**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH "D" NEW DELHI**

**BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER**
**AND**
**SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER**

**आ.अ.सं/.I.T.A No.5181/Del/2016**
**निर्धारणवर्ष/Assessment Year:2011-12**

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| Spice Jet Limited,<br>319, Udyog Vihar, Phase-IV,<br>Gurgaon, Haryana. | बनाम<br>**Vs.** | Addl. CIT<br>Range-9,<br>New Delhi. |
| **PAN No. AACCR1459F** | | |
| अपीलार्थी **Appellant** | | प्रत्यर्थी/**Respondent** |

**आ.अ.सं/.I.T.A No.5153/Del/2016**
**निर्धारणवर्ष/Assessment Year:2011-12**

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| ACIT<br>Circle-24(1),<br>Room No.163,<br>C.R. Building,<br>New Delhi. | बनाम<br>**Vs.** | Spice Jet Ltd.,<br>319, Udyog Vihar, Phase-IV,<br>Gurgaon, Haryana. |
| | | **PAN No. AACCR1459F** |
| अपीलार्थी **Appellant** | | प्रत्यर्थी/**Respondent** |

**आ.अ.सं/.I.T.A No.879/Del/2022**
**निर्धारणवर्ष/Assessment Year:2012-13**

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| DCIT<br>Central Circle-01,<br>Room No.334, E-2,<br>ARA Centre, Jhandewalan<br>Extension, New Delhi. | बनाम<br>**Vs.** | Spice Jet Ltd.,<br>319, Udyog Vihar, Phase-IV,<br>Gurgaon, Haryana. |
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**आ.अ.सं/.I.T.A No.667/Del/2022**
**निर्धारणवर्ष/Assessment Year:2012-13**

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| Spice Jet Limited,<br>319, Udyog Vihar, Phase-IV,<br>Gurgaon, Haryana. | बनाम<br>**Vs.** | DCIT<br>Circle 24(1),<br>New Delhi. |
| **PAN No. AACCR1459F** | | |
| अपीलार्थी **Appellant** | | प्रत्यर्थी/**Respondent** |

**आ.अ.सं/.I.T.A No.668/Del/2022**
**निर्धारणवर्ष/Assessment Year:2015-16**

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| Spice Jet Limited,<br>319, Udyog Vihar, Phase-IV,<br>Gurgaon, Haryana. | बनाम<br>**Vs.** | DCIT<br>Circle 24(1),<br>New Delhi. |
| **PAN No. AACCR1459F** | | |
| अपीलार्थी **Appellant** | | प्रत्यर्थी/**Respondent** |

**आ.अ.सं/.I.T.A No.882/Del/2022**
**निर्धारणवर्ष/Assessment Year:2015-16**

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| DCIT<br>Central Circle-01,<br>Room No.334, E-2,<br>ARA Centre, Jhandewalan<br>Extension, New Delhi. | बनाम<br>**Vs.** | Spice Jet Ltd.,<br>319, Udyog Vihar, Phase-IV,<br>Gurgaon, Haryana. |
| | | **PAN No. AACCR1459F** |
| अपीलार्थी **Appellant** | | प्रत्यर्थी/**Respondent** |

**आ.अ.सं/.I.T.A No.883/Del/2022**
**निर्धारणवर्ष/Assessment Year:2016-17**

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| DCIT<br>Central Circle-01,<br>Room No.334, E-2,<br>ARA Centre, Jhandewalan<br>Extension, New Delhi. | बनाम<br>**Vs.** | Spice Jet Ltd.,<br>319, Udyog Vihar, Phase-IV,<br>Gurgaon, Haryana. |
| | | **PAN No. AACCR1459F** |
| अपीलार्थी **Appellant** | | प्रत्यर्थी/**Respondent** |

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**आ.अ.सं/.I.T.A No.669/Del/2022**
**निर्धारणवर्ष/Assessment Year:2016-17**

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| Spice Jet Limited,<br>319, Udyog Vihar, Phase-IV,<br>Gurgaon, Haryana. | बनाम<br>**Vs.** | DCIT<br>Circle 24(1),<br>New Delhi. |
| **PAN No. AACCR1459F** | | |
| अपीलार्थी **Appellant** | | प्रत्यर्थी/**Respondent** |

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| **Assessee by** | **Shri Tarandeep Singh, Adv. &<br>Shri Sandeep Yadav, Adv.** |
| **Revenue by** | **Shri Vizay B Vasanta, CIT DR** |

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| सुनवाईकीतारीख/ Date of hearing: | 19.06.2023 |
| उद्घोषणाकीतारीख/Pronouncement on | 05.07.2023 |

**आदेश /O R D E R**

**PER C.N. PRASAD, J.M.**

All these appeals are filed by the Assessee and Revenue against different orders of the Ld. Commissioner of Income Tax (Appeals)-28, New Delhi for the assessment years 2011-12, 2012-13, 2015-16 and 2016-17.

2. First we take up the appeal of the assessee for the AY 2011-12. The assessee raised the following grounds in its appeal: -

> *1. Learned Commissioner of Income Tax (Appeals)-28, Delhi, ('CIT(A)-28'), has erred on the facts as well as in law while holding that: -*

*1.1 The Foreign Exchange Loss of Rs.11,72,81,379/- was:*

*(a) A Contingent Liability,*
*(b) Incurred on Capital Account,*
*(c) Liable to be reduced from cost of asset.*

*1.2 That on facts and in law the AO erred in holding that the Foreign Exchange Gain could not be set off against Foreign Exchange Loss.*

*2. That on the facts and in the circumstances of the case and in law, the Appellant denies its liability to be assessed at a book profit of Rs.1,25,89,57,239/- under section 115JB of the Act.*

*2.1 That on the facts and in the circumstances of the case and in law, the Assessing Officer ought to have held that the book profits were to arrive at after reducing a sum of Rs.44,40,47,384/- in terms of cause (iii) of the Explanation below sub-section (2) of section 115JB, based on consolidated amount of brought forward loss and unabsorbed depreciation as reflected in the books of accounts."*

3. At the outset, Ld. Counsel for the assessee submits that ground no.2 and 2.1 of the grounds of appeal are not pressed. In view of the submissions of the Ld. Counsel these grounds are dismissed as not pressed. The only ground for adjudication of assessee's appeal is whether the Ld.CIT(Appeals) erred in sustaining the action of the Assessing Officer in denying Forex unrealized loss on account of Foreign Exchange amounting to Rs.11,72,81,379/- as not allowable deduction and at the same time the gain on Foreign Exchange fluctuation amounting to Rs.82,56,666/- is taxable.

4. Briefly stated the facts are that the Assessing Officer while completing the assessment noticed that assessee has debited an amount of Rs.93,41,17,888/- as exchange fluctuation loss in profit and loss account. The assessee was required to justify the allowability of this loss. The assessee submitted that the transactions entered into foreign currency are required to be reported in Indian Rupees following the accounting treatment prescribed in the Accounting Standard-11 issued by Institute of Chartered Accountants of India (ICAI). The loss arising on account of difference in the Foreign Exchange rates prevailing on the date of transaction and the closing rate on the date of balance sheet (when the transaction is settled for the subsequent year) on account of restatement of outstanding loss for Revenue transactions on the balance sheet date is Revenue loss eligible for deduction u/s 37(1) of the I.T. Act. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India Pvt. Ltd. (312 ITR 254).

5. The Assessing Officer observed that loss under this head is arising on account of revaluation of liability payable in Foreign Exchange and it includes liability is in respect of External Commercial Borrowings (ECB) and Foreign Currency Convertible

Bonds (FCCB). The Assessing Officer noticed that these have been treated as long term foreign currency mandatory items and the revaluation on account of foreign exchange fluctuation has been debited as notional loss in profit and loss account. The assessee was again asked to explain the nature of expenditure made under ECB and FCCB and why they should be allowed as an expenditure on Revenue account and why it should not be treated as a capital expenditure in accordance with Section 43A of the Act. The assessee made submissions that it had entered in agreement with Royal Holdings Services Limited on 03.01.2005 in respect of ECB loans and took loan to part finance commencement of Air line operations and the amount was borrowed for the purpose of meeting working capital requirement. Part of the loan was utilized towards deposits for operating lease of aircrafts and the other part was utilized towards other expenses. Assessee contended that during the year the loan was repaid with interest to Royal Holdings Services Ltd. on 23.11.2010 and furnished copy of ECB return submitted to RBI to HSBC Bank Limited. In so far as the FCCB are concerned the assessee contended that the bonds were initially used for financing non-refundable pre-delivery payments for acquisition of 10 aircrafts. Assessee made an offer through an offer

letter dated 07.12.2005 for issue of US dollars, 80 million 0 coupon secured convertible bonds due for redemption in 2010 comprising of 800 bonds at the issue price of US dollars 1,00,000/- per bond to the foreign investors and the proceeds were utilized towards advance payment for acquisition of 10 aircrafts. Assessee submitted that after obtaining the possession of 8 aircrafts out of 10 upto September, 2007 were sold to the lessors and taken back on operating leases. The remaining two aircrafts were sold and were not taken back on lease. The assessee therefore submitted that the profits on sale of 10 aircrafts were offered for taxation in the year in which the aircrafts were sold.

6. Not convinced with the submissions of the assessee, the Assessing Officer treated the unrealized Foreign Exchange loss is on capital account, a notional loss and not allowable as deduction. At the same time the Assessing Officer has held that the unrealized Forex gain due to deduction in liability in Foreign Exchange fluctuation is with respect to various sundry creditors pursuant to repair and maintenance of aircraft parts and components was only on Revenue account and liable to be taxed. Thus, the Assessing Officer denied the claim for unrealized Forex loss as deduction and brought to tax the Foreign Exchange gain at the same time.

7. On appeal, the Ld.CIT(A) sustain the action of the Assessing Officer.

8. Before us, the Ld. Counsel for the assessee reiterated the submissions made before the Ld. Assessing Officer. The Ld. Counsel also referring to page 82 of the PB which is the fixed assets schedule submits that the schedule does not contain any aircrafts owned by the assessee. Ld. Counsel submits that all the aircrafts were sold in the year 2007 and the gain on sale of aircrafts was also offered to tax. All these facts were not appreciated by the Assessing Officer in rejecting the claim of the assessee and the Ld.CIT(A) has simply sustained the order of the Ld. Assessing Officer and, therefore, the Ld. Counsel submits that the issue requires re-examination by the Ld. Assessing Officer with reference to the decision of the Hon'ble Supreme Court in the case of Woodward Governor India Limited (supra) and also taking into consideration all the facts on record.

9. On the other hand, Ld. DR has no serious objection in restoring the matter to the file of the Assessing Officer for *denovo* adjudication on appreciation of facts and contentions of the assessee.

10. On hearing both the parties, considering the submissions made before the Assessing Officer as well as before us we feel it appropriate to restore the issue to the file of the Ld. Assessing Officer for examining the issue afresh taking into consideration all the facts and contentions of the assessee and to decide the issue in accordance with law after providing adequate opportunity of being heard to the assessee. Thus, we restore ground no. 1 and 1.2 of grounds of appeal of the assessee to the file of the Assessing Officer for deciding afresh in accordance with law.

11. Coming to Revenue's appeal (ITA No.5153/Del/2016), AY 2011-12, the only ground is whether the Ld.CIT(Appeals) was right in deleting the addition in respect of supplemental lease rent amounting to Rs.168,72,51,723/- made by the AO u/s 40(a)(i) of the Act.

12. Briefly stated the facts are that the Assessing Officer noticed that assessee company debited an amount of Rs.168,72,51,723/- under the head "supplementary rent" in its profit and loss account which has been paid to foreign companies/entities from whom the assessee acquired aircrafts on lease. The assessee was required to give details and also explain its position regarding deduction of tax at source from these payments. The assessee contended that

maintenance reserve is in the nature of supplemental rent paid by the assessee on monthly basis in addition to the basic lease rental for the aircraft and is part of lease rent. It was submitted that one way of fixing the lease rent could be one consolidated lease rent payable per month in respect of total cost to the lesser incurred in providing the aircrafts on lease. However, in its case lease rent has been broken into parts and apart from the basic lease rent a supplemental rent has been provided with reference to major parts of the aircrafts separately considering the overall cost required to be incurred by the lesser in respect of major parts including the replacement or overhauling which may be required to be carried out by the lesser to keep the aircrafts in perfect operational condition. It was contended that the basic lease rent is fixed per month and the supplemental rent is calculated with reference to flight hours for various items like auxiliary power unit, landing air left and right hand translating cowl installed on each engine etc. It is stated that the lessor would incur a fixed cost per month in respect of the aircrafts and further cost could be incurred on account of wear and tear of the aircrafts on the basis of flight hours. Referring to the decision in the case of Sahara Airlines vs. DCIT [831 ITD 11] it was contended that the Delhi Tribunal held that the maintenance

reserve payments in respect of lease aircraft taken from non-residents under lease agreements are allowable expenditures u/s 10(15A) of the Act. It was also submitted that the lease of aircraft used in the FY 2009-10 by the assessee along with copy of Double Taxation Avoidance Agreement (DTAA) with Ireland and contended that payments in respect of aircrafts taken from an Irish entity is exempt from tax. Therefore, it was contended that total payment made by the assessee on account of basic lease rent as well as supplemental rent are exempt from tax u/s 10(15A) of the Act and Ireland DTAA.

13. However, the Assessing Officer rejected the submissions of the assessee holding that the supplementary rent is actually for the replacement of parts/spares and in connection of services related to operational of lease aircrafts. The payment instead of being at the time of replacement of parts is being done on a regular basis based on the actual usage of various parts. Therefore, it is clear that exemption u/s 10(15A) of the Act would not apply to supplemental rent/maintenance reserve. Therefore, he concluded that as the payment was not exempt u/s 10(15A) of the Act the assessee was liable to deduct tax at source. Accordingly, an amount of Rs.84,07,89,542/- was disallowed u/s 40(a)(i) for non-

deduction of tax at source in respect of the supplemental rent/maintenance reserve paid for the aircrafts taken on lease prior to 01.04.2007.

14. Further the Assessing Officer in so far as the supplemental lease rent paid by the assessee in terms of the lease agreements entered into on or after 01.04.2007 amounting to Rs.84,64,61,731/- is concerned the same was treated as royalty as per Article 12 of Indo Ireland DTAA. The AO also held that as per the provisions of DTAA the receipt of royalty would be taxable in the contracting state of residence i.e. Ireland and hence no TDS would be liable in India.

15. On appeal the Ld.CIT(A) deleted the disallowance made u/s 40(a)(ia) of the Act following the decision of the Hon'ble Delhi High Court in the case of Jet Lite (India) Ltd. vs. DCIT, wherein the Hon'ble Delhi High Court affirmed the order of the Tribunal in the case of Sahara Airlines Ltd. vs. DCIT [83 ITD 11], in so far as the lease agreements entered into by the assessee prior to 01.04.2007 are concerned. Accordingly, the disallowance to the extent of Rs.84,07,89,542/- was deleted.

16. Coming to the lease agreements entered into on or after 01.04.2007 and the payments made towards supplemental rent which was treated as royalty is concerned the Ld.CIT(A) on examining Article 12 and Article 8 of Indo-Ireland DTAA, held that the payments of aircrafts are specifically excluded from the ambit of "royalty" as defined in Article 12 of the DTAA and also held that as per Article 8 of the DTAA the profits derived by an enterprise of a contracting state from rentals of aircraft are taxable "only" in such country. Therefore, the Ld.CIT(Appeals) rejected the contention of the Ld. Assessing Officer that the supplemental lease rent paid for the aircrafts taken on lease on or after 01.04.2007 will be treated as royalty. The Ld.CIT(A) accordingly deleted the disallowance of the supplemental rent of Rs.84,64,61,731/-. In other words the Ld.CIT(A) deleted the entire disallowance of Rs.168,72,51,723/- made u/s 40(a)(ia) of the Act by the AO while completing the assessment.

17. The Ld. Counsel for the assessee submits that the issue is decided by the Tribunal in its own case for the assessment years 2006-07 to 2010-11 in ITA No.2688/2011, 5657/2011, CO 401/Del/2012, 6140/2013 dated 28.12.2022 which is placed at page 1 to 41 of the Paper Book.

18. The Ld.DR fairly submitted that issue has been decided in favour of the assessee by the Tribunal only in respect of the supplemental rent/maintenance reserve paid by the assessee for the lease agreements entered into prior to 01.04.2007. Ld.DR submits that the supplemental lease rentals which were paid for the agreements entered into on or after 01.04.2007 and treated as royalty by the Assessing Officer was not decided by the Tribunal. In reply the Ld. Counsel for the assessee submits that the issue of whether the lease agreements entered into after 01.04.2007 and the payments made therein are liable for TDS or taxable as royalty came up before the Special Bench of the Delhi Tribunal in the case of Inter Globe Aviation Ltd. (Indigo) vs. Addl. CIT [191 ITD 1] and the Special Bench held that the payments made towards supplemental rent on or after 01.04.2007 are not liable for TDS as the payments does not fall under the term “royalty”.

19. Heard rival submissions, perused the orders of the authorities below.

20. On perusal of the order of the Tribunal in assessee’s own case for the assessment years 2006-07 to 2010-11 which is placed at pages 1 to 41 of the Paper Book we observe that the Tribunal by order dated 28.12.2022 decided the issue in favour of the assessee

holding that supplemental rent/maintenance reserve would be exempt from tax in the hands of lesser in India as per Section 10(15A) of the Act and hence, no disallowance u/s 40(a)(ia) can be made observing as under: -

> *"36. In ground no. 3(a), the revenue has challenged deletion of addition of Rs.26,22,21,942/- made under section 40(a)(i).*
>
> *37. Briefly the facts are, in course of assessment proceeding the Assessing Officer noticed that the assessee had debited various expenses amounting to Rs.28,55,97,487/- under the head aircraft maintenance cost. After calling for necessary details and examining them the Assessing Officer found that an amount of Rs.26.88 crores was paid towards supplemental lease rent to the lessor of the aircrafts. He observed, the supplemental rent is towards usage of life limited parts of auxiliary power unit, and part of engines which are not covered by the approval of CBDT under section 10(15A). Alleging that the asses see had failed to deduct tax at source while making the payment, the Assessing Officer disallowed the amount under section 40(a)(i) of the Act. Similarly, for the very same reason of non-deduction of tax at source, the Assessing Officer disallowed various other expenses under section 40(a)(i) of the Act. The assessee contested the disallowance before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) deleted the disallowance made by the Assessing Officer.*
>
> *38. We have considered rival submissions and perused the materials on record. The expenditures, which have been subjected to disallowance under section 40(a)(1) are as under:*
>
> *i. Supplemental Rent /Maintenance Reserve of Rs.26,88,07,231/-*

*ii. Engine Guarantee Availability Fee of Rs.5,24,155/-*

*iii. Repair of Rotables of Rs.3,75,556/-*

*iv. Logo Printing of Rs.25,15,000/-*

*39. As far as supplemental rent/maintenance reserve is concerned, it is observed, learned Commissioner (Appeals) after analyzing the lease agreement has recorded a factual finding that the supplemental rent was paid for acquisition of aircraft. He has observed that the basic lease rent is fixed for month, whereas, the supplemental rent is calculated with reference to flight hours which signifies the lessor would incur a fixed cost for month in respect of aircraft. The lessor would incur further cost on account of wear and tear on the aircraft on the basis of flight hours. Therefore, supplemental rent is ascertained with reference to flight hours. As per the agreement, responsibility of the assessee is only to carry out minor repair works which are required to be done in the normal course of operation. All major repairs like replacement, overhauling etc. are the responsibility of the lessor. It has been factually found that the cost incurred in respect of normal repairs and replacement of routine spares etc. is not included in the supplemental rent. Thus, as rightly observed by the first appellate authority, for payments which are covered in the exceptional clause of section 10(15A) of the Act, it is not the assessee who is making the payment. On the contrary, it is the lessor who is making such payment to the lessee. It is relevant to observe, in a recent decision rendered in case of Inter Globe Aviation Ltd. Vs. DGIT, ITA No.2202/Del/2012, vide order dated 18.07.2016, the Special Bench of the Tribunal has held that since, the supplemental rent was determined taking into consideration a number of flying hours and had character of basic rent, said payment would be exempt from tax in the hands of lessor in India as per section 10(15A) of the Act, hence, no disallowance under section 40(a)(i) can be made. The aforesaid decision of the Special Bench of the Tribunal clinches the issue in favour of the assessee: Therefore, no disallowance under section 40(a)(i) can be*

*made in respect of supplemental rent of Rs.26.88 crores."*

21. We further observe that the Special Bench of the Delhi Tribunal in the case of Inter Globe Aviation Ltd. (Indigo) vs. Addl. CIT (supra) considered the lease rental pursuant to agreements executed after 01.04.2007 and its chargeability to tax in the hands of lesser under Article 12 of DTAA between India and Ireland and the Special Bench held that supplementary rent paid for lease agreements executed after 01.04.2007 are not chargeable to tax in India. While holding so the Special Bench observed as under: -

*"42. For Lease Agreements executed after 1st April, 2007, a claim was made by the assessee before 1 'Mower authorities that the income is not chargeable to tax in hands of Lessor under Article 12 of the DT7 between India and Ireland. We find the AO has not accepted this the reasons of which has already be 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. A However, a sunset clause was introduced by Finance Act, 2005 to provide that this exemption shall not available for agreements entered after 1st April, 2007. In the aftermath of withdrawal of exemption the 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 non-resident lessor has a permanent establishment (PE) in India as per Article 5 of the relevant. According to him, m leasing of an aircraft which is located in India ought not to result in an existence of PE and there is also 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 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 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 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 £ 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, patent, trade mark, design or model, plan, secret formula or process or for the use of or the r 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 rendering of any managerial, technical or consultancy services including the provision*

*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 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)(«) 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 1-4-2007 are, therefore, not chargeable to tax in India. However, the above figure is subject to verification by the A.O."*

22. In view of the above, respectfully following the decision of the coordinate bench of the Tribunal in assessee's own case and also the decision of the Special Bench of Delhi Tribunal in the case of Inter Globe Aviation Ltd. (Indigo) vs. Addl. CIT (supra), we uphold the order of the Ld.CIT(Appeals) and reject the grounds raised by the Revenue.

ITA No.667/Del/2022 (AY 2012-13) (Assessee's appeal) :

23. The assessee has raised the following grounds: -

*"1. That on facts and in law, the CIT(A) has erred in upholding disallowance of Rs. 9,80,34,955/- being Loss incurred on account of Foreign Exchange Fluctuation.*

*1.1 That on facts and in law, the AO/CIT(A) have erred in holding/observing that:*

*(a) Foreign Exchange Loss is notional and not actualized.*

*(b) Forex Loss has been incurred on Capital Account.*

*(c) Appellant has not been able to give working of Loss claimed.*

*2. Without prejudice, that on facts and in law, the AO/CIT(A) have erred in not appreciating that if Foreign Exchange Loss of Rs. 9,80,34,955/- is not allowable as a deduction then the corresponding Foreign Exchange Gain of Rs. 19,79,61,407/- is also not taxable."*

24. These grounds are identical to the grounds raised by the assessee for the AY 2011-12 and the decision taken therein applies *mutatis mutandis* for the appeal of the assessee for the year under consideration i.e. 2012-13. We ordered accordingly.

ITA No.879/Del/2022 (AY 2012-13) (Revenue's appeal):

25. The Revenue has raised the following grounds:

1. *"That on the facts and circumstances of the case, Ld.CIT(A) has erred in deleting addition of Rs.75,28,37,358/- made by AO on account of disallowance of supplementary rent/maintenance reserve u/s 40(a)(i).*

2. *That on the facts and circumstances of the case, Ld.CIT(A) has erred in deleting addition of Rs.172,06,19,297/- on account of disallowance of supplementary rent being royalty u/s 40(a)(ia).*

3. *That on the facts and circumstances of the case, Ld.CIT(A) has erred in deleting addition of Rs.76,52,276/- on account of disallowance of interest paid on late deposit Service Tax and VAT u/s 37(1)."*

26. Ground no. 1 and 2 of grounds of appeal of the Revenue are directed against the deletion of disallowance made u/s 40(a)(i) of the Act in respect of supplemental rent/maintenance reserve, supplementary rent being royalty. This issue has been adjudicated by us while dealing the appeal of the Revenue for the AY 2011-12 and the decision taken therein shall apply *mutatis mutandis* to the

appeal of the Revenue for the assessment year under consideration i.e. 2012-13. We ordered accordingly.

27. The last ground of appeal in the appeal of the Revenue is directed against deletion of disallowance on account of interest paid on late deposit of service tax and VAT u/s 37(1) of the Act.

28. Brief facts are that in the course of assessment proceedings the Assessing Officer noted that interest paid on late deposit of service tax and VAT amounting to Rs.78,68,958/- has not been added back. The assessee contended that the interest on late deposit of service tax and VAT was compensatory in nature and, therefore, is an allowable deduction. However, the Assessing Officer denied the claim observing that assessee has not furnished any documentary evidence or any details/explanation to show that the interest payment was indeed compensatory in nature and was not because of any breach of law.

29. On appeal the Ld.CIT(A) deleted the disallowance to the extent of Rs.76,52,276/- as the assessee was able to substantiate the nature of interest expenditure as compensatory in nature.

30. Before us the Ld.DR supported the orders of the Assessing Officer and the Ld. Counsel placed reliance on the orders of the Ld.CIT(Appeals).

31. On perusal of the order of the Ld.CIT(A), we observe that the assessee made its submissions along with evidences to prove that the interest paid on delayed deposit of service tax and VAT are only compensatory in nature and the Ld.CIT(Appeals) deleted the disallowance observing as under: -

> *"10.2 During the course of appellate proceedings before me, when directed, the appellant has furnished copies of semi-annual service tax returns filed by the appellant for the year under consideration. Relying upon this it was submitted that the nature of interest of Rs.76,52,276/- is compensatory in nature, in this regard, it has been submitted by the appellant as under:-*
>
> *"It is submitted that since the appellant is liable to pay Service Tax there was a delay in deposit of Service tax for following months and accordingly the appellant had to ii additional interest cost as under:*

| **Month** | **Interest Paid (Rs.)** |
|---|---|
| Mar-11 | 56.519 |
| Jun-11 | 16,74,417 |
| Jul-11 | 21,93,066 |
| Oct-11 | 92.715 |
| Nov-11 | 1,33,612 |
| Dec-11 | 17,71,596 |
| Jan-12 | 17,30,351 |
| **Grand Total** | 76,52,276 |

> *In order to demonstrate that the above interest cost is compensatory in nature and no we are enclosing herewith our Service Tax Return for the Quarter 1 for April, 2 September 2011 and Quarter 2 for*

*October, 2011 to March, 2012. The above interest was paid in terms of section 75 of Chapter V of the Finance Act, 1994 which is as under: -*

> *"Section 75. Interest on delayed payment of service tax- Every person, liable to p tax in accordance with the provisions of Section 68 or rule's made there under, who I credit the tax or any part thereof to the account of the Central Government within the prescribed, shall pay simple interest (at such rate not below ten per cent, and not exceeding thirty-six per cent, per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette for the period by which such crediting of the tax or an thereof is delayed).*
>
> *Provided that in the case of a person who collects any amount as service tax but fails to pay the amount so collected to the credit of the Central Government, on or before the date on which such payment is due, the Central Government, by notification in the Official Gazette, specify such other rate of interest, as it may deem necessary:*
>
> *Provided further that in case of a service provider, whose value of tax services provided in a financial year does not exceed sixty lakh rupees during any of the financial years covered by the notice or during the last preceding financial year, as the case may be, such rate of interest, shall be reduced by three per cent per annum. ”*

*11. The facts of the case and the material available on record has been considered. It is observed that the AO has made a total disallowance Rs.78,68,958/-. Out of this during the course of appellate proceedings, the appellant was able to substantiate the nature of interest expenditure only vis-à-vis delay in payment of service tax of Rs.76,52,276/-. As regards, the balance amount of Rs.2,16,682/-, no details or other relevant*

*facts have been submitted by the appellant in order to demonstrate whether the nature of interest is compensatory or penal. Since the appellant has not been able to substantiate claim for deduction of interest expense of Rs. 2,16,682/-, therefore, disallowance to this extent is upheld.*

*12. As regards, interest payment on delay in payment of service tax, from the perusal of service tax returns furnished by the appellant, it is apparent that the nature of interest paid is compensatory as mandated in terms of Section 75 of Chapter V of Finance Act 1994. Section 75 provides for a levy of compensatory interest for any delay in payment of service tax after due date. This is clearly allowable within the ambit of section 37(1) of the Income Tax Act. Hon'ble Mumbai ITAT in the case of Shri Radhakrishna Shipping Ltd. reported in 179 ITD 139 (Mum) analyzing nature of interest paid on delay in deposit of TDS has held as under: -*

> *"9. We shall now advert to the disallowance made by the AO of the interest on service tax of Rs.4,84,307/- paid by the assessee, which thereafter had been vacated by the CIT(A). As is discernible from the orders of the lower authorities, the assessee had paid the aforesaid amount of interest on account of delay in payment of service tax. The AO was of the view, that as the assessee had to make the payment of the aforesaid interest because of violation of service tax rules, therefore, the same being in the nature of a penal payment was not allowable as a deduction under Sec. 37(1) of the Act. However, the CIT(A) did not find favour with .the view taken by the AO and observed, that as the payment of interest was compensatory in nature, therefore, the same was rightly claimed as a deduction u/s 37 by the assessee. We have given a thoughtful consideration to the Issue before us and are unable to persuade ourselves to subscribe to the view taken by the AO. We find that Sec.75 of the Finance Act, 1994, which envisages levy of interest on late service tax payment is compensatory in nature and cannot be characterized as a levy of*

*penalty. In fact, the levy of penalty under the Service Tax Act is contemplated in Sec.76 of the finance Act, 1994. Accordingly, as the payment of interest on late service tax payment by the assessee is found to be compensatory in nature, therefore the same in our considered view could not have been held as not allowable as a deduction under Sec.37(1) of the Act. We thus finding no infirmity in the order of the CIT(A), who in our considered view had rightly vacated the disallowance oi the interest on late service tax payment of Rs.4,84,307/- made by the AO uphold his order U the said extent The Ground of appeal No.3 raised by the revenue is dismissed."*

*13. Respectfully following the above decisions of Hon ble ITAT disallowance made by the AO to the extent of Rs.76,52,276/- is deleted. As a result ground No.6 s partly allowed."*

32. On careful perusal of the Ld.CIT(Appeals), we observe that the disallowance was deleted on appreciation of facts and the evidences on record and also applying the decision of the Mumbai Bench in the case of Sri Radha Krishna Shipping Ltd. (supra), wherein it has been held that interest on account of delay in payment of service tax is allowable as deduction u/s 37(1) of the Act. Thus, we see no infirmity in the order passed by the Ld.CIT(A). Ground no.3 of the Revenue appeal is rejected.

ITA No.668/Del/2022 (AY 2015-16) (Assessee's appeal) :

33. The assessee has raised the following grounds: -

1. *"That on facts and in law, the CIT(A) has erred in upholding disallowance of Rs.13,00,37,516/- being Loss incurred on account of Foreign Exchange Fluctuation.*

*1.1That on facts and in law, the AO/CIT(A) have erred in holding/observing that:*

*a) Foreign Exchange Loss is notional and not actualized.*
*b) Forex Loss has been incurred on Capital Account.*
*c) Appellant has not been able to give working of Loss claimed.*

2. *Without prejudice, that on facts and in law, the AO/CIT(A) have erred in not appreciating that if Foreign Exchange Loss of Rs.13,00,37,516/- is not allowable as a deduction then the corresponding Foreign Exchange Gain of Rs.8,36,55,039 is also not taxable."*

34. These grounds are identical to the grounds raised by the assessee for the AY 2011-12 and the decision taken therein applies *mutatis mutandis* for the appeal of the assessee for the year under consideration i.e. 2015-16. We ordered accordingly.

ITA No.882/Del/2022 (AY 2015-16) (Revenue's appeal):

35. The Revenue has raised the following grounds:

1. *"That on the facts and circumstances of the case, Ld.CIT(A) has erred in deleting addition of Rs.22,87,51,591/- made by AO on account of disallowance of supplementary rent/maintenance reserve u/s 40(a)(i).*

2. *That on the facts and circumstances of the case, Ld.CIT(A) has erred in deleting addition of Rs.311,14,52,493/- on account of disallowance of supplementary rent being royalty u/s 40(a)(i)."*

36. Ground no. 1 and 2 of grounds of appeal of the Revenue are directed against the deletion of disallowance made u/s 40(a)(ia) of the Act in respect of supplemental rent/maintenance reserve, supplementary rent being royalty. This issue has been adjudicated by us while dealing the appeal of the Revenue for the AY 2011-12 and the decision taken therein shall apply *mutatis mutandis* to the appeal of the Revenue for the assessment year under consideration i.e. 2015-16. We ordered accordingly.

ITA No.669/Del/2022 (AY 2016-17) (Assessee's appeal) :

37. The assessee has raised the following grounds: -

1. *"That on facts and in law, the CIT(A) has erred in upholding disallowance of Rs.19,53,11,970/- being Loss incurred on account of Foreign Exchange Fluctuation.*

*1.1 That on facts and in law, the AO/CIT(A) have erred in holding/observing that:*

*a) Foreign Exchange Loss is notional and not actualized.*
*b) Forex Loss has been incurred on Capital Account.*
*c) Appellant has not been able to give working of Loss claimed."*

38. These grounds are identical to the grounds raised by the assessee for the AY 2011-12 and the decision taken therein applies

*mutatis mutandis* for the appeal of the assessee for the year under consideration i.e. 2016-17. We ordered accordingly.

ITA No.883/Del/2022 (AY 2016-17) (Revenue's appeal):

39. The Revenue has raised the following grounds:

1. *"That on the facts and circumstances of the case, Ld.CIT(A) has erred in deleting addition of Rs.25,18,06,024/- made by AO on account of disallowance of supplementary rent/maintenance reserve u/s 40(a)(i).*

2. *That on the facts and circumstances of the case, Ld.CIT(A) has erred in deleting addition of Rs.290,41,04,552/- on account of disallowance of supplementary rent being royalty u/s 40(a)(i)."*

40. Ground no. 1 and 2 of grounds of appeal of the Revenue are directed against the deletion of disallowance made u/s 40(a)(ia) of the Act in respect of supplemental rent/maintenance reserve, supplementary rent being royalty. This issue has been adjudicated by us while dealing the appeal of the Revenue for the AY 2011-12 and the decision taken therein shall apply *mutatis mutandis* to the appeal of the Revenue for the assessment year under consideration i.e. 2016-17. We ordered accordingly.

41. In the result, appeal of the assessee for AY 2011-12 is partly allowed for statistical purposes, appeals of the assessee for AY 2012-13, 2015-16 and 2016-17 are allowed for statistical purposes

and Revenue's appeals for assessment years 2011-12, 2012-13, 2015-16 and 2016-17 are dismissed.

Order pronounced in the open court on 05.07.2023

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(NARENDRA KUMAR BILLAIYA)** | **(C.N. PRASAD)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Dated: 05.07.2023

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

**By order**

**Assistant Registrar, ITAT: Delhi Benches-Delhi**