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INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 751/Del/2016
(Assessment Year: 2010-11)

M/s. InterGlobe Aviation Ltd, Central Wing, Ground Floor, Thapar House-124, Janpath, New Delhi-110003 (Appellant)	Vs.	Deputy Commissioner of Income Tax (DCIT), Circle-11, New Delhi (Respondent)

PAN: **AABCI2726B**

Assessee by :	Shri Tarandeep Singh, Adv
Revenue by:	Shri H. K. Choudhary, CIT DR
Date of Hearing:	03/08/2022
Date of pronouncement:	10/08/2022

O R D E R

PER ANUBHAV SHARMA, J. M.:

1. The present appeal has been preferred by the Assessee against the order dated 20.01.2016 of Ld. CIT(A)-4, New Delhi (hereinafter referred as Ld. First Appellate Authority) arising out of an appeal before it against the assessment order dated 15.03.2013 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the AO, ld. Dy. CIT, Circle-11(1)), New Delhi (hereinafter referred as the Ld. AO).

2. Facts in brief are that the Assessee Company is engaged in the business of operation of low cost airlines in India under the name and style of "IndiGo" and for this purpose the company has obtained NOC from Ministry of Civil Aviation to operate schedule air transport services. It filed it's return of income on 27.09.2010 declaring total income at Rs.

Nil. It was observed in the scrutiny assessment that the Assessee had entered into purchase agreement with Airbus SAS, France for supply of 100 aircraft. The company had selected V-2500 engines manufactured by IAF International Aero Engineers AG, Switzerland (also referred as IAE hereafter) as supplier of engines which are to be fitted in the aircraft. As a consideration for selection of the IAE engines to be fitted in the aircraft to be purchased by the company, certain credited allowable to the assessee company from IAE on the delivery of such aircraft. As per the assessee the aircraft had been acquired on operating lease basis consequent to assigning the purchase contract between the company and respective lessor in favour of leasing/ finance company. It was further observed that the assessee company has received credits from IAE in respect of supplier furnished equipment on the actual delivery of the aircraft during the year amounting to Rs.2,77,36,49,716/- which have been spread over the period of lease and the proportionate amount aggregating to Rs. 2,04,70,44,328/- relatable to this year has been reduced from the expense charge for aircraft lease rentals while the balance of Rs. 5,67,95,30,805/- has been depicted as deferred credit under current liabilities. As per assessee, since the credit given by IAE are linked to the acquisition of the aircraft by the company, the amount being capital receipt, is not liable to tax. The assessee was asked to explain as to why the same should not be treated as revenue receipt and brought to tax net during the year under consideration.

3. The ld AO was not satisfied with the claim of Assessee and added a sum of Rs. 2,04,70,44,328/- as revenue receipt in the hands of Assessee. Further, as the Assessee had claimed to have paid an amount of Rs. 1,52,20,67,780/- under the head "supplementary lease rental" to the lesser based in Ireland and it was considered over and above the basic lease rent fixed in the lease agreement. The payments made by the Assessee were considered as chargeable in the hands of the recipient and the Assessee was found to be an Assessee in default for not deducting tax

at source u/s 195 of the Act and the exemption was denied and expenditure was disallowed u/s 40(a)(i) of the Act.

4. The ld CIT(A) following previous years assessment sustained additions and dismissed the appeal.

5. The Assessee is now in appeal before Tribunal raising following grounds of appeal:-

"1. That on facts and in law the Commissioner of Income-tax (Appeals) (hereinafter referred to as "the CIT(A)"} erred in holding that credit in the aggregate of 'Rs. 277,36,49,716/- (alleged to be subsidy) from suppliers of aircraft engines and other components is a revenue receipt (in the nature of commission) and taxable as such.

1.1 That on facts and in law the CIT(A) erred in assuming / exercising jurisdiction to enhance the Income assessed by the Deputy Commissioner of Income-tax (hereinafter referred to as "AO").

1.2 That on facts and in law the CIT(A) erred in not adjudicating upon the objection to the assumption of jurisdiction to enhance income assessed by the AO by Rs. 72,66,05,388/-.

2. That on facts and in law the orders passed by the CIT(A) and the AO are inter alia void-ab-initio and bad in law.

2.1 That on facts and in law the CIT(A) erred in not complying with the principles of natural justice rendering the impugned order as bad in law.

3. That on facts and in law the CIT(A) erred in upholding disallowance of Supplementary Lease Rent of Rs. 152,20,67,780/-.

3.1 That on facts and in law the AO/CIT(A) erred in not appreciating that payments made for Supplementary Lease Rents are not liable for Tax Deduction at Source under section 195 of the Income-tax Act, 1961 {hereinafter referred to as "the Act"}.

4. That on facts and in law the AO / CIT(A) erred in not appreciating that:

(a) Payments made by the assesse on account of Supplementary Lease Rent vis a vis lease agreements executed prior to 01st April 2007 are income exempt from tax under section 10(15A) of the Act.

(b) Payments of Supplementary Lease Rent vis a vis lease agreements executed after 01st April 2007 are exempt from taxation under the provisions of Agreement for Avoidance of Double Taxation between India and Ireland."

6. Heard and perused.

7. Ground No. 1 along with ground No. 1.1 and 1.2 are taken up together for determination. In regard to these grounds it was submitted that in Assessee's own case for Assessment Year 2012-13 in ITA No. 3224/Del/2017 and 2997/Del/2017 the Hon'ble Special Bench of the Tribunal has followed and upheld the earlier decision of the division bench for Assessment Year 2007-08 in ITA No. 2202/Del/2012.

8. The fact was not controverted by the ld Sr. DR. It can be observed from the copy of the order on record that the division bench vide its judgment dated 18.07.2016 in ITA No. 2202/Del/2012 for Assessment Year 2007-08 in para No. 9 and 9.1 held as under:-

"9. We have considered the arguments advanced by the parties and have gone through the material available on record as well as the decisions relied upon by both the parties. Since a conclusive finding on merits is being given by the learned CIT in the impugned order, it is relevant for us to examine the issue in dispute on merits. A perusal of the impugned order shows that it is accepted by the Ld. CIT that credits are being received by the appellant from IAE as a consideration for selection of the IAE engines to be fitted in aircraft. Ld. CIT however holds that these receipts are revenue in nature premised upon facts that ultimately the aircrafts were only taken on lease by the appellant and that the appellant itself credited these receipts by deducting the same from the expense of 'aircraft lease rental' in its Profit and Loss Account, It would first be relevant to consider the well-settled purpose test, which we need to keep into consideration while opinion upon the issue under consideration. In this regard Hon'ble Apex Court in case of Ponni Sugars & Chemicals (supra) has held as under:-

" The importance of the judgment of this Court in Sahney Steel & Press Work's Ltd.'s case (supra) lies in the fact that it has discussed and analysed the entire case taw and it has laid down the basic test to be applied in judging the character of a subsidy. That test is that the character of the receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply the purpose test. The point of time at which the subsidy is paid is not relevant. The source is immaterial. The form of subsidy is immaterial. The

main eligibility condition in the scheme with which we are concerned in this case is that the incentive must be utilized for repayment of loans taken by the assessee to set up new units or for substantial expansion of existing units. On this aspect there is no dispute. If the object of the subsidy scheme was to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the assistance under the subsidy scheme was to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account: Therefore, it is the object for which the subsidy/assistance is given which determines the nature of the incentive subsidy. The form of the mechanism through which the subsidy is given is irrelevant."

9.1 The learned senior counsel Shri Syali in his arguments has relied upon the decision of Hon'ble Delhi High Court in case of Bougainvillea Multiplex Entertainment Center Pvt. Limited (supra). The importance of this judgment is that in this case after considering the Hon'ble Supreme Court's decisions in the cases of Ponni Sugars (supra) and Sahney Steel (supra) and after applying the purpose test as laid down in these decisions, the Hon'ble Delhi High Court has been pleased to hold as under:

"31. The Revenue, however, argues in the matters at hand that the assessee cannot be allowed to treat the entertainment tax subsidy as capital receipts because the U.P. Scheme leaves it at liberty to utilize the finds in the manner it likes. In this context, it craves reference to following further observations of Supreme Court (appearing in Para No. 16) in the case of Ponni Sugars & Chemicals Ltd. (supra):-

"16. One more aspect needs to be mentioned. In Sahney Steel & Press Works Ltd.'s case (supra this Court found that the assessee was free to use the money in its business entirely as it liked. It was not obliged to spend the money for a particular purpose. In the case of Seaham Harbour Dock Co. (supra assessee was obliged to spend the money for extension of its docks. This aspect is very important. In the present case also, receipt of the subsidy was capital in nature as the assessee was obliged to utilize the subsidy only for repayment of term loans undertaken by the assessee for setting up new units/expansion of existing business." [Emphasis supplied]

32. The UP Scheme under which the assessee claims exemption to the extent of entertainment tax subsidy, claiming it to be capital receipt, is clearly designed to promote the investors in the cinema industry encouraging establishment of new multiplexes. A subsidy of such nature cannot possibly be granted by the Government directly. Entertainment tax is leviable on the admission tickets to cinema halls only after the facility becomes operational. Since the source of the subsidy is the public at large which is to be attracted as viewers to the cinema halls, the funds to support such an

incentive cannot be generated until and unless the cinema halls become functional.

33. The State Government had offered 100% tax exemptions for the first three years reduced to 75% in the remaining two years. Thus, the amount of subsidy earned would depend on the extent of viewership the cinema hall is able to attract. After all, the collections of entertainment tax would correspond to the number of admission tickets sold. Since the maximum amount of subsidy made available is subject to the ceiling equivalent to the amount invested by the assessee in the construction of the multiplex as also the actual cost incurred in arranging the requisite equipment installed therein, it naturally follows that the purpose is to assist the entrepreneur in meeting the expenditure incurred on such accounts. Given the uncertainties of a business of this nature, it is also possible that a multiplex owner may not be able to muster enough viewership to recover all his investments in the five year period.

34. Seen in the above light, we are of the considered view that It was unreasonable on the part of the Assessing Officer to decline the claim of the assessee about the subsidy being capital receipt. Such a subsidy by its very nature, was bound to come in the hands of the assessee after the cinema hall had become functional and definitely not before the commencement of production. Since the purpose was to offset the expenditure incurred in setting up 'of the project, such receipt (subject, of course, to the cap of amount and period under the scheme) could not have been treated as assistance for the purposes of trade.

35. The facts that the subsidy granted through deemed deposit of entertainment tax collected does not require it to be linked to any particular fixed asset or that is accorded "year after year" do not make any difference . The scheme makes it clear that the grant would stand exhausted the moment entertainment tax has been collected (and retained) by the multiplex owner meeting the entire cost of construction (apparatus, interiors etc. included), even if it were "before completion of five years".

36. As held by the Supreme Court in the case of Sahney Steel & Press Works Ltd. (supra), the character of the subsidy is to be determined having regard to the purpose for which it is granted. The "purpose test", referred to in Ponni Sugars & Chemicals Ltd. (supra) when applied to the case at hand, leaves no room for doubt that the assistance in the form of entertainment tax exemption is shown to have come in the hands of assessee to enable it to set up the new unit which renders it a receipt on capital account. The periodicity (year to year) of the subsidy, its source (collections from the public at large) and the form (deemed deposit) are irrelevant considerations.

37. The factual matrix in Ponni Sugars & Chemicals Ltd. (supra) is nearer home to the case at hand which is distinguishable from the case of Sahney Steel & Press Works Ltd. (supra). In Sahney

Steel & Press Works Ltd. (supra), the incentives were linked to production which is reason why the subsidy of sales tax was held to be operational subsidy or revenue in nature.

38. Indeed, in Ponni Sugars & Chemicals Ltd. (supra), the fact that the amount received as subsidy was required necessarily to be utilized only repayment of term loans for setting up of the new unit was one of the important actors taken into account for treating it to be capital receipt. The case at hand is not very different. As observed earlier, the subsidy is meant to liquidate the cost incurred in setting up of the multiplex cinema hall and for making it operational by installing the requisite apparatus. The flow of subsidy stops as soon as the expenditure on such account is met in entirety."

In the above decision Hon'ble Delhi High Court solely applying the purpose test as propounded by Hon'ble Supreme Court has negated the arguments raised by tax department placing undue importance on facts such as subsequent use of subsidy and that the subsidy was not linked to a particular fixed asset. In our considered opinion the decision of Hon'ble Jurisdictional High Court in Bougainvillea Multiplex Entertainment Center Pvt. Limited (supra) supports the claim made by the appellant that the receipt of credits from IAE are capital in nature. Shri Syali has highlighted the sequence of events starting right from Letter of Intent dated 01.06.2005 to the execution of lease agreement dated 15.12.2006. Ironically these agreements were also on records of the authorities below, however, the Ld. CIT instead of appreciating and giving importance to the purpose for which the credits were granted to the appellant, has given undue importance to the fact that ultimately the aircrafts were only taken on lease by the appellant and that the appellant itself credited these receipts by deducting the same from the expenses aircraft lease rental in its Profit and Loss Account. Decision of Bougainvillea Multiplex Entertainment (supra) clearly holds that subsidy need not be linked to a particular asset. Similarly netting off of the proportionate credits with the amount of lease rentals in the profit of the appellant is a mere utilization of the receipt. Merely because a capital receipt is utilized for incurring revenue expenditure it will not change the nature of capital receipt into a revenue item. As an example proceeds received from issuance of shares by a company may be utilized for daily working capital purposes, but the nature of receipts from issuance of shares will still be Capital in nature. In the case under consideration for a better accounting purposes the proportionate credits were netted off against the recurring lease rentals. Acceptably as pointed out by the appellant the accounting policy followed was in spirit with the AS-12 issued by ICAI. Ld CIT after having accepted that the credits were given to the appellant as a consideration for selection of IAE engines to be fitted in aircrafts manufactured by Airbus, which were also acquired by the appellant, should have held that the receipts are Capital in nature. Appellant's right to receive the a credits got triggered when the appellant made a selection of IAE engines, giving preference to the engines manufactured by other competitors of IAE. This right got crystallized when agreement date 19th October 2005 was executed between interglobe and IAE. Once choice of engine was made thereafter purchase agreement dated 18th November 2005 was executed

between interglobe and Airbus. We concur with submission of Shri Syali and that under no circumstance could have Interglobe escape with its liabilities to take delivery of Aircrafts from Airbus as per the agreed schedule. Assignment of right to purchase the aircraft by triggering Article 21 therein was only a modus operandi of acquiring the aircraft the aircraft with a finance option. Ld. CIT(DR) Dr. Prabhakant has merely reiterated the arguments taken by learned CIT in the impugned order. In his written note he has characterized the credits received from IAE as commission income. We do not concur with this submission of Ld CIT(DR). As per letter of intent an option was given to Interglobe: by Airbus for choosing the type of engine to be fitted in the aircraft, which Airbus will manufacture for Interglobe. Exercising this option interglobe selected IAE engines giving them importance over competitors of IAE. In absence of any services beep rendered by Interglobe to IAE we fail to appreciate, how can receipt of credits in the present case be termed as a commission income. ***We therefore reverse the finding recorded by CIT in the impugned order and hold that the credits received by the appellant from IAE are capital in nature."***

9. Hon'ble Special bench while considering the case of the Assessee for Assessment Year 2012-13 in ITA No. 3224/Del/2017 and 2977/Del/2017 in para No. 33.1.1 had acknowledged the aforesaid findings of the coordinate bench for Assessment Year 2007-08. The ld CIT(A) had disallowed the ground by following the order u/s 263 for Assessment Year 2007-08 thus the finding of the ld Tax Authorities Below cannot be sustained and grounds are decided in favour of the Assessee.

10. In regard to ground Nos. 2 and 2.1 it can be observed that the same are superfluous and are covered in the remaining ground so do not require any specific determination.

11. In regard to ground Nos. 3, 3.1 and 4 it was submitted on behalf of the Assessee that the disputed lease rent had two components. As to the extent of Rs. 55,44,84,803/-, in regard to lease agreement executed prior to 01.04.2007 and supplementary lease rent payment of Rs. 96,75,82,977/- according to lease agreement executed after 01.04.2007. According to the supplementary lease agreement executed prior to 01.04.2007 ld. counsel submitted that the special bench has followed and approved the decision of division bench for Assessment Year 2007-08 by holding that payment of supplementary rent in respect of lease

agreement executed prior to 01.04.2007 is exempted from tax in the hands of the lessor u/s 10(15)(A) of the Act and hence, there was no requirement to deduct TDS. In regard to the lease agreement executed after 01.04.2007 also the special bench judgment approved the claim of Assessee that payment of supplementary rent in respect of lease agreement executed after 01.04.2007 is not taxable in India considering the provision of Article 12 of India-Ireland DTAA. Therefore, there was no requirement to deduct TDS. Accordingly, it was submitted that disallowance made u/s 40(a)(i) were liable to be deleted but ld CIT(A) has approved the determination of issue by the ld AO. These facts remained uncontroverted by Revenue.

12. In this regard it can be observed that the coordinate bench for Assessment Year 2007-08 has observed in para No. 12, 12.1, 12.2, 12.3, as under:-

> *"12. We have considered the arguments advanced by the parties and also have gone through the material available on record as well as the decisions relied upon. As rightly submitted by the learned senior counsel that the claim for supplementary lease rent being exempt as per provision of section 10(15A) of the Act was inquired upon by the Assessing Officer during the course of original assessment proceedings. Thus this is not a case of lack of enquiry. We agree with the submissions made by the appellant that the payment of supplementary lease rent in the present case is not for provision of spares, facilities or any such services being rendered by the lessor in the present case. A coordinate bench of Delhi ITAT in the case of Sahara Airlines (supra) had considered identical issue and had held as under:-*
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> > *"10. The perusal of the above covenants of the agreement reveals that lessee was responsible to bear all the expenses in the course of the term of the lease on account of operational cost, repair and replacement, losses and other expenditure which were required to keep the aircraft in air-worthy condition. So the lessor was under no obligation to meet any expenditure or bear any loss in respect of the leased aircraft. Complete maintenance of the aircraft was the absolute responsibility of the lessee. The lessor was interested only in receiving the basic lease rent which could be utilised by them in the manner it liked and therefore, was income of the lessor which was exempt under section 10(15A) of the Act. But the supplemental rent was to be reimbursed in accordance with the terms of Article 13 of the agreement. The obligation to repair and keep the aircraft in the airworthy condition was that assessee and such obligation could be discharged either by paying directly to the repair agency without involving the lessor or by the manner as provided in Article*

13 of the agreement. Such agreement was made only to ensure that the leased aircraft is kept in airworthy condition. If the Lessee fails to maintain the aircraft in good condition, then the lessor, in such cases, could get the aircraft repaired out of the reserves. Further, the quantum of reserve depends upon the period of use of the aircraft and the right of reimbursement is only limited to the extent of reserve only. If the cost of repair exceeds the reserve, then such liability has to be borne by the assessee only.

11. In view of the above discussion, it is clear that the supplemental rent was paid and kept in the form of reserves only for meeting the expenditure which was to be incurred by the lessee to keep the aircraft in airworthy condition. Therefore, we are in agreement with the contention of the Id. Sr. DR that the payment by the lessee by way of supplemental rent was in connection with the operation of the leased aircraft. But that is not enough for holding that such payment fall within the exclusionary provisions of section 10(15A) of the Act. In order to fall within the ambit of such exclusionary provisions, there must exist the inextricable link between the expenditure regarding supply of spares or for use of any facility or for rendering of any service by the lessor and operation of the leased aircraft. Article 13 of the agreement does not provide for utilisation of reserve either for the supply of any spare parts or for utilisation of any facilities or for rendering of any services by the lessor. On the other hand, the terms of the lease clearly provide that it is the absolute responsibility of the lessee to bear all the expenses and the losses during the operation of the leased aircraft. It is not the case of the department that the lessor provided any spares to the lessee against such payments. Further, there is no material/evidence to suggest that the lessor ever provided for any of facility or service to the lessee against such payments. Merely because that the payment of supplemental rent was to meet certain types of operational cost, it cannot be said that such payment was attributable to any facility or service by the lessor.

…….

13. So the question that arises is as to what was intended to be excluded by the Legislature by amendment made by Finance Act, 1995 w.e.f. 1-4-1996. From the perusal of the memorandum explaining the provisions of Finance Bill, 1995, it appears that after the insertion of section 10(15A) in the statute, it was experienced by the Government that the non-resident companies were receiving payments in consideration of facilities or services provided/rendered by the lessors such as training to the pilots or other crew men, providing technicians etc. in the guise of leased rent. It is this mischief which was suppressed by the substitution of section 10(15A) w.e.f. 1-4-1996. This is manifest from the memo explaining the proposed Finance Bill, 1995. The relevant portion is quoted below (212 ITR (St.). 351):

……

From the above, it is crystal clear that the intention of the Legislature was to tax the payment made for spares, facility or services provided by the recipient. Therefore, the change in the law has to be understood in that context. So if any payment has to be brought within the exclusionary portion of section 10(15A) of the Act, then it must be established (i) that lessor either had supplied the spares or provided any facility or service in connection with operation of the leased already and (ii) the payment has been made by the lessee in consideration of such spares/facilities/services. Once it is agreed that the supplemental rent was within the ambit of original provisions of section 10(15A) then the onus is on the revenue to establish that such supplemental rent fell within the ambit of such exclusionary provisions. The Id. Sr. DR has not been able to point out any of the terms of the agreement on the basis of which it can be said that lessor was required to provide for spares, facility or services in connection with the operation of the leased aircraft. He has also not brought any material or evidence to suggest that lessor in fact. supplied any spare or provided any facility or service whatsoever in connection with the operation of the leased aircraft. Therefore, we are in complete agreement with the contention of the learned counsel for the assessee that the supplemental rent did not fall within the ambit of the exclusionary provisions of section 10(15A) of the Act Since prior to 1-4-1996 such payments were covered by the main provisions, as originally inserted, it can be said that such payments continued to be exempt under section 10(15A) of the Act. Consequently, the same was not chargeable to tax and, therefore, there was no obligation on the assessee to deduct the tax at source under section 195 of the Act. The question of holding the assessee as an assessee in default under section 201(1) of the Act, therefore, does not arise. Accordingly, we set aside the orders of C1T(A) on this issue and delete the demands raised for financial years 1996-97 to 1998-99 with reference to the payments made to ILFC. "

12.1 The above decision has thereafter also been upheld by the Hon'ble jurisdictional High Court of Delhi in the case of Jet Lite (India) Ltd. (supra), wherein Hon'ble Court has been pleased to hold as under:-

"47. Clause 13 of the Agreement between Sahara and ILFC shows that the lessor was not under obligation to meet any expenditure or bear any loss in respect of the leased aircraft. Complete maintenance of the aircraft was the absolute responsibility of the lessee. Clause 13.1 talks of Airframe Reserves. It states that the Lessor will reimburse Lessee from the Airframe Reserves for the actual cost of the completed scheduled major structural inspection and rectification of structural deficiencies (overhauls) of the Airframe (i.e., the complete 'O' check or equivalent if the aircraft is on a block 'O' maintenance system under Lessee's Maintenance Programme or V check level structural inspections carried out during a 'C check if the aircraft is on a phased 'D' check system under Lessee's Maintenance Programme), with any other partial structural overhauls and work performed for all other causes excluded, including those causes set forth in Article 13.4.

Reimbursement will be made up to the amount in the Airframe Reserve."

48. The IT AT has examined the object behind amending Section 10(15A) with effect from 1st April 1996. If any payment had to be brought within the exclusionary portion of Section 10(15A) of the Act, then it must be shown (i) that the lessor either had supplied the spares or provided any facility or service in connection with operation of the leased aircraft; and (ii) the payment has been made by the lessee in consideration of such spares/facilities/services. The IT AT has rightly pointed out that the supplement rental was within the ambit of the original provision of Section 10(15A) of the Act.

49. On facts the Revenue was unable to point out any clause in the agreement that required the lessor to provide facilities or services in connection with the leased aircraft. Therefore, the supplemental rent did not fall within the ambit of the exclusionary provisions of Section 10(15A) of the Act. Since prior to 1st April 1996 such payments continued to be exempted under Section 10(15A) of the Act, they were not chargeable to tax. Consequently, there was no obligation on the Assessee to deduct the tax at source under Section 195 of the Act. The question of holding the Assessee as an Assessee in default under Section 201(1) of the Act, therefore, did not arise.

50. Consequently, the Court affirms the order of the HAT deleting the additions made by the AO under Section 195. read with Section 40(a)(i) of the Act on account of the non-deduction of tax at source for the payment of supplemental lease rent to the various lessors, Le., ILFC, AMTEC, Malaysian Airlines and Lufthansa

12.2 The learned senior counsel is thus justified is drawing parity of facts between the present case and the case of Sahara Airlines (supra) as we observe that both the lease agreements are similar in terminology and intent. We further observe that even the Ld. CIT in the impugned order accepts that primary responsibility to maintain the aircraft is that of Interglobe. However thereafter no facts have been brought on record to demonstrate that payment for Supplementary Rent is towards provision of either spares, facilities of services in connection with operation of leased aircraft by the lessor. The learned CIT relies upon order .of assessment for AY 2008-09, however, even in that order no such material has been brought on record by the AO. As held by coordinate bench in case of Sahara Airlines (supra) to fall within the exception of section 10(15A) there must exist an inextricable fink between the expenditure regarding supply of spares or for use of any facility or for rendering of any service by the lessor and operation of the leased aircraft. This clearly has not been demonstrated by the learned CIT in the impugned order or by the AO in his order of assessment for AY 2008-09. Facts of the present case being similar to that of Sahara Airlines (supra), respectfully following the decision of Hon'ble Jurisdictional High Court we hold that payment of Supplementary Lease rent was exempt u s 10(15A) of the Act and the appellant was not required to deduct TDS thereon. As regards assumption of jurisdiction u/s 263 on this issue, we concur with the submissions made

by the learned senior counsel that once the relevant assessment order had been passed in consonance with the decision of a superior court then the same cannot be termed as erroneous or prejudicial to the interest of revenue The Hon'ble Jurisdictional High Court in the case of Honda Siel Power Products (supra) supports the appellant on this issue by observing as under:-

> *"18. From the aforesaid discussion, it is apparent that the expression 'prejudicial to the interest of revenue' appearing in section 263 has to be read in conjunction with the expression "erroneous" and that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of the revenue. In cases where the Assessing Officer adopts one of the courses permissible in law or where two views are possible and the income-tax Officer has taken one view, the Commissioner of Income-tax cannot exercise his powers under section 263 to differ with the view of the Assessing Officer even if there has been a loss of revenue. Of course, if the Assessing Officer takes a view which is patently unsustainable in law, the Commissioner of Income-tax can exercise his powers under section 263 where a loss of revenue results as a consequence of the view adopted by the Assessing Officer. It is also clear that while passing an order under section 263, the Commissioner of Income-tax has to examine not only the assessment order, but the entire record of the profits. Since the assessee has no control over the way an assessment order is drafted and since, generally, the issues which are accepted by the Assessing Officer do not find mention in the assessment order and only those points are taken note of on which the assessee's explanations are rejected and additions / disallowances are made, the mere absence of the discussion of the provisions of section 80- IB(13) read with section 80-1A(9) would not mean that the Assessing Officer had not applied his mind to the said provisions. As pointed out in Kelvinator of India Ltd. 's case (supra) when a regular assessment is made under section 143(3), a presumption can be raised that the order has been passed upon an application of mind. No doubt, this presumption is rebuttable, but there must be some material to indicate that the Assessing Officer had not applied his mind.*
>
> *23. In the facts of the present case, we find that there is no material to indicate that the Assessing Officer had not applied his mind to the provisions of section 80-IB(13) read with section 80-lA(9). The presumption that the assessment orders passed under section 143(3) passed by the Assessing Officer had been passed upon an application of mind, has not been rebutted by the revenue. No additional facts were necessary before the Assessing Officer for the purpose of construing the provisions of section 80-IB(13) read with section 80-!A(9). It was only a legal consideration as to whether the deduction under section 80HHC was to be computed after reducing the amount of deduction under section 80-lB from the profits and gains. There is no doubt that the Assessing Officer had allowed the deduction under section 80HHC without reducing the amount of deduction allowed under section 80-IB from the*

profits and gains. He did not say so in so many words, but that was the end result of his assessment order. Since he was holding in favour of the assessee, as has been observed in Hari Iron Trading Co.'s case (supra) and Eicher Ltd. 's case (supra), generally, the issues which are accepted by the Assessing Officer, do not find mention in the assessment order, it cannot be said that the Assessing Officer had not applied his mind. It cannot also be said that the Assessing Officer had failed to make any enquiry because no further enquiry was necessary and all the facts were ' before the Assessing Officer. Consequently, we are of the view that the decisions cited by the learned counsel for the revenue, wherein assessment orders were found to be erroneous for want of an enquiry or proper enquiry, would have no application to the present appeals. It is also true that the validity of an order under section 263 has to be tested with regard to the position of law as it exists on the date on which such an order is made by the Commissioner of Income-tax. From the narration of facts in the Tribunals order, it is clear that on the date when the Commissioner of Income-tax passed his orders under section 263, the view taken by the Assessing Officer was in consonance with the views taken, by several Benches of the Income-tax Appellate Tribunal. Therefore, the conclusion of the Tribunal that the Commissioner of Income-tax could not have invoiced his jurisdiction under section 263 of the said Act was correct As a result we answer the question against the revenue and in favour of the assessee by holding that the Income-tax Appellate Tribunal was correct in law in cancelling the order passed by the Commissioner of Income-tax wider section 263 and in restoring the order of the Assessing Officer by holding that the Assessing Officer had taken a possible view at the relevant point of time. The appeals are accordingly, dismissed. There shall be no order as to costs. "

12.3 Hon'ble High Court in its above judgment following its earlier Full Bench decision in case of Kelvinator of India reported in 256 ITR 1 (Del)(FB) = 2003-TII-19-HC-DEL-WR-LB

has also observed that once regular assessment is made u/s 143(3) of the Act. when a presumption can be raised then the order has been passed upon an application of mind. Since as on date of passing of the original assessment order and on the date of passing of the impugned order the position of law as narrated by this Tribunal in case of Sahara Airlines (supra) supported the fact that supplementary lease rentals are also exempt u/s 10(15A) of the Act, it cannot be said that there is any error in the order of assessment passed by the AO Moreover, the Hon'ble jurisdictional High Court has upheld the said view and it is the sole High Court decision on the issue as on date and, therefore, even otherwise no such error exists even today. We, therefore, hold that learned CIT was wrong in assuming jurisdiction u/s 263 on this issue Ground Nos. 2 and 2.1 of the appeal are therefore allowed in favour of the appellant."

13. Special bench has approved the same in regard to lease agreement for the period prior to 01.04.2007 in its order dated 03.09.2021 and held in para 41 as under:-

> *"41. As regards the issue relating to disallowance u/ s 40(a) (i) is concerned, we find from the details furnished by the Learned Senior Counsel for the Assessee that during the year under consideration, the assessee had incurred an expenditure on account of Supplemental Rent of Rs.61.81.04,551/- in respect to lease agreements executed prior to 1st April, 2007. The assessee had also incurred an expenditure on account of Supplementary Rent of Rs.276,28,59,861/- in respect of Lease Agreements executed after 1st April, 2007. We find the Tribunal in assessee's own case for A.Y. 2007-2008 had examined the nature of Supplementary Rent and it was held that payment of Supplementary Rent is nothing different than the character of basic rent which is also payable under the Lease Agreement to the Lessors. It was held that Supplementary Rent is not a payment made for use of spares, facilities or any services, whereas Basic Rent is a fixed amount. Supplementary Rent is determined taking into consideration the number of flying hours. Supplementary Rent, in our opinion, is a payment made for lease of aircraft. The Lease Agreement defines "Rent" as "means collectively Base Rent and Supplementary Rent". Therefore, respectfully following the decision of Tribunal for A.Y. 2007-2008 which has also been followed in subsequent years, we hold that payment of Supplementary Rent of Rs.61,81,04,551/- is exempt from tax in hands of Lessors as per provisions of section 10(15A) and hence, disallowance under section 40(a)(i) is not called for. However, the above figure is subject to verification by the AO."*

14. At the same time in regard to supplementary lease agreement executed after 01.04.2007 the Special Bench has made following observation in para 42 to 42.3 as under:-

> *"42. For Lease Agreements executed after 1st April, 2007, a claim was made by the assessee before the lower authorities that the income is not chargeable to tax in hands of Lessor under Article 12 of the DT AA between India and Ireland . We find the AO has not accepted this the reasons of which has already been reproduced at para 1.5 of the order.*
>
> *42.1. 257 ITA.Nos.3224 & 2977/Del./2017 M/s. InterGlobe Aviation Limited [IndiGo), Gurgaon. Cross border leasing of aircraft enjoyed a special exemption under section 10{15A) of the IT. Act. However, a sunset clause -as introduced by Finance Act, 2005 to provide that this exemption shall not be available for agreements entered after 1st April, 2007. In the aftermath of withdrawal of exemption the tax liability of the lessor is to be governed by the provisions of bilateral tax treaties. Learned Senior counsel for the assessee submitted that as per provisions of section 90 of the Act, provisions of DTAA shall apply to the extent they are beneficial. Under the DTAA the foremost consideration is whether the nonresident lessor has a permanent establishment (PE) in India as per*

Article 5 of the relevant. According to him, mere leasing of an aircraft which is located in India ought not to result in an existence of PE and there is also no such allegation made by the lower authorities in the present case. It is his submission that the definition of royalty under the Income Tax Act and Tax Treaty includes a consideration for use and right to use any commercial, scientific and industrial equipment and aircraft do arguably fall within this category of equipment and therefore the corresponding lease rentals may be characterized as royalty. However, certain tax treaties which India has entered into notably with Ireland it has explicitly excluded aircraft from the scope of Royalty. He drew our. attention to the relevant provision of DTAA between India and Ireland (Article 12) which are as under:-

> *"1. Royalties or fees for technical services arising in a Contracting State and paid to a resident of the other contracting State may be taxed in that other State.*
>
> *2. Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or fees for technical services.*
>
> *3. (a) The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph film or films or tapes for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of or the right to use industrial, commercial or scientific equipment, other than an aircraft, or for information concerning industrial, commercial or scientific experience;*
>
> *(b) The term 'fees for technical services" means payment of any kind in consideration for the rendering of any managerial, technical or consultancy services including the provision of services by technical or other personnel but does not include payments for services mentioned in Articles 14 and 15 of this Convention.*
>
> *4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 1 or Article 14, as the case may be, shall apply.*
>
> *5. Royalties or fees for technical services shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, a local authority or a resident of that State. Where, however, the person paying the royalties or fees for*

technical services, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties or fees for technical services was incurred, and such royalties or fees for technical services are borne by such permanent establishment or fixed base, then such royalties or fees for technical services shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties or fees for technical services, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last- mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention

42.2. In Para-41 above we have examined the nature of Supplementary Rent and it is held that payment of Supplementary Rent is nothing different than the character of basic rent. We find that Supplementary Rent is not a payment made for use of spares, facilities or any services. Supplementary Rent is, therefore, a payment made for use of Aircraft. As per provisions of Section 90 of the Income Tax Act, the provisions of a bilateral Tax Treaty will apply to the extent it is more beneficial to the tax payer. We find under Article 12(3)(a) of India-Ireland DTAA, the term "Royalty" is specifically defined to exclude from its scope payment of any kind for use of "Aircraft". We further find the tax treaty also incorporates a separate provision in Article-8 on profits from shipping and air transport. Article 8(1) reads as under:

"Profits derived by an enterprise of a contractor state from the operation of rental of ships or aircraft in international traffic and the rental of containers and related equipment which is incidental to the operation of ships or aircraft in international traffic shall be taxable only in that contractor State."

42.3 This Article states that profits from rental of Aircrafts is taxable only in state of residence of Lessor. We, therefore, find merit in the arguments of the Learned Senior Counsel for the Assessee that as per Articles 12 and 8 of the Tax Treaty with Ireland, profits derived by an enterprise of a contracting State from rental of Aircraft are taxable "only" in Ireland. Supplementary Rent of Rs. 276,28,59.821/- paid for Lease Agreements executed after 01.04.2007 are, therefore, not chargeable to tax in India. However, the above figure is subject to verification by the AO."

15. Thus, in the absence of any other distinction of facts or law being cited on behalf of the revenue, the grounds are decided in favour of the Assessee.

16. The appeal is allowed and impugned additions shall be deleted by Ld. AO.

Order pronounced in the open court on 10/08/2022.

-Sd/-	-Sd/-
(ANIL CHATURVEDI)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 10/08/2022
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi