

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI
(Through Video Conferencing)**

**BEFORE,
SHRI N.K.BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.749/Del/2016
(ASSESSMENT YEAR 2008-09)**

&

**ITA No.750/Del/2016
(ASSESSMENT YEAR 2009-10)**

M/s Inter Globe Aviation Ltd. Central Wing, Ground Floor, Thapar House-124, Janpath, New Delhi-110 001. PAN-AABCI 2726B (Appellant)	Vs.	Addl. CIT ["ACIT"], Range-11, New Delhi. (Respondent)
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Appellant By	Sh. Tarandeep Singh, Adv.
Respondent by	Sh. H.K.Chaudhary, CIT-DR
Date of Hearing	09.11.2021
Date of Pronouncement	07.02.2022

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

These appeals have been filed against orders dated 8th January, 2016 and 20th January, 2016 passed by the Ld. Commissioner of Income Tax (Appeals)-IV, New Delhi [CIT(A)] in Appeal Nos.336/10-11 and 287/11-12 for A.Ys.2008-09 & 2009-10 respectively. These appeals were original disposed off by the Tribunal vide order dated 18th November, 2016 passed in ITA Nos.749 & 750/Del/2016 by partly allowing them for statistical purposes. Thereafter, a Miscellaneous

Petition (MA) was filed by the Assessee, claiming that ground No. 4(b) of the appeal has remained unadjudicated. MA was disposed off by the Tribunal vide order dated 1st January, 2018 in MA Nos.158 & 159/Del/2017 and it was held as under :-

“5. We have perused the record in view of the facts mentioned in the application and find that ground No.4(a) of the appeal which involves supplementary rent paid (Rs.73,13,23,026/-) under lease agreement executed prior to 01/04/2007, has been adjudicated in para 6.5 of the appeal following the decision of the Tribunal in assessment year 2007-08. However, the ground No.4(b) of the appeal which involves supplementary rent paid (Rs.11,84,97,120/-) under lease agreements executed after 01/04/2007 remains to be adjudicated. The lease rent payments prior to 01/04/2007 are income exempt under section 10(15A) of the Act whereas lease rent payments after 01/04/2007 have been claimed as exempt under the provisions of agreement for avoidance of double taxation (DTAA) between India and Ireland.

6. We also note that Hon'ble Madras High Court in the case of Malladi Project Management Private Limited 324 ITR 87 (Mad) has held that not considering a specific ground raised in the appeal by the Tribunal is a mistake which could be rectified. In view of above facts and circumstances, we hold that non-adjudication of the specific ground No.4(b) of the appeal by the Tribunal is a mistake apparent from record rectifiable under section 254(2) of the Act and accordingly, we recall the order of the Tribunal to the extent of ground No.4(b) of the appeal and direct the registry to fix the appeal on 06/02/2018. The date of

hearing has been pronounced in the open court and informed to both the parties and therefore it is not required to issue separate notice of hearing.”

2. Post Recall the appeals have now again come up for hearing before us for the limited purpose of adjudication of Ground No.4(b). Facts relevant in this regard are that appellant is engaged in the business of operation of a low-cost airline. During the years under consideration, it had claimed a deduction on account of Supplemental Lease Rent (SR) paid to lessors for use of Aircrafts taken on lease. The details of expenditure claimed on account of SR are as under:-

Particulars	AY 2008-09	AY 2009-10
Supplemental lease rent paid for lease agreements executed prior to 1 st April, 2007- Lessor's income claimed as not chargeable to tax in India u/s 10(15A) of the Act	Rs 73,13,23,026/-	Rs 67,46,19,389/-
Supplemental lease rent paid for lease agreements executed after 1 st April, 2007- Lessor's income claimed as not chargeable to tax in India under Article 12 of India Ireland DTAA	Rs 11,84,97,120/-	Rs 61,94,58,694/-
Total	Rs 84,98,20,146/-	Rs 129,40,78,083/-

3. During the course of assessment, it was observed by the AO that the Appellant had not deducted TDS on above payments, it was therefore held by him that there is a default committed u/s 40(a)(i) of the Act and

accordingly a disallowance u/s 40(a)(i) was made by the AO in the order of assessment. The Ld. CIT(A) has upheld this disallowance made.

3.1 Before the Tribunal in ground No.4 the assessee has challenged the action of the lower authorities in making the above disallowance. Ground No.4 is in two parts i.e., Ground No.4(a) wherein the assessee has challenged the actions of lower authorities in making a disallowance of supplemental lease rent for lease agreements executed prior to 1st April, 2007 and Ground No.4(b) wherein the assessee is aggrieved by the actions of lower authorities in making a disallowance of supplemental lease rent for lease agreements executed after 1st April, 2007. This Tribunal, vide order dated 18th November, 2016 has allowed Ground No.4(a) and it is held that the nature of Supplemental Lease Rent is nothing different than the character of basic rent. It was further held that the supplemental rent is not a payment made for use of spares, facilities or any services rendered by the lessors. This Tribunal, while holding as above has followed the order passed by Division Bench of Tribunal in case of assessee for AY 2007-08. Before us, it was fairly brought on record by both the parties that the conclusions drawn by the Tribunal in its appellate order for AY 2007-08 has recently been upheld by the Special Bench of this Tribunal vide order dated 3rd September,

2021 which has been passed in the case of assessee for AY 2012-13. Both the sides have also fairly stated before us that as regards issue of Supplemental Rent paid for lease agreements executed after 1st April, 2007 the Special Bench has deleted the disallowance by observing 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 DTAA between India and Ireland. We find that AO has not accepted this the reasons of which has already been reproduced at para 1.5 of the order.

42.1 Cross border leasing of aircraft enjoyed a special exemption under section 10(15A) of the I.T. 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 the provision 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 the 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. Royalty 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 paragraph 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 provision 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) read 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 Article 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 A.O.”

4. We find that the grievance raised by the assessee in Ground No. 4(b) of the present appeals have been answered by the Larger Bench of this Court in case of assessee for AY 2012-13. Respectfully following the ratio descendi of the Larger Bench we allow ground No.4(b) of the present appeals and direct the AO to delete disallowance u/s 40(a)(i) on account of Supplemental Lease Rent paid by the appellant for lease agreement executed after 1st April, 2007.

4. Ground No.4(b) of appeals for AYs 2008-09 and 2009-10 are therefore allowed.

Order pronounced on 07.02.2022.

Sd/-

(N.K.BILLAIYA)

ACCOUNTANT MEMBER

Dated: 07.02.2022

PK/rkk

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(SUDHANSHU SRIVASTAVA)

JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	07.02.2022
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	