

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'D', NEW DELHI**

**Before Sh. Saktijit Dey, Vice President**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 880/Del/2022 : Asstt. Year: 2013-14**

**ITA No. 881/Del/2022 : Asstt. Year: 2014-15**

DCIT, Central Circle-1, New Delhi-110055	Vs.	Spicejet Ltd., 319, Udyog Vihar, Phase-IV, Gurgaon, Haryana-122016
(APPELLANT)		(RESPONDENT)
<b>PAN No. AACCR1459F</b>		

**Assessee by : Sh. Tarandeep Singh, Adv.**

**Revenue by : Sh. Vizay Vasanta, CIT DR**

**Date of Hearing: 19.04.2023**

**Date of Pronouncement: 17.07.2023**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeals have been filed by the Revenue against the orders of Id. CIT(A)-23, New Delhi dated 27.01.2022 and 24.02.2022.

2. In ITA No. 880/Del/2022, following grounds have been raised by the Revenue:

*"1. That on the facts and circumstances of the case, Ld. CIT(A) has erred in deleting addition of Rs. 125,61,57,758/- 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. 198,73,77,543/- on account of disallowance of supplementary rent being royalty u/s 40(a)(i).*

*3. That on the facts and circumstances of the case, Ld.CIT(A) has erred in deleting addition of Rs. 16,22,93,583/-on account of disallowance of non deduction of tax on commission 40(a)(i)."*

3. In ITA No. 881/Del/2022, following grounds have been raised by the Revenue:

*"1. That on the facts and circumstances of the case, Ld. CIT(A) has erred in deleting addition of Rs. 44,30,74,961/- 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. 380,17,49,701/- on account of disallowance of supplementary rent being royalty u/s 40(a)(i)."*

**Supplementary Rent & Non-deduction of Tax on Commission:**

4. These are legacy issues. We have gone through the 10 page order of the Assessing Officer deliberating on these two issues while making the addition. We have gone through the order containing 48 pages of the Id. CIT(A) and the discussion, reasoning thereof while deleting the addition made by the AO.

5. For the sake of ready reference and brevity, the orders relied upon by the Id. CIT(A) are as under:

6. Order of the Special Bench of ITAT in the case of Interglobe Aviation Ltd. 131 Taxmann 98 dealing with the similar issue is as under:

*"I. DISALLOWANCE OF SUPPLEMENTARY RENT (SR)*

40. The next issue that it to be adjudicated is regarding disallowance of Supplementary Rent (SR). We find from the details filed in the paper book that during the year under consideration, assessee had incurred an expenditure of Rs. 338,09,64,412/- as SR paid to lessors for aircrafts acquired on operating lease. We have perused the lease agreements enclosed in the paper books filed before us. Assessee in its paper book has enclosed a copy of Lease Agreement Dated December 15, 2006 with M/s McR Aviation Ltd. Revenue in its paper book has submitted three lease agreements i.e., Agreement Dated 14th June, 2007 with Genesis Acquisition Ltd., Dated 04th July, 2007 with Lara Leasing Ltd. and Dated 10th August, 2010 with Crescent Leasing 9 Ltd. Under all these Agreements SR is a mandatory payment required to be made to the Lessors for use of aircrafts. Amount payable for SR is calculated based upon flying hours attributable towards critical parts of the aircraft i.e. aircraft body, auxiliary power unit, landing gear etc. We find the AO in the assessment order made disallowance under section 40(a)(i) of the I.T. Act, 1961 alleging that owing to non-deduction of tax, the expenditure is disallowable. However, the Ld. CIT(A) held that payment of SR is reimbursable and hence the expenditure is not allowable under section 37(1) of the I.T. Act, 1961.

40.1 We find an identical issue came up before the Division Bench in assessee's own case in AY 2007-08, wherein the Tribunal held as under:-

"10.2 It was submitted by the learned senior counsel that the learned CIT has erroneously compared payment of supplementary lease rent in the present case with payments for providing spares, facilities or services in connection with the operation of lease aircraft. In support of this, the learned senior counsel referred to the lease agreement executed between M/s McR Aviation Limited and Interglobe dated 15.12.006, copy of which is enclosed at pages 76 to

*175 of the Paper Book. It was submitted by the learned senior counsel that the terms & conditions of the lease agreement executed by Interglobe were identical to those, which were considered by Delhi Bench of IT AT in the case of Sahara Airlines (supra). To draw parity between the two cases, the learned senior counsel referred to following clauses of the lease agreement:-*

*"Rent" means collective, Base Rent and Supplemental "Supplemental Rent" means, without duplication, all Maintenance Supplemental Rent, all expenses and all other amounts, liabilities, indemnities and obligations (other than Base Rent) that Lessee assumes or becomes obligated to or agrees to pay under any Operative Document to or on behalf of Lessor or any other Person, including without limitation, payments of Total Loss Proceeds, interest at the Default Rate and payments of indemnities under Article 12 of this Sublease.*

*3.12.3 Payment by Lessor any Lessor maintenance Disbursement under section 3.12.4 (the "Lessor Obligations") shall be subject to Lessor having approved the applicable work scope and maintenance provider (such approval not to be unreasonably withheld) for the related maintenance work prior to the commencement thereof. Lessee agrees to provide Lessor with the planned work scope and maintenance provider for any such maintenance work no later than 45 days prior to the scheduled commencement thereof. Any failure by the Lessee to obtain lessor's approval in respect of any such maintenance work as aforesaid shall relieve the Lessor of the related Lessor Obligation hereunder.*

*3.12.4 Lessor Maintenance Disbursements (1) If lessee submits to Lessor, within sixty (60) days after the completion of the applicable approved maintenance work (except if otherwise agreed between Lessor and Lessee, it being agreed that such time periods may be extended as determined in the reasonable discretion of Lessor, to the extent that Lessee notifies Lessor at or before the end of such sixty*

*(60) day period that there are still outstanding invoices (which shall be specifically identified) for approved maintenance work), an invoice and supporting documentation evidencing performance of and payment for (each in reasonable reimbursement shall be made in respect of replacement, repair or overhaul caused by foreign object damage, domestic object damage, operational or other mishandling, family maintenance or any accidental cause or in respect of any cost which is reimbursable by insurance or which relates to convenience, premature or unscheduled shop visits or overhauls or Lessee effected operational modifications, Engine QEC, Engine accessories, removal/installation of Engines, removal/Installation. of APUs removal/installation of Landing Gear, structural and non-structural components including but not limited to nacelle structures, the thrust reversers, cowlings and engine mounts, or shipping charges, and (ii) no Material Default or Event of Default is continuing, promptly pay to Lessee the following amounts ("Lessor Maintenance Disbursements") from the respective Maintenance Supplemental Rent account.*

*(i) Airframe 4C/6Y Checks: with respect to a scheduled heavy structural 4C/6Y checks of the Airframe if it comes due during the Sublease Term, the lesser of (i) the amount of such invoice and (ii) the net balance of Airframe 4C Maintenance Supplemental Rent received by Lessor at the time of payment;*

*(ii) Airframe 8C/12Y Checks: with respect to a scheduled heavy structural 8C/12Y checks of the Airframe if it comes due during the Sublease Term, the lesser of (i) the amount of such invoice and (ii) the net balance of Airframe 8C Maintenance Supplemental Rent received by Lessor at the time of payment;*

*(iii) Engine Refurbishment: with respect to any Overhaul for an Engine, the lesser of (i) the amount of such invoice and (ii) the net*

*balance of Engine Refurbishment Maintenance Supplemental Rent received by Lessor in respect of such Engine at the time of payment;*

*(iv) Engine LLP Replacement: with respect to any LLP replacement for an Engine that is replaced due to expiration of its life limit, the lesser of (i) the amount of such invoice (with any credits for installation of LLPs with less life than the originally installed LLP offsetting any charges for installation of longer life remaining LLPs) and (ii) the net balance of Engine LLP Maintenance Supplemental Rent received by Lessor in respect of such Engine at the time of payment;*

*(v) APU: with respect to any scheduled APU Overhaul, the lesser of (i) the amount of such invoice and (ii) the net balance of APU Maintenance Supplemental Rent received by Lessor at the time of payment;*

*(vi) Landing Gear: with respect to a scheduled Landing Gear Overhaul if it comes during the Sublease Term, the lesser of (i) the amount of such invoice and (ii) the net balance of the Landing Gear Maintenance Supplemental Rent received by Lessor at the time of payment.*

*(2) For the avoidance of doubt, Lessee has no right to payment of any Lessor maintenance Disbursement except (i) following the occurrence of a Total Loss following payment of all moneys due and owing pursuant to Section 14.3.2(ii) as expressly provided in this Section 3.12.4 and (ii) as expressly provided in Exhibit H, and any remaining balances of the Maintenance Supplemental Rent following the Expiry Date, after application of the foregoing provisions, shall be retained by Lessor as its sole property, with the exceptions set forth in Exhibit H. To the extent any maintenance expenses exceed the amount available in the applicable Maintenance Supplemental Rent account, such expenses shall be for the account of the Lessee*

*and the shortfall, if any shall not be carried forward or made the subject of any further claim for reimbursement. Lessee acknowledges that Lessor may commingle the Maintenance Supplemental Rent with its general funds and no interest shall accrue in favor of Lessee in respect of Maintenance Supplemental Rent held by Lessor.*

*8.1.1 During the Sublease Term and until the Aircraft is returned to Lessor in the condition required by this Sublease, Lessee alone has the obligation, at its expenses, to timely maintain, service, test, inspect, Overhaul and repair the Aircraft, Engines and all of the Parts (a) in accordance with the Maintenance program, (b) in accordance with the rules and regulations of the Aviation Authority, (c) in accordance with Manufacturer's type design, (d) so as to ensure that the Aircraft meets the requirements of its type certificate data sheets in accordance with all Aviation Authority requirements, (e) so as to keep the Aircraft in as good an operating condition as when delivered to Lessee (ordinary wear and tear excepted) and in accordance with any other regulations or requirements necessary in order to maintain a valid Certificate of Airworthiness for the Aircraft and meet the requirements at all times during the Sublease Term and upon return of the Aircraft to Lessor for issuance of a standard Certificate of Airworthiness for transport category aircraft issued by the Aviation Authority in accordance with applicable laws (except during those periods when the Aircraft is undergoing maintenance or repairs as required or permitted this Sublease) and (f) in the same manner and with the same care as used by lessee with respect of similar aircraft and engines operated by Lessee and without in any way discriminating against the aircraft.*

*8.1.2 No Engine will remain in an unserviceable condition for more than: (i) thirty (3) days before such Engine is delivered to an Approved Maintenance Performed for repair; and (ii) one-hundred twenty 9120) days (or such longer period as may be mutually agreed*

*by the parties) after such Engine is removed from an Aircraft for repair.*

*8.1.3 Lessee shall not make any material change to its Maintenance Program or make any material deviations from the Manufacturer's approved maintenance program (including the MPD) (in each case excluding changes or deviations made mandatory by the Aviation Authority or Manufacturer) without the prior written consent of Lessor."*

*10.3 Explaining the nature of the transactions farther it was submitted by the learned senior counsel Shri Syali that payment of supplementary lease rent is an industrial norm which ensures that the lessor is compensated for regular wear & tear of the critical components of the aircrafts. It was submitted by the learned senior counsel that as per the lease agreement the primary responsibility of maintenance of the aircraft is that of the lessee and the lessor was under no obligation to meet any expenditure or bear any loss in respect of the lease aircraft. It was submitted that the Interglobe's obligation to repair and keep the aircraft in worthy condition could have been discharged by it by either paying directly to the repair agency without the lessor having any role or in the manner as provided in Article 3.12 of the lease agreement. It was further submitted that for invoking the exclusionary clause as provided in section 10(15A) of the Act, it is mandatory for the authorities below to demonstrate that either the lessor had supplied certain spares or provided any facility or service in connection with the operation of the lease aircraft. Since no such fact has been brought on record by the Id CIT, it was submitted that the impugned action u/s 263 be quashed. It was also submitted by the learned senior counsel that recently Hon'ble Jurisdictional High Court has upheld the ratio propounded by this Bench of the Tribunal in the case of Sahara Airlines (supra) in orders reported in the name of M/s Jet Lite (India) Ltd. reported in 236 Taxmann 453 (Del). It was also submitted by*

*the learned senior counsel that once an assessment order has been passed in consonance with the judicial wisdom of the superior court then the same cannot be termed as erroneous or prejudicial to the interest of revenue. In support of this proposition, learned senior counsel relied upon the decision of Hon'ble Delhi High Court in case of Honda Siel Power Products Ltd. reported in 333 ITR 547 (Del). It was further clarified by him that in reply to show cause notice u/s 263 of the Act issued by the learned CIT the appellant had specifically pointed out that as per the decision of this Bench of the ITAT in the case of Sahara Airlines (supra) payment for supplementary lease rent is exempt u/s 10(15A) of the Act, however, the learned CIT in this order has completely ignored the same and premised upon mere suppositions held that supplementary lease rentals were paid to lessor as reimbursement of expenses incurred towards providing facilities or services in connection with the operation of these aircrafts. Alternatively it was also claimed by the learned senior counsel that the payment of supplementary lease rents is also not liable to tax in India as per the provisions of Article 12 of the DTAA between India and Ireland.*

*11. Per contrary, the learned CIT(DR) Dr. Prabhakant vehemently opposed the above arguments. It was submitted by the Id. CIT(DR) that the teamed CIT had for just reasons assumed jurisdiction to revise the assessment and no prejudice is being cause to the appellant as the issue has merely been set aside for a fresh assessment.*

*12. We have considered the arguments advanced by the parties and also have gone through the material available on record as well as the decisions relied upon. As rightly submitted by the learned senior counsel that the claim for supplementary lease rent being exempt as per provision of section 10(15A) of the Act was inquired upon by the Assessing Officer during the course of original assessment proceedings. Thus this is not a case of lack of enquiry. We agree*

*with the submissions made by the appellant that the payment of supplementary lease rent in the present case is not for provision of spares, facilities or any such services being rendered by the lessor in the present case. A coordinate bench of Delhi ITAT in the case of Sahara Airlines (supra) had considered identical issue and had held as under:-*

*"10. The perusal of the above covenants of the agreement reveals that lessee was responsible to bear all the expenses in the course of the term of the lease on account of operational cost, repair and replacement, losses and other expenditure which were required to keep the aircraft in air-worthy condition. So the lessor was under no obligation to meet any expenditure or bear any loss in respect of the leased aircraft. Complete maintenance of the aircraft was the absolute responsibility of the lessee. The lessor was interested only in receiving the basic lease rent which could be utilised by them in the manner it liked and therefore, was income of the lessor which was exempt under section 10(15A) of the Act. But the supplemental rent was to be reimbursed in accordance with the terms of Article 13 of the agreement. The obligation to repair and keep the aircraft in the airworthy condition was that assessee and such obligation could be discharged either by paying directly to the repair agency without involving the lessor or by the manner as provided in Article 13 of the agreement. Such agreement was made only to ensure that the leased aircraft is kept in airworthy condition. If the Lessee fails to maintain the aircraft in good condition, then the lessor, in such cases, could get the aircraft repaired out of the reserves. Further, the quantum of reserve depends upon the period of use of the aircraft and the right of reimbursement is only limited to the extent of reserve only. If the cost of repair exceeds the reserve, then such liability has to be borne by the assessee only.*

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

.....

*13. So the question that arises is as to what was intended to be excluded by the Legislature by amendment made by Finance Act, 1995 w.e.f. 1-4-1996. From the perusal of the memorandum explaining the provisions of Finance Bill, 1995, it appears that after the insertion of section 10(15A) in the statute, it was experienced by the Government that the non-resident companies were receiving*

*payments in consideration of facilities or services provided/rendered by the lessors such as training to the pilots or other crew men, providing technicians etc. in the guise of leased rent. It is this mischief which was suppressed by the substitution of section 10(15A) w.e.f. 1-4-1996. This is manifest from the memo explaining the proposed Finance Bill, 1995. The relevant portion is quoted below (212 ITR (St.). 351):*

*.....*

*From the above, it is crystal clear that the intention of the Legislature was to tax the payment made for spares, facility or services provided by the recipient. Therefore, the change in the law has to be understood in that context. So if any payment has to be brought within the exclusionary portion of section 10(15A) of the Act, then it must be established (i) that lessor either had supplied the spares or provided any facility or service in connection with operation of the leased already and (ii) the payment has been made by the lessee in consideration of such spares/facilities/services. Once it is agreed that the supplemental rent was within the ambit of original provisions of section 10(15A) then the onus is on the revenue to establish that such supplemental rent fell within the ambit of such exclusionary provisions. The Id. Sr. DR has not been able to point out any of the terms of the agreement on the basis of which it can be said that lessor was required to provide for spares, facility or services in connection with the operation of the leased aircraft. He has also not brought any material or evidence to suggest that lessor in fact supplied any spare or provided any facility or service whatsoever in connection with the operation of the leased aircraft. Therefore, we are in complete agreement with the contention of the learned counsel for the assessee that the supplemental rent did not fall within the ambit of the exclusionary provisions of section 10(15A) of the Act. Since prior to 1-4-1996 such payments were covered by the main provisions, as originally inserted, it can be said that such payments continued to be exempt*

*under section 10(15A) of the Act. Consequently, the same was not chargeable to tax and, therefore, there was no obligation on the assessee to deduct the tax at source under section 195 of the Act. The question of holding the assessee as an assessee in default under section 201(1) of the Act, therefore, does not arise. Accordingly, we set aside the orders of CIT(A) on this issue and delete the demands raised for financial years 1996-97 to 1998-99 with reference to the payments made to ILFC."*

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

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

*48. The ITAT has examined the object behind amending Section 10(15A) with effect from 1st April 1996. If any payment had to be brought within the exclusionary portion of Section 10(15A) of the*

*Act, then it must be shown (i) that the lessor either had supplied the spares or provided any facility or service in connection with operation of the leased aircraft; and (ii) the payment has been made by the lessee in consideration of such spares/facilities/services. The ITAT has rightly pointed out that the supplement rental was within the ambit of the original provision of Section 10(15A) of the Act.*

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

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

*12.2 The learned senior counsel is thus justified in drawing parity of facts between the present case and the case of Sahara Airlines (supra) as we observe that both the lease agreements are similar in terminology and intent. We further observe that even the Ld. CAT in the impugned order accepts that primary responsibility to maintain the aircraft is that of Interglobe. However thereafter no facts have been brought on record to demonstrate that payment for Supplementary Rent is towards provision of either spares, facilities of services in connection with operation of leased aircraft by the lessor. The learned CIT relies upon order of assessment for AY 2008-*

*09, however, even in that order no such material has been brought on record by the AO. As held by coordinate bench in case of Sahara Airlines (supra) to fall within the exception of section 10(15A) there must exist an inextricable link between the expenditure regarding supply of spares or for use of any facility or for rendering of any service by the lessor and operation of the leased aircraft. This clearly has not been demonstrated by the learned CIT in the impugned order or by the AO in his order of assessment for AY 2008-09. Facts of the present case being similar to that of Sahara Airlines (supra), respectfully following the decision of Hon'ble Jurisdictional High Court we hold that payment of Supplementary Lease rent was exempt u/s 10(15A) of the Act and the appellant was not required to deduct TDS thereon....."*

*40.2 Thereafter, this issue again came up before the Tribunal in A.Ys. 2008-09 and 2009-10 wherein decision for AY 2007-08 was followed. Being aggrieved, the revenue filed an appeal before the Hon'ble Delhi High Court which has been dismissed vide orders dated 07th July, 2017 and 31st October, 2017. Aggrieved further, SLP was filed by the Tax Department which has also been dismissed vide order dated 30-7-2018 and 10-9-2018. The issue is therefore no more res integra.*

*40.3 However, the learned CIT(A) in the instant case has held that the expenditure per se is not allowable as per provision of Section 37(1). We have perused the relevant agreements filed before us and are unable to uphold the disallowance made by Ld. CIT(A). Payment of SR is mandatory and failure to do so would result in civil consequences wherein the lessor will be entitled to take back the possession of the Aircraft. This is clearly apparent from the following clauses of lease agreement :-*

*"Section 3.4 Supplemental Rent. Lessee hereby agrees to pay to Lessor or to any other Person designated by Lessor or otherwise*

*entitled to receive such payment any and all Supplemental Rent and any other amounts due hereunder at the time the same shall become due and owing. In the event Lessee shall fail to pay any Supplemental Rent, or any other amounts due hereunder when due, Lessor and each other Person entitled to such amounts shall have all rights, powers and remedies provided for herein or in any other Operative Document or by Law or equity or otherwise in the case of non-payment of Base Rent."*

*40.4 In our opinion, the Ld. CIT(A) has erroneously held that SR is reimbursable. In case of an operating lease the lessor is the owner of the aircraft. Aircrafts are enormously expensive and to ensure timely maintenance of the aircraft SR is determined and paid. When the scheduled maintenance becomes due the lessee incurs the maintenance expense and this expense is reimbursed by the lessor to the extent of SR fund maintained by the lessor. This ensures that on redelivery of the aircraft when lease term expires the aircraft is in good condition. The lease agreement provides for reimbursement of maintenance expense and not of SR. This is clearly apparent from the following clauses:*

#### *Section 3.12 Maintenance Supplemental Rent*

*3.12.1 On the twelfth (12th) day of each calendar month following the Delivery Date during the Sublease Term and on the Expiry Date, Lessee will pay to Lessor, as Supplemental Rent, Maintenance Supplemental Rent for the Airframe, Engines, Landing Gear and APU in respect of the hours and cycles flown in the previous calendar month during the Sublease Term (as evidenced in the related Monthly Report) in the following amounts:*

*(i) in respect of the Airframe, US\$45 for each Airframe Flight Hour operated by the Aircraft to cover scheduled heavy structural/4C/6Y*

*checks of the Airframe ("Airframe 4C Maintenance Supplemental Rent");*

*(ii) in respect of the Airframe, US\$22.50 for each Airframe Flight Hour operated by the Aircraft to cover scheduled heavy structural/8C/12Y checks of the Airframe ("Airframe 8C Maintenance Supplemental Rent");*

*(iii) in respect of each Engine, an amount determined in accordance with Exhibit G attached hereto for each Engine Flight Hour, in each case operated by that Engine to cover such Engine's Overhauls (as to each Engine, "Engine Refurbishment Maintenance Supplemental Rent");*

*(iv) in respect of each Engine, US\$111 for each Engine Cycle, in each case relating to that Engine to cover such Engine's LLP replacements (as to each Engine, "Engine LLP Maintenance Supplemental Rent");*

*(v) in respect of the APU, US\$20 for each Airframe Flight Hour to cover APU Overhauls ("APU Maintenance Supplemental Rent"); and*

*(vi) in respect of the Landing Gear, US\$2,700 for each calendar month (prorated for partial months) during the Sublease Term to cover the Landing Gear Overhaul ("Landing Gear Maintenance Supplemental Rent")*

*The Airframe 40 Maintenance Supplemental Rent, the airframe 80 Maintenance Supplemental Rent, the Engine Refurbishment Maintenance Supplemental Rent, the Engine LLP Maintenance Supplemental Rent, the APU Maintenance Supplemental Rent, and the Landing Gear Maintenance Supplemental Rent are referred to collectively herein as the "Maintenance Supplemental Rent". The Maintenance Supplemental Rent for the Airframe 40 maintenance, the Airframe 8C maintenance, each Engine's refurbishment, each*

*Engine's LLP replacements, the APU refurbishment and the Landing Gear overhaul shall each be deemed to be a separate account and shall, until paid out in accordance with the terms hereof, be and remain the property of the Lessor. Maintenance Supplemental Rent for the month in which the Expiry Date shall occur shall be determined as of and payable on the Expiry Date. The Maintenance Supplemental Rent in respect of the Airframe, each Engine and the APU may be adjusted on the Expiry Date in accordance with the terms of Exhibit H hereto.*

*3.12.4 Lessor Maintenance Disbursements (1) If Lessee submits to lessor, within sixty (60) days after the completion of the applicable approved maintenance work (except if otherwise agreed between Lessor and Lessee, it being agreed that such time periods may be extended as determined in the reasonable discretion of Lessor, to the extent that Lessee notifies Lessor at or before the end of such sixty (60) day period that there are still outstanding invoices (which shall be specifically identified) for approved maintenance work) an invoice and supporting documentation evidencing performance of and payment for (each in reasonable detail) the following work by or on behalf of Lessee, lessor shall, provided that (i) no reimbursement shall be made in respect of replacement, repair or overhaul caused by foreign object damage, domestic object damage, operational or other mishandling, faulty maintenance or any accidental cause or in respect of any cost which is reimbursable by insurance or which relates to convenience, premature or unscheduled shop visits or overhauls or Lessee effected operational modifications, Engine QEC, Engine accessories, removal/installation of Engines, removal/installation of APUs, Removal/installation of Landing Gear, structural and non-structural components including but not limited to nacelle structures, the thrust reversers, cowlings and engine mounts, or shipping charges, and (ii) no Material Default or Event of Default is continuing, promptly pay to lessee the following amounts ("Lessors*

*Maintenance Disbursements") from the respective Maintenance Supplemental Rent account.*

*(i) Airframe 4C/6Y Checks : with respect to a scheduled heavy structural 4C/6Y checks of the Airframe if it comes due during the Sublease Term, the lesser of (i) the amount of such invoice and (ii) the net balance of Airframe 4C Maintenance Supplemental Rent received by Lessor at the time of payment;*

*(ii) Airframe 8C/12Y Checks : with respect to a scheduled heavy structural 8C/12Y checks of the Airframe if it comes due during the Sublease Term, the lesser of (i) the amount of such invoice and (ii) the net balance of Airframe 8C Maintenance Supplemental Rent received by Lessor at the time of payment;*

*(iii) Engine Refurbishment : with respect to any Overhaul for an Engine, the lesser of (i) the amount of such invoice and (ii) the net balance of Engine Refurbishment Maintenance Rent Received by Lessor in respect of such Engine at the time of payment;*

*(iv) Engine LLP Replacement: with respect to any LLP replacement for an Engine that is replaced due to expiration of its life limit, the lesser of (i) the amount of such invoice (with any credits for installation of LLPs with less life than the originally installed LLP offsetting any charges for installation of longer life remaining LLPs) and (ii) the net balance of Engine LLP Maintenance Supplemental Rent received by Lessor in respect of such Engine at the time of payment;*

*(v) APU : with respect to any scheduled APU overhaul, the lesser of (i) the amount of such invoice and (ii) the net balance of APU Maintenance Supplemental Rent received by Lessor at the time of payment; and*

*(vi) Landing Gear : with respect of a scheduled Landing Gear Overhaul if it comes during the Sublease Term, the amount of such invoice and (ii) the net balance of APU Maintenance Supplemental Rent received by Lessor at the time of payment; and (ii) the net balance of the Landing Gear Maintenance Supplemental Rent received by Lessor at the time of payment.*

*(2) For the avoidance of doubt, Lessee has no right to payment of any Lessor Maintenance Disbursement except (i) following the occurrence of a Total Loss following payment of all moneys due and owing pursuant to Section 14.3.2 (ii) as expressly provided in this Section 3.12.4 and (iii) as expressly provided in Exhibit H, and any remaining balances of the Maintenance Supplemental Rent following the Expiry Date, after application of the foregoing provisions, shall be retained by Lessor as its sole property, with the exceptions set forth in Exhibit H. To the extent any maintenance expenses exceed the amount available in the applicable Maintenance Supplemental Rent account, such expenses shall be for the account of the Lessee and the shortfall, if any, shall not be carried forward or made the subject of any further claim for reimbursement. Lessee acknowledges that Lessor may commingle the Maintenance Supplemental Rent with its general funds and no interest shall accrue in favor of Lessee in respect of Maintenance Supplemental Rent held by Lessor.*

*40.5 Therefore, clearly the Supplemental Rent is a permanent outflow from the coffers of the assessee and post payment of that sum assessee retains no control over the amount paid. SR once paid is "retained by Lessor as its sole property". As per the lease agreement post incurring of scheduled maintenance expenditure the assessee is entitled to reimbursement of the expense incurred on maintenance. Amount of reimbursement is lesser of actual expense or the SR Fund maintained by the lessor. Expense incurred for SR is thus not contingent. It is determinative and due as per lease*

*agreement. Contingency if at all is attached to the expenditure incurred on maintenance of aircraft and its reimbursement from the lessor.*

*40.6 Assessee has also demonstrated before us that when actual maintenance expenditure is incurred by it then only the net amount (i.e., net of reimbursement received from the lessor) is debited by it to its P&L Account and therefore there is no double deduction claimed. This was also demonstrated before the Ld. CIT(A).*

*40.7 The Ld. CIT(A), in our opinion, has not properly understood the facts of the case. The fact that Supplemental Rent is determinable as per the terms of the Agreement and is mandatory payment demolishes the presumption of the Ld. CIT(A) that it is reimbursable. Reimbursement of actual maintenance expenditure if at all is a future contingent event, but, Supplemental Rent is a determined expenditure which is not at all contingent. We, therefore, agree with the submission of the learned Senior Counsel for the assessee that once a business liability is ascertained it has to be allowed as deduction under the mercantile system of accounting. We, therefore, hold that Supplemental Rent in the instant case is an allowable expenditure u/s 37(1) of the I.T. Act, 1961.*

*41. As regards the issue relating to disallowance u/s 40(a)(i) is concerned, we find from the details furnished by the Learned Senior Counsel for the Assessee that during the year under consideration, the assessee had incurred an expenditure on account of Supplemental Rent of Rs. 61,81,04,551/- in respect to lease agreements executed prior to 1st April, 2007. The assessee had also incurred an expenditure on account of Supplementary Rent of Rs. 276,28,59,861/- in respect of Lease Agreements executed after 1st April, 2007. We find the Tribunal in assessee's own case for A.Y. 2007-2008 had examined the nature of Supplementary Rent and it was held that payment of Supplementary Rent is nothing different*

*than the character of basic rent which is also payable under the Lease Agreement to the Lessors. It was held that Supplementary Rent is not a payment made for use of spares, facilities or any services, whereas Basic Rent is a fixed amount. Supplementary Rent is determined taking into consideration the number of flying hours. Supplementary Rent, in our opinion, is a payment made for lease of aircraft. The Lease Agreement defines "Rent" as "means collectively Base Rent and Supplementary Rent". Therefore, respectfully following the decision of Tribunal for A.Y. 2007-2008 which has also been followed in subsequent years, we hold that payment of Supplementary Rent of Rs. 61,81,04,551/- is exempt from tax in hands of Lessors as per provisions of section 10(15A) and hence, disallowance under section 40(a)(i) is not called for. However, the above figure is subject to verification by the AO."*

7. With regard to the commission, the Id. CIT(A) deleted the addition based on the order of the ITAT in ITA No. 6103/Del/2015 and in assessee's own case in ITA No. 1496/Del/2017. The relevant part of the order of the ITAT is as under:

*"8. We have gone through the record in the light of the submissions made on either side. It's not the case of the Revenue that the decision of the Hon'ble jurisdictional High Court in the case of JDS Apparels (supra) has no obligation to the facts of the case. Further, this Tribunal followed the said decision in assessee's own case for the Assessment Years 2011-12 and 2012-13 in ITA Nos. 4226/Del/2014 and 6103 /Del/2015 by orders dated 22.4.2019 and 28.2.2019 respectively answered the issue in favour of the assessee.*

9. *When there is no change in the fundamental facts that permeate all through these years to disturb a consistent view taken by the Tribunal in assessee's own case while following the binding precedent*

*of the Hon'ble judicial High Court in the case of JDS Apparels (supra), there is no reason for this Bench also to take a different view or to deviate from the view that is consistently taken on the same set of facts and circumstances. While respectfully following the decision of the Hon'ble jurisdictional High Court and also the view taken by this Tribunal consistently over a period of time, we take a view that there is no relationship of principal between the assessee and the banks and the bank has no obligation to deduct TDS in respect of the amounts retained by the banks towards the service charges. We, therefore, while accepting the contention of the assessee upheld the order passed by the Id. CIT(A) and dismiss the appeal of the Revenue.*

*10. In the result, appeal of the Revenue is dismissed."*

8. Since, the issues before us are squarely covered by the orders of the Tribunal which have been the basis of the order of the Id. CIT(A), in the absence of any change in the factual matrix and the legal proposition, we hereby affirm the order of the Id. CIT(A).

9. In the result, both the appeals of the Revenue are dismissed.

Order Pronounced in the Open Court on 17/07/2023.

Sd/-

**(Saktijit Dey)**  
**Vice President**

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**Dated: 17/07/2023**

\*Subodh Kumar, Sr. PS\*

Copy forwarded to:

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

**ASSISTANT REGISTRAR**