



Air India Limited

Assessment Years: 2006-07 & 2007-08

**आयकर अपीलिय अधिकरण "ए" न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"A" BENCH, MUMBAI**

श्री शक्तिजीत दे, न्यायिक सदस्य एवं  
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।  
**BEFORE SHRI SAKTIJIT DEY, JM AND**  
**SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./I.T.A. No. 1207/Mum/2015  
(निर्धारण वर्ष / Assessment Year: 2006-07)

<b>Deputy Commissioner of Income Tax-5(1)(1)</b> Room No.568,5 <sup>th</sup> Floor Aaykar Bhavan Mumbai – 400 020	<b>बनाम/</b> <b>Vs.</b>	<b>Air India Limited</b> Old Airport Kalina,Santacruz (E) Mumbai – 400 029
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. <b>AACCA-9213-E</b>		
(पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

&

Cross Objection No.171/Mum/2016  
(निर्धारण वर्ष / Assessment Year: 2006-07)

<b>Air India Limited</b> Old Airport Kalina,Santacruz (E) Mumbai – 400 029	<b>बनाम/</b> <b>Vs.</b>	<b>Deputy Commissioner of Income Tax-5(1)(1)</b> Room No.568,5 <sup>th</sup> Floor Aaykar Bhavan Mumbai – 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. <b>AACCA-9213-E</b>		
(पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

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आयकर अपील सं./I.T.A. No. 1208/Mum/2015  
(निर्धारण वर्ष / Assessment Year: 2007-08)

<b>Deputy Commissioner of Income Tax-5(1)(1)</b> Room No.568,5 <sup>th</sup> Floor Aaykar Bhavan Mumbai – 400 020	<b>बनाम/</b> <b>Vs.</b>	<b>Air India Limited</b> Old Airport Kalina,Santacruz (E) Mumbai – 400 029
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. <b>AACCA-9213-E</b>		
(पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

&



Cross Objection No.58/Mum/2017  
(निर्धारणवर्ष / Assessment Year: 2007-08)

<b>Air India Limited</b> Old Airport Kalina, Santacruz (E) Mumbai – 400 029	<b>बनाम/ Vs.</b>	<b>Deputy Commissioner of Income Tax-5(1)(1)</b> Room No.568, 5 <sup>th</sup> Floor Aaykar Bhavan Mumbai – 400 020
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. <b>AACCA-9213-E</b>		
(□ पीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

<b>Assessee by</b>	:	D.J.Shukla, Ld. AR
<b>Revenue by</b>	:	R.P.Meena, Ld. DR

सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	22/05/2018
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	11/07/2018

## आदेश / ORDER

### Per Bench

1. Aforesaid appeals by revenue for Assessment Years [AY] 2006-07 & 2007-08 contest separate orders of Ld. first appellate authority. The assessee has filed cross-objections against the same. Since common issues are involved, the same are being disposed-off by way of this common order for the sake of convenience and brevity. First, we take up cross appeals for AY 2006-07.

### Cross Appeals for AY 2006-07

2.1 The revenue's appeal for AY 2006-07 contest the order of Ld. Commissioner of Income Tax (Appeals)-10, Mumbai [CIT(A)], *Appeal No.CIT(A)-10/DCIT-5(1)/210/2013-2014 dated 12/12/2014* by raising the following sole ground of appeal:-

*Whether on the facts and circumstances of the case and in the law, the Ld. CIT(A) has erred in directing the Assessing Officer to value the fringe benefits in respect of free / concessional tickets to the employees at par with the provisions made in*



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*respect of frequent flier programme and thereafter the amounts recovered from the employees, if any should be reduced as has been directed by the Hon'ble ITAT in the case of M/s Jet Airways in A.Y.2006-07.*

The grounds raised in assessee's cross objections reads as under:-

- 1) *The learned Dy. Commissioner of Income Tax (D.C.I.T) erred in reopening Fringe Benefit Tax (Assessment) for Asst. Year 2006-07 without recording satisfaction that Fringe Benefits chargeable to Tax has escaped assessment.*
- 2) *The learned D.C.I.T erred in reopening Fringe Benefit Tax (F.B.T) assessment completed u/s.115WE(3) of the I.T.Act,1961 vide order dated 30-12-2008*
- 3) *The appellant respectfully submits that the provisions of Sec.115WG of I.T.Act,1961 for reopening the F.B.T. assessment cannot be resorted to for reviewing a FBT assessment completed u/s.115WE(3) of the I.T.Act,1961.*
- 4) *On the above facts and circumstances of the law the impugned reassessment Order dated 22-03-2013 passed in contravention of law be declared null and void.*

*Without prejudice to above*

- 1) *On the facts and circumstances of the facts and in law the learned C.I.T.(A) erred in directing the Assessing Officer to value Fringe Benefit in respect of free/concessional tickets to the employees at par with the provision made in respect of Frequent Flier Programme and reduce therefrom amounts recovered from the employees for valuation of F.B.T. in respect of such tickets.*
- 2) *The learned C.I.T(A) ought to have directed the Assessing Officer to value F.B.T in respect of free tickets issued to employees at Rs.NIL.*

The assessment of *fringe benefit* for impugned AY was framed by *Ld. Deputy Commissioner of Income Tax-5(1), Mumbai [AO]* on 22/03/2013 u/s 115WE(3) read with Section 115WG of the Income Tax Act, 1961.

2.2 Briefly stated the assessee being *resident corporate assessee* engaged in *Airlines* business was subjected to re-assessment of *Fringe Benefit [FB]* u/s 115WE (3) read with Section 115WG of the Income Tax Act, 1961 on 22/03/2013. The return of *Fringe Benefit Tax [FBT]* was filed by the assessee on 28/11/2006 declaring value of *fringe benefit* at Rs.6.79 crores which was assessed u/s 115WE(3) at Rs.8.38 crores on 30/12/2008. Subsequently, the proceedings were subjected to reassessment within the meaning of Section 115WG by issuance of



statutory notice u/s 115WH dated 06/11/2012 followed by notice u/s 115WE(2). The reasons for reopening have been extracted by Ld. AO on *Page-2* of the quantum assessment order and the same were also supplied to the assessee as per the request. The perusal of the same reveal that reassessment proceedings were initiated on the premise that the assessee did not show any expenditure under the head of free and concessional tickets to the employees and their family members whereas the assessee being an *Airline Company*, the possibility of expenditure under this head could not be ignored.

2.3 During reassessment proceedings, it was noted that the assessee provided free / concessional tickets to its employees / their family members, the value of which, in the opinion of Ld. AO, was subjected to *fringe benefit tax [FBT]*. The assessee justified the same on the ground that no such expenditure was incurred by the assessee in providing free tickets to the employees since the employees could undertake journey on these tickets only if there were unsold seats in the aircraft which would even otherwise remain vacant whether the employee travels or not and therefore, the value thereof was *Nil* for *FBT* purposes. However, not convinced, Ld. AO relying upon *CBDT circular No. 8/2005*, worked out additional *fringe benefit* to the extent of Rs.62.38 crores which was arrived at after multiplying the number of free tickets issued with average revenue per passenger generated by the airline during the year.

3. Aggrieved, the assessee contested the same before Ld. CIT(A) on legal grounds as well as on merits with partial success vide impugned order dated 12/12/2014 wherein Ld. first appellate authority upheld the initiation of reassessment proceedings. A partial relief was granted to the



assessee with respect to valuation of the tickets in terms of judgment of this Tribunal rendered in *Jet Airways (India) Limited Vs DCIT [153 TTJ 624]* and the Ld. AO was directed to value the tickets at par with the provisions made by the assessee with respect to *frequent flier programme* which would be further reduced by the amount recovered by the assessee from its employees in this regard. The relevant observations of Ld. first appellate authority, in this regard, are extracted below:-

*5.3. Ground Nos.4 to 6 pertains to the taxability and the valuation of Fringe Benefit Tax in respect of free and concessional Air Tickets issued to the employees of the appellant company. The A.O. has valued it on the basis of actual fair whereas the appellant has contended that the valuation of such tickets should be the cost of the tickets in the hands of the appellant's company and it should be valued as concessional tickets provided under the scheme of the frequent fliers for which regular provision is made in the account of the appellant. The appellant has vehemently relied upon the decision of the Hon'ble ITAT in the case of M/s Jet Airways in A.Y.2006-07, where under almost similar circumstances the valuation of the fringe benefits of concessional tickets has been directed to be at par with the cost of such tickets to the appellant as worked out in the provisions made by the appellant in its books of accounts in respect of the frequent flier scheme. After considering the rival submissions and respectfully following the decision of Hon'ble ITAT in the case of M/s Jet Airways in A.Y. 2006-07, the A.O. is directed to value the fringe benefits in respect of fee/ concessional tickets to the employees at par with the provisions made in respect of frequent flier programme and thereafter the amounts recovered from the employees, if any, should be reduced as has been directed by the Hon'ble ITAT in the above said case. This ground of appeal is therefore, partly allowed.*

Aggrieved, the assessee as well as revenue is in further appeal before us. The assessee has contested the issue on legal grounds as well as on merits whereas the revenue is aggrieved by relief provided by Ld. CIT(A) to the assessee.

4. The Ld. Departmental Representative [DR], *Shri R.P.Meena* supported the approach adopted by Ld. AO to arrive at the valuation of *fringe benefit*. The same was controverted by Ld. Authorized



Representative for Assessee [AR], *Shri D.J.Shukla*, by submitting that reopening was bad in law since there were no material on record to suggest any escapement of income on the part of the assessee and same was resorted to by the revenue only to verify certain facts.

5. We have carefully heard the rival contentions and perused relevant material on record. Since legal grounds questions the very jurisdiction acquired by the Ld. AO under law, we take up the same first. We find that the AY under question is AY 2006-07, wherein the original assessment has been completed u/s 115WE(3) on 30/12/2008. The reassessment proceedings have been initiated vide issuance of notice u/s 115WH dated 06/11/2012 and the reassessment proceedings have been completed on 22/03/2013. The reasons to initiating reassessment proceedings, as extracted in the quantum assessment order, read as follows:-

*"In this case, subsequent to completion of assessment, information has been received from DCIT-5(2), Mumbai in the case of Jet Airways India Ltd. for A.Y.2006-07, 2007-08 and 2008-09, that the cost of free and concessional tickets provided by the airline company to its employees and their family members was earlier not offered to tax for the relevant A.Yrs. as Fringe benefit under the provisions of section 115WB(1)(b) of the I.T.Act. Therefore, the same has been brought to tax under the said section after reopening the case.*

*On the basis of this information received, the details of the FBT return for A.Y.2006-07 filed by the assessee (M/s. Air India Ltd.) has been perused and it has been observed that the assessee has not shown any expenditure under the head of fee and concessional tickets to the employees and their family members. However, being an airlines company the possibility of expenditure incurred under this head cannot be ignored.*

The reassessment provisions as contained in Section 115WG are extracted here-in-below:-

**"115WG : Fringe benefits escaping assessment** - *If the Assessing Officer has reason to believe that any fringe benefits chargeable to tax have escaped assessment for any assessment year, he may, subject to the provisions of sections 115WH, 150*



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and 153, assess or reassess such fringe benefits and also any other fringe benefits chargeable to tax which have escaped assessment and which come to his notice subsequently in the course of the proceedings under this section, for the assessment year concerned (hereinafter referred to as the relevant assessment year)

*Explanation - For the purpose of this section, the following shall also be deemed to be cases where fringe benefits chargeable to tax have escaped assessment, namely :-*

- (a) *where no return of fringe benefits have been furnished by the assessee;*
- (b) *where a return of fringe benefits have been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the value of fringe benefits in the return;*
- (c) *an assessment has been made, but the fringe benefits chargeable to tax have been under-assessed."*

A perusal of the same reveal that the prime condition to initiate reassessment proceedings is that the Ld. AO has *reasons to believe* that any fringe benefits chargeable to tax has escaped assessment. The explanation to this Section creates a deeming fiction wherein, in certain situation, the fringe benefits chargeable to tax are deemed to have escaped assessment. Since the assessee has originally been assessed, its case is covered by Clause (c) of the explanation, since the information as received by Ld. AO, suggested possible escapement of fringe benefit. At this stage, only a *prima facie* opinion suggesting *under-assessment* was required to be formed by Ld. AO, which has apparently been formed. It is settled law that deeming fiction has to be construed strictly. The Ld. AO, subsequent to completion of assessment, came across certain information which suggested possible *under-assessment* of fringe benefit in the hands of the assessee. This being the case, we are of the opinion that the Ld. AO was clinched with valid jurisdiction to reassess the *fringe benefit* of the assessee. This ground of assessee's appeal stand dismissed.



6. Coming to the merits of the case, we find that Ld. CIT(A) has granted partial relief to the assessee by relying upon the decision of this Tribunal rendered in *Jet Airways (India) Ltd. Vs. DCIT [153 TTJ 624]* . Since a view has already been taken by the Tribunal on identical factual matrix, taking the same view, we confirm the stand of Ld. CIT(A) in this regard particularly when the revenue is unable to place on record any contrary judgment of any judicial authority. Accordingly, this ground as raised by revenue in the appeal and as raised in cross-objections, stands dismissed.

7. In nutshell, the cross appeals stands dismissed.

### **Cross Appeals for AY 2007-08**

8. The cross appeals for AY 2007-08 are on similar factual matrix wherein the assessee has been reassessed for fringe benefits on 20/02/2014 wherein it has been saddled with additional fringe benefits of Rs.78.83 crores on account of free / concessional tickets provided by the assessee to its employees / their family members. The Ld. CIT(A), in similar manner, has provided partial relief to the assessee. Aggrieved, the assessee as well as revenue is in cross appeal before us with identical worded grounds. However, the assessee, in its cross objections, has filed an additional ground vide letter dated 03/05/2018. The Ld. DR has opposed the same on the ground that the same is altogether a new ground and being raised by the assessee for the first time and therefore not valid. However, the same being legal ground which do not require appreciation of new facts and hence, taken on record in terms of judgment of Hon'ble Apex Court rendered in *NTPC*



*Company Ltd Vs CIT [229 ITR 383].* The additional ground reads as follows:-

*On the facts and circumstances of the case, since the order u/s.115WG of I.T.Act 1961 was not passed within the time limit stipulated u/s 153(1B) of the I.T.Act, 1961, it is prayed that the same is bad in law and may be cancelled.*

As evident from additional ground, the quantum assessment order has been challenged on the premise that the same is time barred as per statutory provisions.

9. We have heard the arguments of both the sides in this regard. Undisputedly the reassessment notice u/s 115WH has been issued on 06/11/2012, a copy of which is available on record. The quantum assessment order u/s 115WG has been completed on 20/02/2014. The time limit to complete the re-assessment, in such a case, has been provided u/s 153(1B). The said provision, as it stood at the relevant time, read as follows:-

**153. Time limit for completion of assessments and reassessments.-** (1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of—

.....

(1B) No order of assessment or reassessment shall be made under section 115WG after the expiry of nine months from the end of the financial year in which the notice under section 115WH was served.

.....

Upon factual matrix, we find that since the notice was issued on 06/11/2012, the re-assessment u/s 115WG was to be completed within 9 months from the end of the financial year i.e. by 31/12/2013. As against this, the assessment has been completed on 20/02/2014, which is



clearly time barred as per statutory provisions of Section 153 (1B). This being the case, the assessment could not be said to have been framed within the ambit of statutory framework and therefore, the same being time barred, could not be sustained in the eyes of law. Resultantly, we quash the same. Accordingly, the additional ground raised by assessee stands allowed. The revenue's appeal as well as other grounds raised in assessee's cross-objection stands dismissed, being *infructuous*.

10. In nutshell, the revenue's appeal stand dismissed whereas the assessee's appeal stand partly allowed in terms of our above order.

### **Conclusion**

11. Co.No.58/Mum/2017 stand partly allowed whereas all the other appeals / cross objection stand dismissed.

*Order pronounced in the open court on 11<sup>th</sup> July, 2018*

Sd/-

**(Saktijit Dey)**

न्यायिक सदस्य / **Judicial Member**

Sd/-

**(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 11.07.2018  
Sr.PS:-Thirumalesh

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)  
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai