

**आयकर अपीलीय अधिकरण “जी” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI**  
**BEFORE SHRI SHAMIM YAHYA, AM AND SHRI C. N. PRASAD, JM**

आयकर अपील सं./I.T.A. No. 5972/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2010-11)

Dy. CIT, Cent. Cir.-13, Room No. 1103, 11 <sup>th</sup> Floor, Old CGO Annexe Bldg., Mumbai-400 020	<b>बनाम/</b> Vs.	M/s. Golden Wings Pvt. Ltd. Malkani Chambers, Ground Floor, Nehru Road, Vile Parle (E), Mumbai-410 099
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACCG 7210 K		
<b>(Revenue)</b>	:	<b>(Assessee)</b>

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आयकर अपील सं./I.T.A. No. 6228/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2010-11)

M/s. Golden Wings Pvt. Ltd. Malkani Chambers, Ground Floor, Nehru Road, Vile Parle (E), Mumbai-410 099	<b>बनाम/</b> Vs.	Dy. CIT, Cent. Cir.-13, Room No. 1103, 11 <sup>th</sup> Floor, Old CGO Annexe Bldg., Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACCG 7210 K		
<b>(Assessee)</b>	:	<b>(Revenue)</b>

<b>Revenue by</b>	:	Shri T. A. Khan
<b>Assessee by</b>	:	Shri Prakash G. Jhunjhunwala

<b>सुनवाई की तारीख / Date of Hearing</b>	:	18.10.2017
<b>घोषणा की तारीख / Date of Pronouncement</b>	:	07.12.2017

**आदेश / ORDER**

Per Shamim Yahya, A. M.:

These are cross appeals by the Revenue and assessee arising out of the orders of the Id. Commissioner of Income Tax (Appeals) dated 28.07.2014 and pertain to the assessment year 2010-11.

2. The ground raised in Revenue's appeal read as under:

1. Whether on the facts and in the circumstances of the case and in law, the learned CIT(A) was justified in granting relief of Rs.51,00,000/- out of addition of Rs.1.50 crores claimed as incentive paid to Shri Pradeep Thampi, Managing Director of the assessee company, without appreciating the fact such payment was reimbursement of share capital contributed by him including interest and tax payable not allowable u/s. 37 of the I. T. Act, being capital expenditure?

3. The grounds raised in assessee's appeal read as under:

1. The Commissioner of Income Tax (Appeals) has erred in confirming the addition on account of under invoicing of Rs.42,89,213/- on the basis of email correspondence between the Director Mr. Pradeep Thampi and the customer.

2. The Id. Commissioner of Income Tax (Appeals) has erred in confirming the disallowance of incentive to Shri Pradeep Thampi Managing Director which was sustained only to the extent of Rs.99 lakhs for A.Y. 2010-11 and further CIT Appeal have deleted only disallowed of expenses of Rs.51,00,000/- instead of total deletion of Rs.1,50,00,000/- (Rs.75,00,000/- each for A.Y. 2009-10 & 2010-11).

Apropos issue relating to under invoicing of Rs.42,89,213/-

4. The assessee in this case is in the business of hiring charter plains and air taxi.

The assessee company has leased an aircraft "challenger 300" from Peel Aviation Limited, Ireland. In the assessment order, the Assessing Officer has noted that survey action u/s. 133A was carried out. During the course of survey, incrementing documents were impounded. A statement of Shri Pradip Thampi, Managing Director of the company was recorded. The Assessing Officer noted that in the statement, Shri Pradip Thampi accepted that Shri Lalit Modi is the defecto owner of the company. The Assessing Officer further referred that in the impounded material, page 11 of annexure A-3 refers to email conversation between Shri Pradip Thampi and Shri Lalit Modi. In the email, Shri Lalit Modi is replying to Shri Pradip Thampi about the

expenses and receipts in the books of the assessee company. In the same page, it is seen that the usage of the aircraft for South Africa Tour is 87.30 hours and the value of which is Rs.3,08,30,150/-. However, on verification of sales record in books of account of the assessee company, it was found that the assessee company has only recorded sale of Rs.2,65,40,937/- for 87.30 flying hours for South Africa Tour. From this, the Assessing Officer inferred that the assessee has under invoiced the usage of the aircraft for South Africa Tour by Rs.42,89,213/-. The assessee was given a show cause letter dated 19.3.2013. In the show cause, the assessee was asked to comment upon the discrepancy of Rs.42,89,213/- which has arisen because of figure of Rs.3,08,30,150/- being the value of 87.30 flying hours for South African Tour, reflected in page no. 11 of Annexure A-3 which was impounded during the survey action on the assessee company and Rs.2,65,40,937/- reflected in the books of account of the assessee company as the invoice value of 87.30 flying hours for South African Tour. Further, the assessee was also asked to explain the reply given by Shri Pradeep Thampi, which was that the figure of Rs.3,08,30,150/- is a quotation based on estimate, on the above discrepancy during the recording of his statement u/s. 131 of the I T Act, 1961 on 02.01.2013. The assessee was further asked to show cause as to why difference of Rs.42,89,213/- should not be treated as unexplained and added to the hire charges.

5. In response to the above show cause, the assessee replied vide letter dated 22/03/2013. The assessee's reply is reproduced as under:

*"The assessee has made lease agreement with Peel Aviation Ltd for a period of 7 years to make promotion of charter flight in India. The monthly lease rent arrived at USD 75,000. Since due to Mr. Pradeep Thampi knowledge & expertise in this field, they have given on lease without taking any deposit money. Over & above, it is mutually agreed between them that CWPL is going to make payment after meeting the day to day expenses and amount realized from the client who is going to utilize the operational services of charter plane in India.*

*During the South African Tour, the duration is from 23.03.09 to 25.05.09 the assessee does not have any inquiry for the charter plane & if the same had not been utilized for Peel Aviation Ltd. then the assessee might had incurred huge losses since irrespective of utilization of single flying hours In a month still they are liable to pay a fixed lease rent amount. A/so, the flying hour rate charged to Peel Aviation Ltd. on basis of prevailing / market rate.*

*The managing director of the assessee company had decided to let them at Rs.2,75,000/- per hour with the intention that whatever the sale proceeds will be received from them for that tour will be indirectly repaid towards their lease amount. Thus, the necessary to get the inflow to the tune of Rs.2,65,40,937/- will be automatically reduced from the assessee working capital.*

*In the competitive market, if this party had been introduced by someone else then, the assessee had to pay them incentive in the range of 7-10% approx. which they have saved.*

*Thus, the assessee had saved incentive figure on an average of 7-10% approx plus interest portion of 2.5% i.e., 15% on Rs.2,65,40,937/- the borrowing cost from the market. In the given circumstances, the billing made to Peel Aviation Ltd. is reasonable & there is no unexplained income to the tune of Rs.42,89,213/-.*

*Regarding, Mr. Pradeep Thampi statement that it was quotation based on estimate basis at the time of survey u/s, 133A. At that time, normally the person is not in position to answer certain queries of technical nature since he is not in good state of mind and due to lack of Income tax knowledge, he cannot answer certain queries."*

6. However, the Assessing Officer was not convinced. He held that in the statement so recorded Shri Pradip Thampi stated he would give explanation in two

days. The explanation was filed after 15 days. That in the explanation he stated that it is a quotation based on estimate basis. That the explanation given that rates were charged because of prevention of the aircraft from lying idle in the competitive market apart from interest cost on lease rental payment to peel aviation. The Assessing Officer held that the statements recorded u/s. 131 of the Act is evidentiary value. That the assessee has retracted from his original position of where quotation from an estimated basis to one where billing done to Peel Aviation of Rs.2,65,40,937/- has been justified. The Assessing Officer further held that when the assessee has been confronted with the evidence of email extract, onus is on the assessee to dispute with the tangible evidence. Under these circumstances, the Assessing Officer held that this is a case of under reporting of higher charges to the tune of Rs.42,49,213/-. Hence, the Assessing Officer invoked the provisions of section 145(3) and rejected the books of accounts and concluded that the profit is estimated after the addition of Rs.42,89,213/- to the total higher charge of the assessee company.

7. Upon the assessee's appeal, the Id. Commissioner of Income Tax (Appeals) referred to the statement recorded u/s. 131 of Shri Pradip Thampi and held as under:

5.3.4 A perusal of the above statements clearly shows that the appellant company is defacto owned and controlled by Shri Lalit Modi. The air craft was used by Shri Lalit Modi and his guests during South Africa tour and the value of the services was Rs.3,08,30,150/-. This was apparently subsequently booked in the appellant company's books at Rs. 2,65,40,937/-. There is no merit in the arguments of the AR figure of Rs. 3,08,30,150/- was merely a quotation based on estimation. The of the relevant period was recorded in the books which

shows that the invoice raised in the name of Shri Lalit Modi amounting to Rs. 49,79,5857- and Pee Ltd. amounting to Rs.2,15,61,352/-. Shri Lalit Modi is the defacto owner of the appellant company and in all likelihood of Peel Aviation Ltd. also. The action of Assessing Officer adding the under invoicing is confirmed.

8. Against the above order, the assessee is in appeal before us.
9. We have heard both the counsel and perused the records. We find that in this case assessee is a corporate entity. There is no finding that there is any change in the shareholding pattern or the control of directors in the company. Hence, the observation of the authorities below that the company belongs to Mr. Lalit Modi, is not based upon any cogent material. In the course of survey an email was found wherein there was a conversation between a director of the company Shri Pravin Thampi and Mr. Lalit Modi regarding the rates to be billed. The actual rates booked in the account were lower by Rs.42,89,213/- than what was mentioned in the email conversation. Shri Pradip Thampi was not in a position to give explanation for the email content at the time of survey and sought time to explain the same. The assessee's explanation later is that the email was only a quotation. This has not been accepted by the assessing officer. No case has been made out by the Revenue that the assessee company has charged a higher rate to other customers than the rate adopted in this case. When the rates charged are competitive with the charges billed to other customers, there cannot be any inference that the books of accounts of the assessee need to be rejected. The rates quoted in the email can by no stretch of imagination be

treated as the final bill, the receipt against which has been clandestinely received by the assessee. There is no mention of any incriminating cash, bank balance etc. found which can corroborate this hypothesis of the assessing officer. In the course of survey also it is not the case that Shri Pradeep Thampi had admitted that assessee company has received any clandestine amount. Thus, there is no case that any person had admitted the receipt of differential amount in the course of survey. The email conversation which has been explained to be a quotation, can by no stretch of imagination be treated as conclusive evidence that the assessee company has made under billing and received a sum of Rs.42,89,213/- which has not been disclosed in the books of accounts. This fact is more accentuated when it is noted that the rates charged are competitive and no case has been made out that it is lower than any rate charged to other customers. Hence in the background of aforesaid discussion, we are of the considered opinion that this addition has been made de hors any cogent material and, hence, the same is not at all sustainable. Accordingly, we reverse the order of the authorities below on this issue and delete the addition in this regard.

Apropos issue relating to disallowance of incentive payment.

10. On this issue, the Assessing Officer noted as under:

5.1 It is seen from the records of the assessee company that Shri Pradip Thampi, Managing Director, has been paid Rs 75,00,000 each in AY 2009-10 and 2010-11. The assessee company has stated that the same has been paid as an incentive to Shri Pradip Thampi. The statement was recorded u/s. 131 of the 1 T Act, 1961 on 02.01.2013 of Shri Pradeep Thampi, Director of the assessee company. In the statement, he stated that as per the instructions of Mr. Lalit

Modi, he was paid an incentive of Rs.75,00,000/- in financial year 2008-09 & 2009-10 each.

11. The assessee company was asked by the Assessing Officer to justify the reasonableness of the payment. The assessee company gave following response:

"Mr. Pradeep Thampi entered the world of Aviation in 1990 working under I AT A recognized travel agency. In 1990, he got himself acquainted with the first Air Taxi Operator. He joined as a General Manger for another Air Taxi operator based in Mumbai. After gaining knowledge, in 1994 formed an independent company ~ M/s. Executive Airways Pvt. Ltd. Worked full time as a director, chartering various types of aircrafts and helicopters from other operators all over India for his clientele and soon monopolized the charter business. He facilitated induction of various aircrafts for many corporate houses and managing their aircrafts. After successfully running the charter business for 14 years, he expanded the business and started a Non Schedule Charter Company - M/s. Golden Wings Pvt. Ltd. He inducted a jet aircraft on lease which was flown over globally for various customers till 2010"

12. However, the Assessing Officer was not satisfied. He held that the assessee has failed to substantiate that the services rendered by the Shri Pradeep Thampi to the assessee company are commensurate with the incentive drawn by the assessee company. That the assessee has listed out services provided by Shri Pradip Thampi which includes acting as the Accountable Manager of the company, liasioning with the directorate of civil aviation, directorate of air worthiness, aeromobile license, maintenance agencies and CAMO office etc. apart from his experience in the industry for 23 years. That the assessee company has paid an incentive of Rs.75,00,000/-. The Assessing Officer observed that however to be able to draw an incentive of Rs.75,00,000/- each year, Shri Pradip Thampi should have contributed exceptionally in the growth of the assessee company. That the annual accounts of the assessee

company reflects that there is a dip in the gross hire charges receipt of the assessee company from Rs.1098 lakhs in AY 2009-10 to 952 lakhs in AY 2010-11. That the assessee company has not been able to justify as to why the incentive was continued to be paid at Rs.75,00,000/- each year even though there is a dip in the gross hire charges receipts. That it is to be noted that assessee company agrees that no other employee has been given an annual incentive of Rs.75,00,000/-. That this shows that the assessee company has not been able to completely justify an incentive of Rs.75,00,000/- in AY 2009-10 and AY 2010-11.

13. The Assessing Officer further referred to the statement of Shri Pradeep Thampi u/s. 131 of the Act that the incentive of Rs.75 lacs was received by him on instruction of Shri Lalit Modi as reimbursement of share capital of Rs.1 crore which was invested by him. The Assessing Officer further held that Shri Lalit Modi was managing the company and Shri Pradip Thampi had minimum role in management. Hence, he held that the incentive was not justified. The Assessing Officer further concluded as under:

6. In fact the assessee company is also claiming a separate deduction of Rs.75,00,000/- as an incentive to Shri Pradip Thampi for A.Y. 2009-10 in the computation of A.Y. 2010-11 because it was disallowed in A.Y. 2009-10 for non-deduction of TDS. This deduction cannot be allowed to the assessee this year because of the same reasons listed above for disallowing Rs.75,00,000/- shown as incentive but actually reimbursement of share capital. Hence, Rs.75,00,000/- given to Mrs. Pradeep Thampi in A.Y. 2009-10 is also treated as reimbursement of share capital the amount of Rs.75,00,000/- belonging to 2009-10 is disallowed from the computation of the A.Y. 2010-11. The reimbursement of share capital is not an allowable expense u/s. 37 of the I. T. Act, 1961 and it treated as capital expenditure. So, it cannot be allowed as a deduction from the Profit & Loss account of the assessee company.

14. Against the above order, the assessee appealed before the Id. Commissioner of Income Tax (Appeals).

15. Upon the assessee's appeal, the Id. Commissioner of Income Tax (Appeals) referred to the submissions of the assessee. The Id. Commissioner of Income Tax (Appeals) did not give any findings of his own. He referred to the Assessing Officer's holding that the nature of payment is not really a genuine payment for business of the assessee company. He did not accept the Assessing Officer's reasoning that it is the repayment of share capital, as he noted that share capital of Rs.1 crore remained in the name of Shri Pradeep Thampi in the books. However, without specifying any cogent basis, he sustained disallowance of Rs.99 lacs and deleted the disallowance of Rs.51 lacs.

16. Against the above order, the Revenue and assessee are in cross appeal before us.

17. We have heard both the counsel and perused the records. We find that the assessee has claimed payment of Rs.75 lacs each as incentive paid to Managing Director for A.Ys. 2009-10 and 2010-11. The payment for A.Y. 2009-10 was suo moto disallowed by the assessee as TDS was not made in that year. Since, the necessary TDS has been done in present year, assessee has claimed the payment as per the mandate of proviso to section 40(a)(i). These facts are undisputed. The disallowance of the incentive paid to the managing director has been done by the

Assessing Officer on two reasoning. Firstly, he has reasoned that the payment is not justified and commensurate with the services rendered. Secondly, he has opined that the payment is a repayment of capital contribution by the said managing director. As regards the holding that payment is not justified with the services rendered by director, the reasoning attributed by the Assessing Officer can only be said to be guesswork not at all sustainable. The assessee in its explanation regarding the services rendered by the said director has elaborately mentioned the same, which has been duly noted by the Assessing Officer himself as reproduced in earlier part of this order. But without giving any cogent reasoning, the assessing officer has rejected the same. His only reasoning is that the performance of the company has not been upto mark. By no stretch of imagination, the Assessing Officer can be said to be holding appropriate qualification to determine appropriate managerial remuneration and incentive that the company should give. No case has been made out that in making the payments there has been any violation of the provisions of payment of managerial remunerations as mandated in the Companies Act. As held by that Hon'ble Supreme Court in the case of *Walchand and Co. (P.) Ltd.* [1967] 65 ITR 381 (SC) that in applying the test of commercial expediency, for determining whether the expenditure was wholly and exclusively laid out for the purpose of the business the reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. Hence, torch bearer of the corporate governance mantle donned by the assessing officer is uncalled for and the disallowance is not sustainable on the facts

and circumstances of this case. Another reasoning given by the assessing officer is that it is a repayment of capital contribution of Rs.1 crore, on the basis of the statement of the said director. The Id. Commissioner of Income Tax (Appeals) has correctly held that this cannot be sustained as a capital contribution of Shri Pradip Thampi remains at Rs.1 crore, at the end of the relevant assessment year. Hence, the view that the payment is reimbursement of capital is wholly unsustainable. Hence, in our considered opinion, there is no justification whatsoever in making the disallowance. Accordingly, in the background of the above discussion and precedent, in our considered opinion, there is no cogent basis for making the disallowance on the ground that it is a capital reimbursement and/or not commensurate with the services provided. Accordingly, we set aside the order's of the authorities below and delete the disallowance.

18. In the result, the appeal by the Revenue stands dismissed and the assessee's appeal stands allowed.

*Order pronounced in the open court on 07.12.2017*

Sd/-

(C. N. Prasad)

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated :07.12.2017

व.नि.स./Roshani, Sr. PS

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**