingly, **Appeal dismissed.** No order as to costs.

(A.K.MENON,J.) **(M.S.SANKLECHA,J.)**