

IN THE INCOME TAX APPELLATE TRIBUNAL,
SPECIAL BENCH 'A', AHMEDABAD
Before Shri G C GUPTA, HON'BLE VICE PRESIDENT,
Shri D. K. TYAGI, JUDICIAL MEMBER and
Shri A. K. GARODIA, ACCOUNTANT MEMBER

Interest Tax Appeal No.36 / Ahd/2004
(Assessment year 1999-2000)

Gujarat Gas Financial Services Vs. ACIT, Circle 4,
Ltd., Ahmedabad
2, Shantisadan Society,
Near Parimal Crossing,
Ellisbridge, Ahmedabad

PAN/GIR No. : AAACG5584E

C.O. No.48/Ahd/2004
(Assessment year 1999-2000)

ACIT, Circle 4, Vs. Gujarat Gas Financial Services Ltd.,
Ahmedabad 2, Shantisadan Societ,
Near Parimal Crossing, Ellisbridge,
Ahmedabad

(APPELLANT) .. (RESPONDENT)

Appellant by: Shri S N Soparkar,
Ms. Urvashi Shodhan, ARs,
Respondent by: Shri Ravinder Kr., CIT DR,
Shri Rahul Kumar, Sr. DR

Date of hearing: 08.03.2013
Date of pronouncement: 17.04.2013

ORDER

PER SHRI A. K. GARODIA, AM:-

As per the order of the Hon'ble President, ITAT, the following
question was referred to the Special Bench for its decision:

“Whether on the facts and in the circumstances of the case, the assessee company is a financial company under the Interest Tax Act, 1974, liable to tax there under and if yes, then which portion of the income/receipts of the assessee company can be considered ‘chargeable interest’ under Interest Tax Act, 1974.

2. We feel it proper that we should note down the history of this case. From the records, it is seen that initially, reference was made by a Division Bench to Hon’ble President, ITAT for constitution of Special Bench in only one appeal under Interest Tax Act being Interest Tax Appeal No.36/Ahd/2004 for the assessment year 1999-2000 dated 22.09.2006. Thereafter, Special Bench was constituted by Hon’ble President, ITAT and the following question was referred to it:

“Whether in the facts and in the circumstances of the case, the assessee company, a non banking financial company (NBFC) u/s 45-I(f) of the Non Banking Finance Companies Act, 1997, is a financial company under the Interest Tax Act, 1974, liable to tax there-under on the revenue income earned on its financial transactions ?”

3. Subsequently, there was a request from the Revenue as per application dated 01.05.2007 and 19.06.2007 requesting for clubbing and fixing one more interest tax appeal and three income tax appeals along with this appeal for which Special Bench has already been constituted. As per the order passed by the Hon’ble President, ITAT on 28.6.2007, it was the direction of the Hon’ble President, ITAT that ‘Special Bench may club if deem it proper’. Thereafter, all these four appeals were also clubbed in Special Bench along with Interest Tax Appeal No.36/Ahd/2004 but the question before the Special Bench remained the same which was referred to the Hon’ble President, ITAT for formation of Special Bench in Interest Tax Appeal No.36/Ahd/2004, which is already reproduced in para 2 above. The special bench decided all these five

appeals as per order passed by it on 19.09.2008. Thereafter, the assessee filed appeal before Hon'ble Gujarat High Court against this decision of the Special Bench of the Tribunal and as per the judgement of Hon'ble Gujarat High Court rendered on 13.04.2010, the order of the Special bench of the Tribunal was set aside and the entire matter was restored back to the file of the Tribunal for afresh decision with the following direction:

“The Court considered the alternative of deciding those appeals which could be decided independently. However, on going through the impugned order of Tribunal, it is not possible to state to what extent the order of the Tribunal stands vitiated by application of wrong principles by referring to provisions under a different Statute. Hence, without formulating any question in any of the appeals, the impugned order of Tribunal dated 19th September, 2008 is hereby quashed and set aside and all the appeals being Interest Tax Appeal No.36/Ahd/2004 with interest Tax Appeal No.48/Ahd/2004 and Income Tax Appeal No.35/Ahd/2005 with Income Tax Appeal No.1095/Ahd/2006 with Income Tax Appeal No.515/Ahd/2005 are restored to file of the Tribunal for being decided afresh independently as separate groups under two different statutes. The appeals stand disposed of accordingly. The questions formulated in Tax Appeals No.153/2009 and 154/2009 are, therefore left unanswered.”

4. Subsequently, as per the order passed by Hon'ble President, ITAT, Special Bench was constituted for all these 5 appeals which included two appeals under Interest Tax Act and 3 appeals under Income Tax Act. As per the subsequent development and as per subsequent order of Hon'ble President, ITAT, 3 income tax appeals were de-linked from Special Bench and were referred to Division Bench and the question originally framed was also revised and as per such order, the present question before the Special bench of the Tribunal has come into picture.

5. At the time of hearing, it was submitted by the Ld. A.R. that on page 82 of the departmental paper book is the provisions of Section 2(5B) of Interest Tax Act, 1974. For the sake of ready reference, we reproduce the provisions of Section 2(5B) of Interest Tax Act, 1974, which read as under:

“(5B) "financial company" means a company, other than a company referred' to in sub-clause (I), (if) or (Hi) of clause (5A), being—

(i) a hire-purchase finance company, that is to say, 'accompany which carries on, as its principal business, hire-purchase transactions or the financing of such transactions; (if) an investment company, that is to say, a company which carries on, as its principal business, the acquisition of shares, stock, bonds, debentures, debenture stock, or securities issued by the Government or a local authority, or other marketable securities of a like nature;

(iii) a housing finance company, that is to say, .a company which carries on, as its principal business, the business of the financing of acquisition or construction of houses including acquisition or development of land in connection therewith;

(iv) a loan company, that is to say, a company [not being a company referred to in sub-clauses (I) to (Hi)] which carries on, as its principal business, the business of providing finance, whether by making loans or advances or otherwise;

(v) a mutual benefit finance company, that is to say, a company which carries on, as its principal business, the business of acceptance of deposits from its members and which is declared by the Central Government under section 620 A - of the Companies Act, 1956 (1 of 1956), to be a Nidhi or Mutual Benefit Society;

[(va) a residuary non-banking company [other than a financial company referred to in sub-clause (I), (H), (Hi), (iv) or (v)], that is to say, a company which receives any deposit under any scheme or arrangement, by whatever name called, in one lump sum or in instalments by way of contributions or subscriptions or by sale of units or certificates or other instruments or in any other manner; or]

(v) a miscellaneous finance company, that is to say, a company which carries on exclusively, or almost exclusively, two or more classes of business referred to in the preceding sub-clauses;].”

6. He further submitted that the principal activities of the assessee company is leasing which is not covered u/s 2(5B) and, therefore, the assessee company is not liable to Interest Tax. At this juncture, a query was raised by the Bench that as per clause (iv) of sub-section (5B) of Section 2 of the Interest Tax Act 1974, it is provided that a loan company which carries on as its principal business, the business of providing finance whether by making loan or advances or otherwise is also a financial company. Hence, even if the assessee's principal activity is leasing and such leasing is financial leasing then how the same is not covered under this clause (iv) of Section 2(5B) of Interests Tax Act 1974. In reply, it was submitted by the Ld. A.R. that this aspect was never examined at any level as to whether the leasing activities undertaken by the assessee was operating leasing or financial leasing. His submission was this that the assessee is engaged in operating leasing. Ld. A.R. also relied on the following judicial pronouncements:

- i) 296 ITR 126 (Del.) CIT Vs Eicher Good Earth Ltd.
- ii) 74 ITR 01 (Cal.) Nirmala Bala Sarkar Vs CIT

7. As against this, it was submitted by the Ld. D.R. that on page 28 of the decision of Special bench of the Tribunal in assessee's own case, it was noted by the tribunal in para 39 that the assessee vide his letter dated 06.12.2006 has submitted that the assessee was engaged in only financial leasing and not operational leasing. He further submitted that the contents of this letter were reproduced by the Tribunal on the same page.

He also submitted written submission of 10 pages, which are reproduced below:

“Government of India
office of the
Commissioner of Income-tax (DR),
(ITAT) -I 2ND floor, neptune tower,
Ashram road, ahmedabad.
phone No. (079) 26581651

No. CIT(DR)/ITAT-I/Gujarat Gas/2012-13 Date: 08.03.2013

To
The Hon'ble Members,
Income Tax Appellate Tribunal,
'A' Bench (Special Bench), Ahmedabad.

Respected Sirs,

Sub:- ITA No. 36/A/2004 & 48/Ahd/2004 for A.Y. 1999-2000 in the case of Gujarat Gas Financial Services Ltd., Ahmedabad.

Kindly refer to the above.

2 The CIT(A) has directed that the sum of Rs. 2,78,98,000/- being receipt of lease rental Income are excluded from income chargeable to interest tax. In this regard, it is pointed out that the lease income can be considered to be lease income as such, only if the lease is an Operating Lease. In case of a financial lease the transaction has to be treated as a loan transaction. The most important issue in this case is to determine the true nature of transaction before any conclusion can be drawn. The question of form over substance is vital to decide whether the lease transactions are operating leases or finance lease which are actually like loan transactions. The importance of substance over form is clearly brought in the following judgments of Hon'ble Supreme Court of India.

(i) CIT Vs. Durga Prasad More - 82 ITR 540 (SC) - Page No. 1 to 6 of paper book, (ii) Controller of Estate Duty Vs. Alope Mitra - 126 ITR 599 (SC) - Page No. 7 to 18 of paper book, (iii) Lalsingh Estate Finance Ltd. Vs. CIT - 216 ITR 644 (Gau.) - Page No. 199 to

203 of paper book.

3 The Supreme Court in the case of Asea Brown Boveri Ltd. Vs. Industrial Finance Corp. of India reported in (2006)154 Taxman 512(SC) has made a distinction between an operating lease and a financial lease and held that in case of finance lease, it is lessee who for all practical purposes is the owner of the assets and not the lessor. In fact, the financial lease is more like a loan (page no. 58 to 63 of paper book).

4 In that case the assessee took 56 cars on lease from Fair Growth Financial Services Ltd. for which, it deposited total security of Rs. 20,97,447/- with the lesser. The total rent payable for 5 years period amounted to Rs. 85,80,6634/- As per the terms of lease finance agreement, the assessee was required to pay 25% of the purchase price of the cars as security deposit carrying interest @ 5% per annum. In pursuance to the terms of this agreement the assessee had to deposit Rs. 20,97,447/- as mentioned above and against the balance amount, the assessee was required to pay Rs.85,35,379/- as lease during the period of 5 years. Fair Growth become a notified party under Sub-Section 2 of section of Special Court (Trial of offences Relating to Transaction in securities Act, 1962 due to certain illegal transactions and the and the Industrial Finance Corp. of India(IFCI) became the custodian of the assets belonging to Fair Growth . The assessee company continued to make the payment to IFCI in place of Fair Growth as per the Lease Finance Agreement. An amount of Rs. 30,96,948/- was paid by the assessee to Fair Growth till December, 1992 while the amount of Rs. 44,612,273/-was paid to the custodian IFCI. The assessee made a communication to the custodian clarifying that the assessee would be entitled under the agreement to the amount on account of security deposit and interest accrued thereon at the time of buy-back of purchase of leased assets. Accordingly, it forwarded a cheque of Rs. 17,800/- in their favour and final settlement of the dues under the lease agreement. The Special Court u/s. 10 passed an order to handover the possession of all the 56 cars to the custodian within one week from date of the order since the assessee has failed to make the payment as per the lease agreement. The assessee has taken a plea before the Special Court that it was a case of lease finance but the said plea had been rejected on the ground that in the pleadings the assessee had termed the agreement as "lease agreement". The matter was carried in appeal. In appeal the Supreme Court posed the question

for adjudication whether the agreement between the parties was a finance lease or not. Various meaning of the term finance lease etc. were referred to and discussed:

(i) *Accounting and Finance by R. Brockington (Pitman publishing Universal Book Trder, 1996 at page 136)*

"A Finance Lease is one where the Lessee uses the asset for Substantially the whole of its useful life and the lease payments are calculated to cover the full cost together with interest charges. It is thus a disguised way of purchasing the asset with the help of a loan. SSAP 23 required that assets held under a finance lease be treated on the balance sheet in the same way, as if they had been purchased and a loan had been taken out to enable this" (Emphasis supplied)

(ii) *Lease financing & Hire Purchase by Dr. J.C. Verma (4th Edition, 1999 at (Page-33)*

"Financial lease is a longer term lease on fixed assets, it may not be cancelled by either party. It is a source of long term funds and serves as an alternative of long term debt financing. In financial lease, the leasing company buys the equipment and leases it out to the use of a person known as the lessee It is a full pay out lessor that exceeds the purchase price of the leased property and finance cost.

Financial lease has been defined by International Accounting Standards Committee as a lease that transfers substantially all the risks and rewards incident to ownership of an asset. Title may or may not eventually be transferred. Lessor is only a financier and it is not interested in the assets. This is the reason that financial lease is known as full payout lease where contract is irrecoverable for the primary lease period and the rentals payable during which period are supposed to be adequate to recover the total investment in the asset made by the lessor" (iii) *Lease Financing & Hire*

Purchased by Vinod Kothari (Second Edition, 198 at Pages-6&7)

"A financial lease is a contract involving payment over an obligatory period of specified sums sufficient in total to amortise the capital outlay of the lessor and give some profit.

An operating lease is an other type of lease that is to say, where the asset is not wholly amortised during the not-cancellable period, if any, of the lease and where the lessor does not rely for his profit, on the rentals in the non-cancellable period".

5. After considering the aforesaid definitions of lease finance, the Supreme Court observed that following are the features of the financial lease

1. The asset is use specific and is selected for the lease specifically. Usually, the lessee is allowed to select it himself.
2. The risks and rewards incident to ownership are passed on to the lessee. The lessor only remains the legal owner of the asset.
3. Therefore, the lessee bears the risk of obsolescence.
4. The lessor is interested in his rentals and not in the asset. He must get his principal back alongwith interest. Therefore the lease is non cancellable by either party.
5. The lease period usually coincides with the economic life of the asset and may be broken into primary and secondary period.
6. The lessor enters into the transaction only as a financier. He does not bear the costs of repairs, maintenance or operation.
7. The lessor is typically a financial institution and cannot render specialized service in connection with the asset.
8. The lease is usually full-pay-out, that is, the single lease repays the cost of the asset together with the interest.

6. Finally, their Lordships expressed their opinion at Page-4 in Para-10 order as under :

"10. In our opinion, financial lease is a transaction current in the commercial world, the primary purpose whereof is the financing of the purchase by the financier. The purchase of assets or equipments or machinery is by the borrower. For all practical purposes, the borrower who chooses the property to be purchased takes delivery enjoys the use of occupation of the property, bears the wear and tear, maintains and operates the machinery/equipment, undertakes indemnity and agrees to bear the risk of loss of damage, if any. He is the one who gets the property insured. He remains liable for payment of taxes and other charges and indemnity. He cannot recover from the lessor, any of the abovementioned expenses. The period of lease extends over and covers the entire life of the property for which it may remain useful divided either into one term or divided into two terms with clause for renewal. In either case the lease is non-cancellable. " 7. Perusal of the above observations clearly reveals that in case of financial lease, it is the lessee who becomes the owner of the property. In view of this judgement, in case of finance lease, it is that the transaction is like a loan transaction where the lessor has only financed the asset and earns interest by way of lease rentals.

8. It would be seen that in the instant case the assessee is a finance company and all the observations of the Supreme Court in the case of Asea Brown Browery (*supra*) are also applicable to the lease entered into by this company.

1. The assets on which lease agreement are entered into are not selected by the assessee company, (page 98 of the paper book shows in para 2 that the asset has been identified as per the specifications of the lessee. This has further been clarified by clause 5.9 of the sample agreement where it has clearly been mentioned that the lessee has made the selection of machineries / equipments - paper book page 101) but are selected by the lessee companies.

2. The assessee company does not continue with the ownership of the asset after the period of lease but the same are transferred to the lessee at the end of lease period.

3. The lessee bears the risk of obsolescence.

4. Lease is not cancelable as lessor is interested in lease rentals and not in the asset.

5. It is noted that the lease period is coinciding with the economic life of asset as given in paper book page no. 110 clause 18.3 which provides a fixed term.

6. (a) Repairs and maintenance are the sole responsibility of the lessee as given in clause (9) (paper book page no. 103).

(b) Insurance policy is to be taken out by the lessor but the premium are to be paid by the lessee as given in clause (11) (page 104 of paper book).

In view of the above it is clear that the appellant was only interested in the lease rentals and the whole agreement was designed as a finance agreement. This contention is further supported by the submission of the assessee itself made by its letter dated 06.12.2006. This letter quoted in the order of the special bench of the ITAT dated 19/09/2008 at page no. 28 in para 39 stated as under:

"We refer to the hearing in our cases and are submitting herewith following papers.

1. Note on Finance and operational lease-Annexure-1 2 Memorandum of Articles Annexure-2

3. Three agreement of Hire Purchase transaction- Annexure-3

4. One agreement of Lease transaction-Annexure-3 5. One agreement of lease transaction-Annexure-4

We hereby confirm that Bad debt has been written off in the accounts during the financial year 2000-01, and accordingly accounts have been prepared and finalized.

"We further confirm that company mainly involves in finance lease and not operating lease as stated in the submission before CIT(A). This is duly stated in the attached note on leasing transactions of the company"

9. The note appended to this letter as Annexure 1 also says so. It reads as under-

/. Note on classification of leases by Gujarat Gas Financial Services Limited.

Accounting Standard 19(leases) defines the finance and operating leases. The standard came in effect from 1/4/2001. Gujarat as Financial Services(GFSL/Company) has classified its leased assets as per definitions given under AS-19.

ii. Relevant abstracts from AS-19 is reproduced below:-

"The classification of leases adopted in this statement is based on the extent to which risks and rewards incident to ownership of a leased asset lie with the lessor or the lessee. Risks include the possibilities of losses from idle capacity or technological obsolescence and of variations in return due to changing economic condition. Rewards may be presented by the expectation of profitable operation over the economic life of the asset and of gain from appreciation in value or realization of residual value. "

At the inception of the lease the present value of the minimum lease payments amounts to at least substantially all of the fair value of the leased asset

In accordance with the provisions of Accounting Standard 19 on leases issued by the Institute of Chartered Accountants of India all transaction entered by the assessee are classified as Finance leases for this year and not operating lease, this is because substantially all the risks' are borne by lessee, and also as the same assets is not offered to various parties from time to time as done in operating lease.

Prior to Accounting Standard 19, the company followed the recommendations of the Institute of Chartered Accountant of India contained in the Guidance not on accounting for leases "

Looking at the aforesaid contention the ITAT Special Bench observed as under on Page 30 of the said decision:

"When the assessee itself has stated and claimed that it was a finance lease and not operating lease what more facts are required to entain the ground,

42. In these circumstances there is no merit in assessee's claim that it is not financial company to which the provisions of Interest Tax Act would apply. It would be residuary financial company cumulatively engaged almost exclusively in one or more businesses enumerated in section 2(5B) of the Act."

10. The above finding that all the lease agreements entered into by the appellant company were finance leases is a finding of fact by the Tribunal. It is a settled law that Tribunal is the highest fact finding authority and its decision on facts cannot be tampered with by the courts unless it is proved that the findings of the facts are perverse. In the instant case, the special bench of the IT AT has given a finding of fact that the lease agreements entered into are finance leases. This being a finding of fact and not being perverse is settled and thus it becomes clear that the lease agreements entered into by the appellant company are finance

11. The appellant company before the CIT(A) during income tax proceedings vide its letter dated 06.02.2006 (quoted above) had stated that it was a finance company and all the leases entered into are finance leases. The company did a turn around and filed a completely opposite statement during interest tax proceedings before the CIT(A). In fact, vide its letter dated 09.01.2008, photo copy of which is enclosed at page 42 to 45 of the paper book in paragraph 6 has stated in respect of lease as under: -

"Lease:

The main activities of the company is leasing and the company is granting various machineries to parties and equipments relating to distribution of gas by them on lease. The lease transactions entered into by the company are mainly in the nature of operating lease "

It is clear that the company has taken different stands before the CIT(A) in Income tax proceedings and during the Interest tax proceedings only to obtain favourable decisions.

12. Whether the leases are operating lease or a finance lease is a question of fact. It is a settled law that one cannot probate and reprobate at the same time. Reliance in this regard is placed on the following decisions which are quoted on page No. 230 of paper book.

1. Lalsingh Estate Private Limited Vs CIT - 216 ITR 644 (Gauhati)

2. *CGT Vs. S. Lakshmana Sarma - 220 ITR 568 (Kerala)*
3. *CGT Vs. Surendra Paul - 256 ITR 173 (Calcutta)*
4. *N. Mangathayaramma And Others Vs. ITO - 255 ITR 127 (A.P.)*
5. *Reliance Industries Ltd. and another Vs. Union 258 ITR 143 (Delhi)*
6. *V. P. Talati Vs. ITO - 262 ITR 135 (Karnataka)*
7. *K. P. Gupta (HUF) Vs. CWT 234 ITR 456 (M.P.) S.Diwan Enterprises Vs. CIT - 246 ITR 571 (Delhi)*
13. *The claim of the assessee that it may take alternative plea to support its stands is not correct. It is settled law that alternative plea cannot be on facts. Reliance in this regard is placed on the following decisions which are quoted on page nos. 280 to 292 of the paper book.*
1. *Bhaiyalal shyam Behari Vs. CIT - 276 ITR 38 (Allahabad)*
2. *Bimal Kumar Damani Vs. CIT - 261 ITR 635 (Calcutta)*
3. *CIT Vs. Kulwant Kaur and Other - 121 ITR 914 (Delhi)*
4. *R. Dalmia (Deed.) Vs. CIT - 255 ITR 401 (Delhi)*
5. *CIT Vs. La-Medica - 250 ITR 575 (Delhi)*
14. *As far as the hire purchase agreement is concerned it would be seen that even the hire purchase agreement entered into by the company are also financial transaction. The Hon'ble Supreme Court in the case of Sundaram Finance Ltd. AIR 1966 SC 178 has held that finance obtained through hire purchase transactions was in fact a loan of money secured by right of seizure of goods.*
15. *The Circular No. 760 issued by the CBDT shown on page no. 138 & 139 of paper book clearly distinguishes hire purchase agreement into two categories - hire purchase agreement which are, in substance, in the nature of hire purchase, the receipts of hire charges would not be in the nature of interest hence not subject to interest tax. On the other hand, if the transactions are in substance in the nature of financing transaction, the hire charges should be treated as interest subject to Interest Tax. For determining the nature of transaction the circular has given certain guidelines in line with the decision of the Supreme Court. It would be seen that the hire purchase agreement by the appellant company is clearly in the nature of financial agreement. The sample hire purchase agreement as given on page No. 128 to 137 of the paper book clearly brings out that the appellant is into a financial agreement.*
16. *In view of the above, it is clear that both the transactions that of leasing and that of hire purchase entered into by the appellant is*

in the nature of financial transactions. As per the decision of the ITAT 'F' Special Bench Delhi in the case of Maruti Countrywide Auto Financial Services Vs. ITO reported in (2009) 120 TTJ (Del) (BB) 760 (2009) 29 SOT 151. The ITAT Special Bench has overruled the decision in the case of Bank of India V CIT 108 TTJ (Mum) 720 by ITAT Mumbai to hold that interest tax Act was applicable on lease transaction. In the case of Maruti Countrywide Auto Financial Services Vs. ITO (supra) it was held as under:

"19. It is clear from the above observations of the Special Bench that in a case where there is no dispute to the nature of transactions which are considered to be financial transactions in place of operational lease, the income earned by the assessee can be brought to tax as "interest" under s. 2(7) of Interest-tax Act and it is only the substance of the transaction which is to be considered and not the nomenclature given to it. We have no reason to differ from the aforementioned findings of the Special Bench in the case of Gujarat Gas Financial Services Ltd, (supra). Here, in the present case also, the transact/on of the assessee are already held to be the transactions in the nature of finance/loan transaction and, such findings have attained finality as mentioned in the question referred to this Special Bench." (Tage No. 29 of the paper book.).

Further, on comparison it is noted that in the case of Maruti Country Wide Auto Financial Services Ltd. the breakup of the income and deployment of asset is a mirror image of the appellant company i.e. Gujarat Gas Financial Services Ltd. Maruti Countrywide Auto Financial Services Ltd.

<i>Income break-up</i>		
<i>Income from lease</i>	<i>13,94,90,345</i>	<i>53%</i>
<i>Income from hire purchase</i>	<i>6,75,23,023</i>	<i>26%</i>
<i>Income from Government securities</i>	<i>67,69,432</i>	<i>3%</i>
<i>Income from inter-corporate dt.</i>	<i>1,49,39,205</i>	<i>6%</i>

<i>Income from bill discounting</i>	<i>1,48,74,208</i>	<i>6%</i>
<i>Income from bank term deposit</i>	<i>32,49,418</i>	<i>1%</i>

<i>Income from late payment</i>	<i>41,94,670</i>	<i>2%</i>
<i>Income from other interest</i>	<i>3,66,184</i>	<i>0%</i>
<i>Investment income</i>	<i>23,34,203</i>	<i>1%</i>
<i>Other income</i>	<i>61,03,106</i>	<i>2%</i>
<i>Total</i>	<i>25,98,43,794</i>	<i>100%</i>

Gujarat Gas Financial Services Ltd.

<i>Particulars</i>	<i>1998-99 Rupees</i>	<i>% of income</i>
<i>Schedule- 14 & 15 Income From Operations & Other Income:</i>		
<i>Lease</i>	<i>139,490,345</i>	<i>54%</i>
<i>Hire Purchase</i>	<i>67,523,023</i>	<i>26%</i>
<i>Bill Discount</i>	<i>14,874,208</i>	<i>6%</i>

<i>Interest on govt. securities</i>	<i>6,769,432</i>	<i>3%</i>
<i>Intercorporate deposit</i>	<i>14,939,205</i>	<i>6%</i>
<i>Interest on term deposit with Banks</i>	<i>3,249,418</i>	<i>1 %</i>
<i>Profit on sale of investment</i>	<i>2,138,374</i>	<i>1 %</i>
<i>Others</i>	<i>4,560,854</i>	<i>2%</i>
<i>Dividend</i>	<i>195,829</i>	<i>0%</i>
<i>Other Income</i>	<i>6,103,106</i>	<i>2%</i>
<i>Total</i>	<i>259,843,794</i>	<i>100%</i>

17. Thus it would be seen that the income in the case of Maruti Countrywide Auto Financial Services Ltd. and the appellant are

identical hence the decision of the Special Bench of the IT AT Delhi in that case would squarely be applicable on the linstant case.

18. Further it would be seen that the appellant is a finance company which is apparent from a plain reading of the section 45 of the RBI Act relating to Non Banking Finance Companies. The relevant provisions of the RBI Act relating to non banking finance companies are enclosed at paper book pages 65 to 81. On page 66 a financial institutions has been defined.

Thus it would be seen that any company entering into hire purchase agreement is clearly covered as a financial institutions by the sub clause section 45 I (c)(iii) of the RBI Act.

The leasing activities of the appellant company also clearly shows that it is also a financial institutions sub clause (i) of clause (c) of section 45 I of the RBI Act. In the instant case as the appellant company is only entering into financial leasing and not operating leasing, thus the appellant company is only financing the money required to the lessee company and is earning interest on the principal amount so deployed by way of financing.

19. It is also seen that from the annual report of the appellant that the appellant is clearly a Non Banking Finance Company because it has taken RBI permission for the same. Back side of page 47 of the paper book may kindly be seen in this regard. Wherein it has clearly been mentioned in the annual report as under:

" RBI registration

It is heartening to note that your company -was successful in obtaining registration from

Reserve Bank of India alongwith the classification as a Lease & Hire Purchase company.

20. The activities of the company are mentioned in the director's report which is reproduced hereunder:

"Consumer Finance

The company made disbursements to the tune ofRs. 2719 lacs under Us consumer finance segment to 13981 customers. Out of this, Rs. 939 lacs was disbursed to 11487 customers for domestic and commercial natural gas connections, while Rs. 1780 lacs was disbursed to 2494 customers under Home Appliances and Vehicle finance schemes.

Corporate Finance

The company has disbursed Rs. 964.40 lacs to 61 corporate customers in medium and long term finance segment. The Resource & Planning Management Cell has achieved a disbursement of Rs. 6040 lacs during 1998-99. "

21. The activities of the appellant company have been presented in the paper book filed by the appellant which is enclosed in the departmental paper book in page no. 293 to 316. It would be seen on page no. 300 in the paper book that it has been mentioned the activities of the company has been

"Registered with non-deposit taking NBFC.

Primarily engaged in providing financial assistance to domestic and industrial customers of GGCL for availing gas connection by way of lease / HP.

Provides consumer finance for purchase of two wheelers and four wheelers.

Earlier involved in bill discounting and ICD lending, which it has now been discontinued."

22. The appellant is clearly a financial company within the meaning of section 5B of the Interest Tax Act, 1974 because its principle business is providing finance by way of providing financial lease. As would be evident some the facts that the lease income of the appellant company are 54 % of its total income. Further, it would be seen that in the case of Maruti Country wide auto finance (supra) the composition of income of the appellant company is identical to that of Maruti Countrywide Auto Finance Services Ltd. In that case it has been decided that Interest Tax Act was applicable on the lease income earned by the assessee.

In the case of CIT Vs. Motor & General Finance Ltd. reported in 327 ITR 530 (Del.) which is enclosed at pages 31 to 41 of the paper book. It has been held by Delhi High Court that Interest Tax Act is clearly applicable on interest portion of the lease rental in case of finance leases. In view of the above Interest Tax Act would also apply to the appellant company as it is a financial company.

23. Further in the case of Jindal Lease Finance Ltd. Vs. ACIT reported in (2005) 94 TTJ (Del) 452 dated 6/1/2005 it has been held that Interest Tax Act is applicable on financing done through hire purchase agreement.

In view of the above it is clear that Interest Tax Act is clearly applicable to the income earned by way of interest by the appellant company.

Submitted for your kind consideration.

Sd./-
(RAVINDRA KUMAR)
Commissioner of Income Tax (DR),
(ITAT)-I, Ahmedabad.”

8. He further submitted that on page 42-45 of the departmental paper book is a copy of letter dated 09.01.2003 filed by the assessee before Ld. CIT(A) in the course of income tax proceedings. In particular, our attention was drawn to page 43 of the paper book where it is stated by the assessee that the lease transaction entered into by the assessee company are mainly in the nature of operating lease. He submitted that the assessee is taking contradictory stands. As per letter dated 09.01.2003 filed before Ld. CIT(A) in the course of income tax proceedings, the assessee claimed that the assessee is engaged in operating lease activities whereas it is noted by the Special bench of the Tribunal in assessee's own case on page 28 that as per letter dated 06.12.2006, it was stated by the assessee that assessee's main activity is granting finance lease. At this juncture, a query was raised by the bench as to whether any evidence or details are available on record to decide this aspect of matter as to whether activity of the assessee company is in the nature of finance lease or operating lease. It was pointed out by the bench that as per the guidance note issued by Institute of Chartered Accountants of India (ICAI), it has been stated that in case there is recovery of capital and return on the fair value of the asset during the lease term, the lease is to be classified as finance lease. The Bench wanted to know as to how much was the lease rent for the entire period of the lease and whether the same was sufficient to recover the principal portion of lease finance along with return of fair value of the asset. But none of the sides could produce any evidence or detail in this regard. However, it was submitted by the Ld. D.R. that on

pages 96-130 of the departmental paper book, is a copy of lease agreement and in particular our attention was drawn to page 114 of the paper book as per which the value of the machine leased is stated to be Rs.27.50 lacs and Rs.5,56,750/- totaling Rs.33,06,750/- and on page 115 of the paper book is the detail of lease rent to be received in the lease period of 7 years which is specified at Rs.29,36,424/-. He further drew our attention to page 119 of the paper book where the assessee has worked out internal rate of return i.e. IRR from lease and in respect of these two assets of Rs.33,06,750/-, IRR has been worked out @ 18.76%. He submitted that both these details are conflicting and confusing because if the total lease rent is only Rs.29,36,758 then it cannot be said that during the lease period, the assessee is able to recover the principal amount along with normal return of investment but if the IRR from lease finance is worked out @ 18.76% then it has to be accepted that assessee is able to do so. He further submitted that on page 119 of the paper book is the value of asset given but it is not clear as to whether the entire amount was financed by the assessee or only part thereof was financed and whether any security deposit was taken by the assessee from the lessee and in the absence of all these facts, it is not possible to work out as to whether it is a finance lease or operating lease. Both the sides placed reliance on various judgements but before deciding this factual aspect, the judgements' applicability cannot be examined. We feel it proper to first analyze the facts to examine as to whether the assessee is undertaking finance lease or operative lease but for doing so, complete facts are not available on record. We can analyze the applicability of various judgements cited by both the sides only after that.

9. In the light of the facts noted by us in above paragraphs, we find that sufficient material is not available on record to give the finding as to whether the assessee is engaged in granting operating lease or finance lease. The assessee has also taken contradictory stands in interest tax proceedings and income tax proceedings. In the interest tax proceedings, the assessee is claiming that it is engaged in operating lease but in income tax proceedings, the stand of the assessee is this that the assessee is engaged in granting financial lease. There is no clear cut finding of the authorities below also in this regard. Under this factual position, we feel it proper that the matter should go back to the file of the A.O. for a clear cut decision on this aspect of matter as to whether the assessee is engaged in granting operating lease or finance lease. Then only, one can decide the applicability of various judgements cited by both the sides. Therefore, we set aside the order of Ld. CIT(A) and restore the entire matter back to the file of the A.O. for a fresh decision. The assessee has to bring complete details and evidence on record to enable the A.O. to decide as to whether the assessee is engaged in granting operating lease or finance lease. If it is found that the nature of lease granted by the assessee is different in one case and different in another case then the total amount of operating lease and similarly total amount of finance lease has to be worked out in the light of details and evidences to be brought on record by the assessee and, thereafter, it has to be seen as to whether the principal activity of the assessee is financial leasing or operating lease. Here, we want to make it clear that finance lease activity should be considered as financial activity and operating lease activity should be considered as leasing activity. Other activities of the assessee of granting loan and advances etc., hire purchase and other activities

should also be grouped accordingly in these two categories i.e. finance lease or operating lease and thereafter, it has to be decided as to what is the principal activity of the assessee and then only, this aspect should be decided as to whether the assessee is a credit institution or not. The judgements cited by both the sides should be considered at this stage to decide the liability of the assessee in respect of interest tax and, therefore, at the present stage, we do not feel it necessary to analyze and discuss these judgements cited by both the sides.

10. In view of above decision, the question referred to us is left unanswered because in the absence of necessary and relevant facts as discussed above, it is not possible to answer this question.

11. In the result, cross appeals of the assessee and the revenue are allowed for statistical purposes.

12. Order pronounced in the open court on the date mentioned hereinabove.

Sd/-	Sd/-	Sd/-
(G. C. GUPTA)	(D. K. TYAGI)	(A. K. GARODIA)
VICE PRESIDENT	JUDICIAL MEMBER	ACCOUNTANT MEMBER
Sp		

Copy of the Order forwarded to:

1. The applicant
2. The Respondent
3. The CIT Concerned
4. The Ld. CIT (Appeals)
5. The DR, Ahmedabad
6. The Guard File

By order

AR,ITAT,Ahmedabad