

**(2003) 09 KAR CK 0035**  
**In the Karnataka High Court**  
**Case No : IT Appeal No. 92 of 2002**

Avasarala Automation Ltd.

APPELLANT

Vs

Joint Commissioner of Income Tax

RESPONDENT

**Date of Decision :** 19-09-2003

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 100  
Income Tax Act, 1961 — Section 260 A  
Registration Act, 1908 — Section 17 (1) (d), 2 (6)

**Citation :** (2003) 185 CTR 402

**Hon'ble Judges :** P. Vishwanatha Shetty, J;Ajit J. Gunjal, J

**Bench :** Division Bench

**Advocate :** G. Sarangan, for S. Pathasarthi and Brindha, for the Appellant; M.V. Seshachala, for the Respondent

**Final Decision :** Dismissed

## **Judgement**

P. Vishwanatha Shetty, J.—The appellant in this appeal (hereinafter referred to as "the assessee") is a domestic company carrying on business relating to manufacture of special purpose machinery.

2. Facts in brief are as hereunder:

For the asst. yr. 1996-97, i.e., year ending 31st March, 1996, the assessee filed its return of income on 29th Nov., 1996, declaring the total income of Rs. 1,54,33,960 (Rupees one crore fifty-four lakhs thirty-three thousand nine hundred sixty only). In the return filed, the assessee had claimed that it had purchased machinery/equipment from Andhra Pradesh State Electricity Board (hereinafter referred to as "the APSES"), by virtue of an agreement of sale deed dt. 29th Sept., 1995, for a total consideration of Rs. 1,60,18,854 (Rupees one crore sixty lakhs eighteen thousand eight hundred fifty four only); and on the same day, by means of a separate lease deed, it had leased back the said machinery/equipment to APSEB for a monthly rent of Rs. 2,19,498.35 (Rupees two lakh nineteen thousand four hundred ninety-eight and paise thirty-five only)

for a period of 72 months commencing from 29th Sept., 1995 till 29th Aug., 2001. The assessee claimed 100 per cent depreciation in respect of the said leased machinery as the machinery purchased, according to the assessee, was the pollution control equipment.

The AO by this order Annexure-E dt 26th March, 1999, disallowed the depreciation claimed by the assessee to the extent of Rs. 1,60,18,854 on the ground that the assessee was unable to establish the ownership of the said equipment and explain the details of the assets and furnish the written down value of the said equipment in the hands of the assessee; and, therefore, in the facts and circumstances of the case, the transaction entered into between the assessee and the APSEB should be treated only as finance transaction and not a genuine lease transaction wherein a sum of Rs. 1,60,18,854 was advanced by the assessee to APSEB. However, the AO excluded from the gross total of income, the leased rental offered for taxation by the assessee to the extent of Rs. 14,63,322 (Rupees fourteen lakhs sixty-three thousand three hundred twenty-two only). He proceeded to bring to tax the deemed interest income applying the rate of interest at 18 per cent per annum on net amount of Rs. 1,16,34,154 (Rupees one crore sixteen lakhs thirty-four thousand one hundred fifty only) advanced and brought to tax Rs. 10,47,100 (Rupees ten lakh forty-seven thousand one hundred only). The appellate authority, in its order Annexure-G dt. 22nd March, 2001, while giving some relief in respect of few other items, confirmed the order of assessment insofar as it relates to rejection of claim for depreciation in respect of the machinery/equipment in question purchased from APSEB and leased back to APSEB. The Tribunal, by means of its order dt. 30th Oct., 2001 rejected the appeal filed by the assessee challenging the correctness of the order Annexure-G passed by the appellate authority. Aggrieved by the said orders referred to above, this appeal is filed.

3. While admitting the appeal, this Court on 23rd Jan., 2003 had framed the questions of law mentioned hereunder:

"1. Whether the Tribunal was right in law in treating the transaction between the appellant and APSEB as a colourable transaction for the avoidance of payment of tax and in applying the ratio of the decision of the Supreme Court in McDowell and Co. Ltd. Vs. Commercial Tax Officer, .

2. Whether the Tribunal was right in law in holding that the appellant had been unable to establish the ownership of the assets and explain the details of the assets and also the details of written down value in the hands of the previous owner and details of depreciation claimed by the previous owner especially when the appellant had submitted all the details as required including photographs and the certificate from APSEB ?

3. Whether the Tribunal was right in law in holding that the appellant was not entitled to 100 per cent depreciation on the assets purchased and leased back to APSEB especially when even APSEB had confirmed the transaction vide its

declaration ?

4. Whether the Tribunal was right in law in upholding the action of the lower appellate authorities in treating the transaction between the appellant and APSEB as the financial transaction and bringing to tax the notional interest at 18 per cent on the net sum paid by the appellant to APSEB ?

5. Whether the order of the Tribunal was perverse insofar as in spite of producing all necessary details to identify the assets and the transaction as entered into between the appellant and APSEB to the said transaction had been treated as a sham transaction ?"

4. Sri G. Sarangan, learned senior advocate appearing along with Sri S. Parthasarathi, for the assessee, strongly urged that since the purchase of machinery/equipment from APSEB was made by means of agreement of sale deed dt. 29th Sept., 1995; and on the same day by means of lease deed, the assessee had leased back the machinery/equipment in question, to APSEB; and the APSEB being a statutory corporation incorporated by the Government of Andhra Pradesh; the Tribunal, the appellate authority and the AO have seriously erred in law in ignoring the said written documents and proceeding to take the view that the transaction in question is a colourable transaction entered into between the assessee and APSEB for the avoidance of payment of tax and the transaction in question is really a financial transaction; and on that basis rejecting the claim made by the assessee for depreciation of the assets purchased by the assessee from APSEB. According to the learned counsel, the reason assigned by the Tribunal in the order impugned proceeds on the basis of conjectures and inferences and in disregard of the materials on record; and therefore, the finding recorded by the Tribunal should be held as perverse in law. Elaborating this submission, he pointed out that the entire approach made by the Tribunal and the subordinate authorities, to the matters in controversy is erroneous. It is his submission that the Tribunal proceeds on the basis that the sale and lease agreements require registration and since they are not registered, the case set up by the assessee cannot be accepted. He pointed out that since the transaction related to transfer of property in movables, i.e., machinery/equipment, the approach made by the Tribunal that the said documents require registration is totally erroneous and perverse in law. He further pointed out that even if the assessee carries an illegal business and for the said purpose, if the expenditure is incurred, the assessee is entitled to claim exemption for the same. Secondly, he submitted that since the parties have not provided for an interest under the lease agreement entered into between them, it was not permissible for the AO to proceed to assess the profit on the basis of an assumed interest received by the assessee on the amount stated to have been advanced. He also submitted that assuming that the depreciation claimed by the assessee cannot be accounted as the income of the assessee, the same is required to be computed under Sections 56 and 57(2) of the Act. In support of his submissions he relied upon the decision of the Hon"ble Supreme Court in the case of

Commissioner of Income Tax, Patiala Vs. Piara Singh, , in the case of Commissioner of Income Tax, Karnataka, Bangalore Vs. M/s. Shaan Finance (P) Ltd., Bangalore, , in the case of Commissioner of Income Tax Vs. Aswati Corporation, , in the case of McDowell and Co. Ltd. Vs. Commercial Tax Officer, , in the case of Commissioner of Wealth Tax, Gujarat-II, Ahmedabad Vs. Arvind Narottam (Individual), , in the case of Sri Mohan Wahi Vs. Commissioner, Income Tax, Varanasi and Others, , and in the case of Mittal Belting and Machinery Stores Vs. Commissioner of Income Tax and Another, . He also referred to us certain passages from Kanga & Palkhivala's at pp. 21A, 46, 48, 50, 51, 53, 54 where judgments of various Courts are referred to, submitted that the Tribunal has failed to consider that the decision of the Hon'ble Supreme Court in the case of McDowell (supra) relied upon by the Tribunal has absolutely no application to the facts of the present case and the Tribunal has failed to consider that it is open to the assessee to have a tax planning and all tax planning allowable in law cannot be equated or treated as the planning meant for evasion of tax.

5. However, Sri M.V. Seshachala, learned counsel appearing for the respondent meeting every one of the submissions made by Sri Sarangan pointed out that all the three authorities, on appreciation of the materials placed before them including the sale agreement and the lease agreement, having recorded a finding that the transaction in question is a financial transaction and the sale agreement relied upon by the assessee by virtue of which it is stated to have purchased the machinery/equipment in question and also the lease agreement by virtue of which it is stated to have leased back the machinery/equipment to APSEB, from whom it had purchased, are not genuine transaction and it is a colourable transaction entered into between the parties for avoidance of payment of tax and claiming depreciation, the said finding being purely a question of fact, it is not permissible for this Court to interfere against the orders impugned in exercise of its power u/s 260A of the Act. The learned counsel for the Revenue pointed out that when the authorities have carefully examined the materials placed before it and have given several reasons which are valid and recorded a finding that the transaction relied upon by the assessee is a sham transaction and the same is in the nature of a financial transaction, it is not permissible for this Court to re-appreciate the materials on record and come to a different conclusion. He strongly refuted the submission of Sri Sarangan that the conclusion of the Tribunal and the subordinate authorities is based on conjectures and inferences and not supported by any material on record. He took us through the orders passed by the AO as well as the appellate authority. It is his submission that since the AO wanted to satisfy himself about the genuineness of the claim made by the assessee, he directed the assessee to furnish certain information such as details of depreciation claimed by the previous owner, the copies of the invoices, details of installation and commissioning, etc., by means of his letter dt. 17th March, 1999; and in spite of the said request made by the AO, the assessee had refused to furnish the details and had only written the letter dt. 25th March, 1999, stating that some of the details called for by the AO had already been

furnished. In this connection, he drew our attention to the observation made in paras 4 and 5 of the order of assessment. He also pointed out that since the machinery/equipment in question are embedded to the earth, any transaction relating to such equipment requires registration. In this connection, he drew our attention to the definition of immovable property attached to earth provided under Sections 2(6) and 17(1)(d) of the Registration Act, 1908, He also referred to us to the contents of valuation report, which was produced for the first time before the appellate authority. According to the learned counsel, the said report would clearly support the conclusion reached by the Tribunal as well as the appellate authority and the AO that the transaction in question is only a colourable transaction. He submitted that when the machinery/equipment in question were being utilised by the APSEB; and were admittedly embedded to the earth; and the case put forward by the assessee also shows that the said machinery/ equipment were required by APSEB; and since it is not the case of the assessee that the machinery/equipment were dismantled or detached from the earth and actual possession was handed over to the APSEB by the assessee, the only inference and irresistible conclusion any reasonable person or authority could arrive at; which as a matter of fact has been arrived at by the Tribunal and the subordinate authorities, is that the transaction in question is a sham transaction. Therefore, he submits that conclusion reached by the Tribunal and the subordinate authorities do not call for any interference in this appeal. In support of his submission that the transaction is a sham transaction, he relied upon the decision of the Hon"ble Supreme Court in the case of Workmen Employed in Associated Rubber Industry Ltd., Bhavnagar Vs. Associated Rubber Industry Ltd., Bhavnagar and Another, , in the case of The Commissioner of Income Tax, Madras Vs. Sri Meenakshi Mills Ltd., Ors., and in the case of Carborandum Universal Ltd. Vs. Commissioner of Income Tax, .

6. In the light of the rival submissions made by the counsel for the parties, the only question that would arise for consideration in this appeal is as to whether the orders impugned in this appeal suffer from any errors involving substantial question of law, which calls for interference by us ?.

7. From the reading of Section 260A of the Act it is clear that this Court can interfere against the order passed by the Tribunal, if the order passed by the Tribunal suffers from errors involving substantial question of law. The scope of interference u/s 260A of the Act by this Court is similar to the power to be exercised by this Court u/s 100 of the CPC. While considering the scope of Section 100 of the CPC, the Hon"ble Supreme Court in the case of Hari Singh Vs. Kanhaiya Lal, of the judgment has observed as follows :

"Sub-section (3) places an obligation on the appellant to precisely state the substantial question of law involving in the appeal. Sub-section (4) confers on the High Court an obligation to formulate the substantial question of law, if it is satisfied that it is involved. Then Sub-section (5) confers right on the respondent to urge that no substantial question of law arises. The proviso supplements the

discretion question of law arises, if not formulated. The aforesaid scheme of this section clearly reveals the intents of legislature to limit the exercise of power of the High Court u/s 100. Thus, existence of substantial question of law is sine qua non for the exercise of power by the High Court under this section.

11. This Court records in Panchugopal Barua and others Vs. Umesh Chandra Goswami and others, :

"Para 7--A bare look at Section 100, CPC shows that the jurisdiction of the High Court to entertain a second appeal after the 1976 amendment is confined only to such appeals as involve a substantial question of law, specifically set out in the memorandum of appeal and formulated by the High Court. Of course, the proviso to the section shows that nothing shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. The proviso presupposes that the Court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier formulated by it. The existence of a "substantial question of law" is thus, the sine qua non for the exercise of the jurisdiction under the amended provisions of Section 100 CPC."

8. Keeping the above principle in mind, we will now proceed to examine the contention advanced by Sri Sarangan. In our view, there is no merit in any one of the submissions advanced by the learned counsel for the appellant, The orders impugned do not suffer from any error, much less, they suffer from any infirmity involving a substantial question of law. The findings recorded by the Tribunal and the subordinate authorities, as rightly pointed out by Sri Seshachala are purely questions of fact. Having elaborately heard the learned counsel appearing for the parties and having carefully gone through the orders impugned, we have no hesitation to hold that the finding recorded by the Tribunal that the transaction between the assessee and the APSEB is a colourable transaction entered into between them for evasion of tax, is fully justified. The Tribunal, in the course of its order impugned, on consideration of the finding recorded by the appellate authority as well as the AO, has come to the conclusion that the transaction in question is a colourable transaction intended to avoid payment of tax. The said finding, in our view, does not suffer from any error involving substantial question of law. While it is permissible, as contended by Sri Sarangan, for an assessee to have tax planning, it is not permissible to prepare documents and to give the colour of real transaction on the basis of the said documents, which would enable the assessee to evade payment of tax. When an assessee makes a claim for depreciation on grounds allowed by law, it would always be open to the AO to lift the veil of the transaction put forward and find out as to whether the transaction put forward for the purpose of claiming depreciation is a genuine transaction or only a make-believe one intended to avoid payment of tax. An assessee who claims depreciation has to satisfy the Revenue, that he is entitled for grant of depreciation on items claimed by it. The burden of proof is on the assessee. In

the instant case, the AO as well as the appellate authority and the Tribunal, after careful consideration of the case pleaded by the assessee and the materials placed by it before the AO, have recorded a finding that the transaction set up by the assessee is not a genuine one and a colourable transaction intended to avoid payment of tax: They have not believed the case of the assessee that the assessee, by means of sale agreement dt. 29th Sept., 1995, had purchased the machinery/equipment from APSEB and on the same day, by means of another lease agreement, the assessee has leased out the said machinery/equipment to APSEB, as claimed by it. While coming to the said conclusion, they have taken into account : (i) the documents in question were not registered; (ii) machinery/equipment were not identified; (iii) written down value as per Section 43(1) of the Act in support of the machinery/equipment could not be ascertained; (iv) market value of the asset without valuer assessment also could not be ascertained; (v) there is no actual delivery or handing over possession of the machinery/equipment by APSEB to the assessee on completion of the sale of the said machinery/equipment; (vi) there was also no redelivery or handing over the possession of the machinery/equipment by the assessee to the APSEB; and (viii) the machinery/equipment also were embedded or attached to the earth. The order made by the AO also indicates that the assessee has not co-operated before him in the course of the assessment proceedings for the purpose of identification of machinery/equipment to verify the actual value of the machinery and the equipment stated to have been purchased and also the nature of machinery/equipment purchased. In this connection, it is useful to refer to the observation made in paras 5 and 6 of the order of assessment, which reads as hereunder:

"5. In response to the above, the assessee-company filed a letter dt. 25th March, 1999, wherein it is stated that some of the details called for have been already furnished. The details stated to have been furnished as per letter dt. 25th March, 1999, do not include the information called for and specifically pointed out as not complied with the earlier paragraphs. The assessee company has also not explained the reasons as to why there is no compliance to the repeated requests for furnishing such important information which has a bearing on the allow ability of the depreciation claim. It is pertinent to point out that the assessee-company ought to have co-operated in the assessment proceedings and furnished all the relevant factual information and the documentary evidences in support of its claim. Non-compliance to the repeated requests only indicates that there is no intention on the part of the assessee-company to come forward to clearly explain the nature of the transaction. Only facts relevant to the issue can clearly explain the nature of transaction, the bona fides of the assessee-company, the legality of the transaction and ultimately the question of admissibility of 100 per cent depreciation on the leased assets. Due to the non-cooperation on the part of the assessee-company, complete analysis of the relevant facts has not been possible. However, with the available facts and information, the following analysis has been made and conclusions are reached.

6. Any movable property should satisfy the basic requirement that it is capable for clear identification and delivery. If the assessee has entered into a transaction where only a sum which is supposed to be the sale value of the equipment is mentioned, but does not satisfy all the requirements of purchase and sale, such transaction in reality is not one of sale. In this case, the assessee-company was asked to furnish a valuation report so as to ascertain its fair market value as well as to ascertain whether the equipment stated to have been purchased and leased was in fact feasible for entering into such a transaction. Besides the assessee-company was also asked to obtain a report from the Chief Engineer of the concerned unit of APSEB so as to ascertain whether the equipment was capable of physical delivery, if required. If the equipment is installed in a building or fixed to a place and interconnected with various other equipments, it would be difficult for selling a part of such a huge equipment. The assessee-company has not furnished all the required factual information so as to examine this issue in detail and come to reasonable conclusion. Therefore, it is inferred that the assessee has no explanation to offer on these issues."

(emphasis, italicised in print, supplied)

9. The appellate authority, after elaborately considering the case placed by the assessee and also after looking into the valuation report dt. 15th Oct., 1999, had concurred with the conclusion reached by the AO. The conclusion reached both by the appellate authority and the AO has been confirmed by the Tribunal in the order impugned. Therefore, if on a careful analysis of the material placed, the AO, the appellate authority and the Tribunal, have not believed the case pleaded by the assessee, in our view, the said finding is not liable to be interfered with in exercise of our power u/s 260A of the Act. It is not permissible for this Court to reappreciate the evidence over and again and come to the different conclusion. It is only in case of errors of substantial question of law, this Court can upset the finding recorded by the Tribunal. We are unable to accede to the submissions of Sri Sarangan that the finding recorded by the Tribunal that the transaction in question is a sham and colourable transaction, is a perverse finding. In our view, in the facts and circumstances of the case, the Tribunal and also the subordinate authorities were fully justified in not accepting the case pleaded by the assessee for grant of depreciation. The machinery/equipment, as it could be seen from the orders impugned and also the valuation report dt, 15th Oct., 1999, given by Sri S. Raja Rao, chartered engineer and registered valuer, were all embedded to the earth in the Vijayawada Thermal Power Station of APSEB. It is useful to refer to the relevant portion of the valuation report, which reads as hereunder:

"This is the brief description of the Water Treatment Plant that has been installed at this place.

The chief engineer of the plant Sri Seetharamaih was kind enough to permit us to inspect the water treatment plant and he requested the chief chemist to send a person who is familiar with the matter, to accompany us. Accordingly, Sri A. Sudhakar Rao, senior chemist, showed the equipment and tanks and was present

during the inspection of this plant on 23rd Aug., 1999. Sri. H.V. Chidananda and Sri Govinda Rao of AVASARALA Group were also present during inspection.

Permission was also granted by the chief engineer to take photographs of the pollution treatment plant installed at the above place. Accordingly, photographs were taken and these are enclosed herewith as a part of the report.

To confirm the existence of this plant, a certificate has also been issued by the Andhra Pradesh Electricity Board on 29th Sept., 1995, that these equipments have been installed at the above place. This letter is signed by SAO (RE), APSEB."

10. From the reading of the said report relied upon by the assessee, it is doubtful whether the machinery/equipment in question could be detached and removed from the place where it has been installed. In this background, if the Tribunal and the subordinate authorities have come to the conclusion that it is not possible to identify the machinery/equipment and also have recorded a finding that the assessee did not co-operate in the course of the assessment proceedings, in our view, the said conclusion reached by the Tribunal and subordinate authorities cannot be found fault with by us in exercise of the our power u/s 260A of the Act. Sri Sarangan repeatedly submitted that APSEB being a statute of Government of Andhra Pradesh has not denied both the sale and the lease transaction in question and it was not permissible for the AO and the Tribunal to go beyond the said transaction, we find it difficult to accede to his submission. The AO, in our view, is entitled to go into the genuineness or otherwise of the transaction entered into for the purpose of determining, whether any attempt is made by the assessee to avoid payment of tax. If an instrumentality of the State or the Department of the State, is one of the parties to the transaction, it may be one of the circumstances that may be taken into account by the AO while considering the claim regarding the genuineness of the transaction, but it cannot be conclusive in nature which will bind the AO. In this instant case, as noticed by us earlier, all the three authorities have come to the conclusion that the transaction in question is a colourable transaction. Even we are unable to appreciate as to what prompted the assessee to purchase secondhand machinery/equipment, which never came to be moved from the place where it was located by APSEB and again to lease it back to the APSEB on the same day. As rightly observed in the orders impugned, the sale agreement only refers to the machinery/equipment described in the invoices enclosed with the sale agreement. Invoices were never produced before the authorities for the purpose of identification. Agreement of lease though refers to machinery/equipment as mentioned in the schedule given to the agreement and also Annexure-A appended to the schedule, the schedule does not set out the details of the machinery/ equipment. Annexure-A only refers to the rentals. It is true that so far as the sale of "movable property" is concerned, the document is not required to be registered. Section 2(6) of the Registration Act, which defines "immovable property" states that the things attached to earth or permanently fastened to it, or anything which is attached to the earth is also a "immovable

property". It is useful to refer to the said provision, which reads as hereunder;

"2(6). "immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to do anything which is attached to the earth, but not standing timber, growing crops nor grass."

However, Section 17(1)(d) of the Registration Act requires that lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent should be registered. In this connection, it is useful to refer to Sections 17(1)(b) and 17(1)(d) of the Registration Act, which read as follows :

"17(1)(a)xxx xxxx

17(1)(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

17(1)(c) xxx xxx

17(1)(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent."

11. The report of the valuer, referred to by the Tribunal, shows that the machinery/equipment are embedded or attached to the earth. Therefore, we are unable to accede to the submission of Sri Sarangan that the Tribunal has erred in law in not relying upon the transaction of sale and lease back of the machinery/equipment is not a genuine transaction on the ground that the said documents were not registered. In the facts and circumstances of the case, it is not possible to take the view that the Tribunal was not justified in holding that the transaction in question is not in the nature of tax planning adopted by the assessee intending to avoidance of tax liability by so arranging its commercial affairs so that charge of tax is distributed. As noticed by us earlier, the taxing authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the assessee has chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of the relationship. However, the only restriction is that the legal effect of the transaction should not be displaced by probing into the "substance of the transaction". Therefore, while every person is entitled to so arrange his affairs as to avoid taxation, the arrangement must be real and genuine and not a sham or make-believe one. In the instant case, the Tribunal, the appellate authority and the AO have recorded a finding that the transaction in question is not real and genuine; it is not in the nature of a tax planning which is within the framework of law. The finding recorded by the authorities referred to above does not suffer from any error, much less, an error involving a substantial question of

law. Therefore, we are of the view that the Tribunal, having regard to the facts and circumstances of the case was fully justified in relying upon the principle enunciated by the Hon''ble Supreme Court in the case of McDowell & Co. Ltd. (supra). It is useful to refer to the observation made by the Hon''ble Supreme Court (Chinnappa Reddy, J., with other Hon''ble Judges of the Court) at p. 160, which reads as hereunder :

"In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it."

Again at p. 171 (Ranganath Mishra, J., with other Hon''ble Judges of the Court) has observed as follows :

"Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay taxes honestly without resorting to subterfuges."

We are of the opinion that even on facts, the conclusion reached by the Tribunal cannot be found fault with.

12. In the facts of this case, we are inclined to take the view that while APSEB was interested in securing financial assistance by way of loan and for the said purpose that machinery/equipment were offered as a security by creating the documents in question to assure repayment of the loan advanced, the appellant found it convenient to enter into such a transaction as a device adopted to avoid payment of tax. Therefore, the Tribunal and the subordinate authorities were fully justified, taking into several circumstances referred to by them in the orders impugned, to determine the nature of the new and sophisticated acumen adopted to avoid payment of tax legitimately due to the State. In a matter like this, we consider that it is the duty of this Court not to give judicial vindication to such an act of avoidance of payment of tax in the guise of sophisticated use of language as "tax planning".

13. We are of the view that the decision in the case of Arvind Narottam (supra), relied upon by Sri Sarangan, is of no assistance to him. No doubt, in the said decision, both the Hon''ble Chief Justice (R.S. Pathak, J.,) who delivered the main judgment and Hon''ble Mr. Justice Sabyasachi Mukharji who agreed with his view, decided the case on the language of the deed of settlement, which came up for consideration before the Court in the said case. The observation made by Hon''ble Mr. Justice Sabyasachi Mukharji in the said case, on which considerable reliance is placed by Sri Sarangan, is of no assistance to him. However, it is useful to refer to the said observation, which reads as hereunder:

"Dr. V. Gauri Shankar, appearing on behalf of the Revenue, made an appeal before us stating that we should really construe the three trust deeds together and see "the game of the hidden purpose" behind these trust deeds which were, in fact, for the sole and exclusive benefit of the assessee. He drew our attention to the observations of Justice Chinnappa Reddy, with which other learned Judges of the Full Bench agreed in McDowell and Co. Ltd. Vs. Commercial Tax Officer, . He invited us to hold that having regard to the taxing statute, the tax avoidance device should be exposed, Justice Chinnappa Reddy has noticed the change in judicial attitude to tax avoidance devices. Justice Reddy mentioned that in the country of its birth, the principles of Westminster, of condoning tax avoidance have been given a decent burial. In that very country, the phrase "tax avoidance" is no longer condoned or looked upon with sympathy.

It is true that avoidance in an underdeveloped or developing economy should not be encouraged on practical as well as ideological grounds, one would wish, as noted by Sri Reddy, J., that one could get the enthusiasm of Justice Holmes that taxes are the price of civilization and one would like to pay that price to buy civilization. But the question which many ordinary taxpayers very often, in a country of shortages with ostentatious consumption and deprivation for the large masses, ask is, does he with taxes buy civilization or does he facilitate the waste and ostentation of the few. Unless waste and ostentation in Government spending are avoided or eschewed, no amount of moral sermons would change people's attitude to tax avoidance.

In any event, however, where the true effect on the construction of the deeds is clear, as in this case, the appeal to discourage tax avoidance is not a relevant consideration. But since it was made, it has to be noted and rejected. With these observations I agree."

Therefore, we are of the view that the Tribunal was fully justified, in the facts and circumstances of the case, applying the principle laid down in the case of McDowell (supra).

14. In the light of the conclusion reached above, we are of the view that this appeal is devoid of any merits. Therefore, all the questions of law formulated are required to be answered against the assessee and in favour of the Revenue. Accordingly it is answered.

15. In the light of the decision made above, this appeal is liable to be rejected. Accordingly it is rejected. However, no order is made as to costs.