

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'F' BENCH  
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER  
&  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.3050/Mum/2022  
(Assessment Year :2018-19)**

DCIT-CC 5(2) Mumbai	Vs.	M/s. Jetair Private Limited Jetair House 13 Community Centre Yusuf Sarai Delhi - 100 049
<b>PAN/GIR No.AAACJ0121C</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

**CO No.23/Mum/2023  
(Arising out of ITA No.3050/Mum/2022)  
(Assessment Year :2018-19)**

M/s. Jetair Private Limited Jetair House 13 Community Centre Yusuf Sarai Delhi - 100 049	Vs.	DCIT-CC 5(2) Mumbai
<b>PAN/GIR No.AAACJ0121C</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Manan Mathuria
Revenue by	Shri Suresh D Gaikwad
<b>Date of Hearing</b>	<b>14/07/2023</b>
<b>Date of Pronouncement</b>	<b>24/07/2023</b>

**आदेश / O R D E R****PER AMIT SHUKLA (J.M):**

The aforesaid appeal has been filed by the Revenue and Cross Objection by the assessee against the order dated 05/09/2022 passed by CIT(A)-53, Mumbai for the quantum of assessment passed u/s.143(3) for A.Y.2018-19.

2. In the grounds of appeal, Revenue has raised the following grounds:-

1."*Whether on the facts and circumstances of the case and in law, Ld. CIT(A) has erred in deleting the addition made ignoring the fact that paying higher rate of commission/ORC to other or non-related companies by M/s Jet Air (India) Ltd and at same time paying lower rate to assessee (related party), is clearly a colourable device for tax evasion, which cannot be permitted by law*"

2."*Whether on the facts and circumstances of the case and in law, Ld. CIT(A) has erred in ignoring the fact that the A.O. passed the order based on various factors which include the statements of Smt Vidyagauri Samant, General Manager (Finance) of M/s Jetair Pvt. Ltd. recorded u/s 131 of the Act though the Ld. CIT(A) agreed that statement of Smt. Vidyagauri Samant recorded during survey proceedings has evidentiary value and it could be utilized as an important piece of evidence during the assessment proceedings*".

3."*Whether on the facts and circumstances of the case and in law, Ld. CIT(A) is correct in deleting the adjustment made on the basis of the arm's length principle without appreciating the fact that for internal comparison, CUP is one of the best methods*"

4."*Whether on the facts and circumstances of the case and in law, Ld. CIT(A) is correct in deleting the addition on the fact that*

*it requires adjustment for difference without actually establishing any such differences*

3. Whereas in the Cross Objection, the assessee has raised the following grounds:-

*1. The Ld. CIT(A) ought to have held that the Assessing Officer has erred in making addition of notional income of Rs. 141,69,12,770/-. The CIT(A) ought to have appreciated that even as per the Assessing Officer the said income has not been earned but ought to have been earned.*

*2. The Ld. CIT(A) ought to have held that the Assessing Officer has erred in applying the arm's length principle of transfer pricing in respect of the domestic transaction under consideration, which is not liable for such adjustments under transfer pricing provisions prescribed under the Income-tax Act.*

*3 The Ld CIT(A) ought to have held that the transaction under consideration was normal business transaction driven by the commercial expediency and, hence, could not have been disturbed by the Assessing Officer.*

*4 The Ld. CIT(A) ought to have held that the Assessing Officer has erred in not following the principle of consistency by ignoring the fact that the transaction of receipt of commission has been accepted in other years.*

*5. The Ld CIT(A) has erred in holding that the retraction of Smt Vidyagauni Samant was not valid, the contents are afterthought and the affidavit has not been validly executed.*

*6. The appellant craves leave to add to, amend or alter, the foregoing grounds of cross objection.*

4. The brief facts are that Assessee Company is engaged in business as General Sales Agent for international and domestic airlines offering marketing, sales and accounting services. A

survey u/s.133A was conducted in the case of the assessee on 19/09/2018. During the course of survey proceedings, statement of Smt. Vidyagauri Samant, General Manager (Finance) of the assessee company was recorded u/s.131 in which she stated that, M/s. Jet Airways (India) Ltd had paid ORC commission to other entities at a higher rate than what was received to the assessee company, a group concern. The ld. AO in the show-cause notice to the assessee asked the assessee as to why charging less commission rate from group concern should not be added as compared to the commission paid from other entities, which he worked out at Rs.1,41,69,12,770/-. He noted that in respect of Online Reservation Commission for passengers 0.2% to 0.99% for the related party Jet Airways / Jet Air averaging about 0.6% while for other unrelated airlines it averages to around 2.5%. He also referred to the statement recorded during the course of search of Smt. Vidyagauri Samant. Relevant question referred by the ld. AO reads as under:-

*Q:15. From details furnished by you, it is seen that there is huge variation in commission fee received by M/s Jetair Pvt Ltd from M/s jet Airways Ltd over various FYS Please comment*

*Ans. Most of the commission earned by M/s. Jetair Pvt. Ltd from passenger ticket booking Further, with most of the non-related airlines, commission at passenger ticket booking is charged either @3% of basic ticket fare or cost plus 15% From jet Airways, commission at passenger ticket booking is charged @ up to 1% of basic ticket fare. Further. during FY 2011-12 and 2012-13. M/s. Jetair Pvt. Ltd agreed to limit commission earning from Jet Airways to assist the Jet Airways (annexure-3 ( page 1 to 3)- letters). Therefore there was further drop in commission earned from Jet Airways during FY 2011-12 and 2012-13*

*Q.16. As per answer given by you above, M/s. Jetair Pvt. Ltd commission from M/s. jet Airways Ltd at lower rate in comparison to rate at which it charges commission from non-related entities. This rate was further lowered during FY 2011-12 and 2012-13. This has reduced taxable profit of M/s Jetair Ltd Please comment. Also give rate at which commission was charged from top 5 airlines including Jet Airways during FY 2011-12 to 2017-18*

*Ans 1) All airlines contracts are individually negotiated and terms/remuneration vary per Airline.*

*2) You will notice that some of the airline have fixed fee (cost plus agreements), if we work out % of fee to sales generated by us, it is less than 3%. Please note services offered in all airlines are similar, however few airlines instead of giving lesser commission, negotiate on changed model of cost plus thereby in actually reducing our effective %*

*3) I have attached letter received from ANA in January 2012 (similar period to that of Jetairway letter) asking reduction in fee which we had agreed.*

*Therefore, commission or cost plus i.e our remuneration models are decided based on individual client and are negotiated on case to case basis commercials teams. We offer all our override commissions net of expenses to tax.*

5. The ld. AO further deduced that, since both Jet Airways (India) Ltd. and Jetair Pvt. Ltd. are private parties in charging of lower rate of commission are indicative of mechanism deliberately employed to lower the payment of commission without any ostensible reasons which is in violation of arm's length principle. Accordingly, he tabulated the average ORC to be received by the assessee from group concerns were in the following manner:-

<b>Sr. No.</b>	<b>Particulars</b>	<b>A.Y.2018-19(Rs.)</b>
1	Total Turnover(Cargo+PAX)	85,06,20,52,006/-
2	Total Commission received by Jetair	71,08,37,275/-
3	Jet Airways PAX Turnover	74,57,43,56,402/-
4	% of Commission calculated by the	0.60%
5	Amount as calculated by the assessee	44,74,46,140/
6	% of commission @2.50% of Jet Airways PAX Turnover as per Survey findings	1,85,43,58,910/-
7	<b>Difference (6-5)</b>	<b>1,41,69,12,770/-</b>

6. In response, assessee filed detailed reply which has been dealt and incorporated in the assessment order. In sum and substance, assessee submissions were as under:-

- The transaction with Jet Airways (India) Limited with respect to the GSA agreement is at Arm's Length Price. The same had been proved by relying on the assessment order of Jet Airways (India) Limited for AY 2015-16 wherein the ORC Rate was the same as in AY 2018-19.
- As per the theory of Taxation of Real Income, an important pillar of the taxing statute, only real income should be taxed, ie, the income which is accrued and an assessee should have the power to claim its right over that income. This view has been upheld by the Hon'ble Apex Court in the decision of CIT v A Raman & Co. (1968 AIR 49]

- All GSA agreements are negotiable agreements. The remuneration depends solely on what has been mutually agreed between the Principal and the Agent To prove this point, the appellant had even submitted, vide letter dated 16.08.2021, the agreements entered with All Nippon Airways Co. Ltd. and Air Seychelles Ltd wherein cost plus models were followed and no ORC Rate had been specifically provided for Commission rate in case of GSA agreements generally decreases as the turnover increases This is because the cost incurred by the agent does not increase proportionately to the increase in turnover, rather the agent achieves a cost advantage
- The passenger turnover of Jet Airways (India) Private Limited was 53.71 times the combined turnover of all the other airlines with whom the appellant had executed a GSA Agreement and therefore the appellant could not afford to lose its major client
- The letters exchanged between the appellant & Gulf Air Company G.S.C (submitted vide letter dated 27.09.2021) showed that even in 2004, the appellant had reduced the commission rate owing to its past relationship with the airline.
- Mail Correspondence with Austrian Airlines (submitted vide letter dated 29.09.2021) showed that the commission rate had been reduced from 2.5% to 1.8% in 2005. Such a letter proved that the ORC agreements are mutually negotiated amongst the parties and there cannot be a standard benchmark or a yardstick to measure the reasonability of the same
- It also submitted that the appellant had not earned, had not charged and had not received anything other than commission from Jet Airways (India) Limited for the General

Sales Agent Services provided. Moreover, it shall be pertinent to note that the appellant has not even received entire income due to it from Jet Airways (India) Limited for the captioned assessment year. Therefore, the notional income proposed to be added in the hands of the assessee is illegal and bad-in-law.

7. The ld. AO however, rejected all the explanations of the assessee about the commercial expediency and the factual matrix of the case and he only referred to the statement and made the addition of Rs.1,41,69,12,770/- holding that, firstly, assessee was adopted mechanism which is a colourable device to reduce profits; and secondly, the tax liability of Jet Airways (India) Ltd and the amount of cash which ought to have been received by the assessee company should be @2.5%.

8. Before the ld. CIT (A) assessee submitted that before the ld. AO assessee at various aspects has given detailed explanation stating that, *firstly*, transaction was at arm's length between the assessee and Jet Airways (India) Ltd., *secondly*, statement made by Smt. Vidyagauri Samant is factual and there is nothing contained therein which can be used by the assessee; *thirdly*, there was a commercial expediency; and *lastly*; only the real income can be taxed. Another point which was raised that the passenger turnover of Jet Airways (India) Private Limited for the captioned assessment year is Rs. 74,57,43,56,402 and the combined passenger turnover of all the other airlines excluding Jet Airways (India) Private Limited for the captioned assessment year is Rs. 1,38,83,90,325. From this, it can be seen that the turnover of Jet Airways (India) Private Limited is 53.71 times the

combined turnover of all the other airlines with whom the assessee has executed a GSA Agreement.

9. Further, it was pointed out that the commission rate in case of GSA agreements generally decreases when the turnover increases and this is because the cost incurred by the agent does not increase proportionately to the increase in turnover rather the agent achieves a cost advantage. Keeping this in mind, the assessee had entered into GSA agreement with Jet Airways (India) Private Limited, wherein both the parties had agreed that the ORC Rate would not exceed 1%. For the captioned assessment year Jet Airways (India) Private Limited has paid ORC @0.6% to the assessee which is well within the limits of 1%.

10. Further, it shall also be pertinent to note that Jet Airways (India) Limited has been consistently bringing in a major source of revenue to the assessee owing to its high volume passenger turnover. A comparison of the passenger turnover of Jet Airways (India) Limited vis-à-vis the passenger turnover of other airlines has been tabulated as under:-

Assessment Year	2018-19	2017-18	2016-17	2015-16	2014-15	2013-14	2012-13
Jet Airways Pax T/o (%)	98.17	97.57	98.17	97.75	97.26	98.41	97.46
Other Airlines Pax T/o (%)	1.83	2.43	1.83	2.25	2.74	1.59	2.54

11. From the above it was contended that Jet Airways (India) Limited was a very important and major source of revenue to the assessee and the assessee could not afford to lose such a huge client. Therefore, the assessee "assisted" Jet Airways (India) Limited during its financial crunch by limiting the rate of commission for specific years as are mentioned in the statement. Thus, it shall not be right to treat "assisted" as a clandestine device to reduce the tax liability, because any businessman would want to retain his major client. Thereafter, assessee also submitted agreement with other entities which has also been incorporated in the impugned appellate order.

12. The ld. CIT (A) after analyzing the terms of GSA agreement with different airlines made following observations:-

*4.3.5.2 From perusal of various GSA agreements, it is seen that the nature of the services provided by the appellant company to various airlines was almost similar and it included (i) Sale and reservation of tickets, (ii) maintain and operate inquiry reservations and booking facilities, (iii) marketing and promotion at the cost of Airline. (IV) Distribute advertising and publicity materials (v) fortnightly preparing reports and (vi) collect and remit the sales proceeds*

*From the perusal of GSA Agreement with different airlines, it is seen that the appellant company was acting as a GSA agent for the whole of India in the case of The Royal Jordanian Airline, All Nippon Airways Co. Ltd Air Austral and Air Seychelles Ltd Whereas in the case of Kenya Airways Ltd., the appellant acted as a GSA agent for the state of Maharashtra (excluding Mumbai Navi Mumbai and Thane), Madhya Pradesh Rajasthan, Punjab and Uttar Pradesh (excluding Noida and Ghaziabad). With respect to GSA agent for Jet Airways (India) Ltd, the appellant acted as GSA Agent for the territories of India excluding Jammu & Kashmir and Andaman & Nicobar Further, in respect of GSA with Kenya*

*Airways Ltd and All Nippon Airways Co. Ltd., the appellant company was required to give bank guarantee and in respect of Air Seychelles Ltd., the appellant company was required to maintain 45 days of gross revenue from sale of passenger tickets.*

*Further, in the case of All Nippon Airways Co. Ltd and Air Seychelles Ltd., the commission was charged on the basis of cost plus method and not on the basis of any fixed rate or percentage of ORC*

*4.3.5.3 The AO made addition of ORC commission after applying the concept of "Arm's Length Price (ALP) principle. For ready reference, the terms and conditions and other conditions with respect to GSA agreement with different airlines is reproduced as under:-*

<i>Sr. No.</i>	<i>Airlines</i>	<i>Service Fee/Commission</i>	<i>Territory</i>	<i>Bank Gaurantee</i>
<i>1</i>	<i>Jet Airways (I) Limited</i>	<i>Over-riding commission on flown revenue not exceeding 1% -.</i>	<i>India excluding Jammu &amp; Kashmir</i>	<i>-</i>
<i>2</i>	<i>Kenya Airways Ltd.</i>	<i>Sales Commission as per Market practice Over-riding commission at 3%</i>	<i>Maharashtra (excluding Mumbai, Navi Mumbai, Thane)., Madhya Pradesh, Rajasthan, Punjab, Uttar Pradesh (excluding Noida, Ghaziabad)</i>	<i>Bank Guarantee of Rs.23 Lakhs</i>

3	<i>The Royal Jordanian Airline</i>	<i>Normal Commission as per IATA</i>  <i>Over-riding commission at 3/2.5% on all sales in his area on Airline documents</i>  <i>Over-riding commission on documents other than airline for transportation on Airline</i>	<i>Whole of India</i>	
4	<i>All Nippon Airways Co. Ltd.</i>	<i>Service Fee which includes Manangement and staff cost, office provisions, technology and telecommunication cost, other expenses and mark up of 20%</i>	<i>Whole of India</i>	<i>Bank Guaratee of Rs.25 Lakhs</i>
5	<i>Air Austral</i>	<i>Reimburse the cost plus service tax. Over-riding commission of 6% on Flown basis</i>	<i>Whole of India</i> <i>..</i>	<i>-</i>
6	<i>Air Seychelles Ltd.</i>	<i>Cost + Route Model i.e. 20% of Total expenses after depreciation including staff cost</i>	<i>Whole of India</i>	<i>Required on Sales of Walk-in Passengers for amount</i>

		+ service tax		of 45 days of Gross Revenue
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As discussed in Para 4.351 above, the nature of the services provided by the appellant company to various Airlines was almost similar But, other conditions such as territorial operations within India, provision of the bank guarantee, method of computation of commission etc. varied from airlines to airlines From the agreements entered into by the appellant with the above mentioned 6 Airlines, it is seen that there is mention of sales commission and ORC commission in the agreement. The sales commission was charged at the prevalent rate as per IATA The ORC rates were decided as per the agreements with each Airlines separately During the appellate proceedings, the appellant has explained that during the year under consideration, no sales commission has been received from any of the 6 Airlines and only ORC commission has been received. The receipt of ORC commission has been verified with the invoices raised by the appellant to various Airlines: Thus, the comparison of rate of ORC is to be made with different Airlines.

In the case of Jet Airways India Ltd, the territorial jurisdiction as a GSA is Indian territory excluding Jammu & Kashmir and Andaman & Nicobar In the case of The Royal Jordanian Airline, All Nippon Airways Co Ltd., Air Seychelles Ltd. and Air Austral, the territories of operation as GSA agent by the appellant company was with respect to the whole of India In the case of Kenya Airways Ltd, the territorial jurisdiction was in Maharashtra (except Mumbai/New Mumbai and Thane), Madhya Pradesh Rajasthan, Punjab, Uttar Pradesh (except NOIDA & Ghaziabad), Thus, the geographical comparison between the ORC rate of Air Austral, All Nippon Airways Co. Ltd Air Seychelles Ltd Kenya Airways Ltd and The Royal Jordanian Airline with the ORC rate of Jet Air India Ltd, made by the AO is not correct method of comparison TAX DE

Further, in the case of All Nippon Airways Co Ltd, the nomenclature of ORC commission is service fee. In Clause 6(B) of the agreement, the appellant company as GSA was to receive service fee for sales made in the territory of Republic of India as per the commission stipulated in Appendix B. The Appendix B to

*the agreement is reproduced in earlier part of this order in para 4.3.5.1 As per this Appendix B, the appellant company shall receive service fee @20% of the total cost. The total cost included management and staff cost, office provision and management cost and technology and telecommunication and other expenses*

*In the case of Air Seychelles Ltd, the over-riding commission is in the nature of remuneration as mentioned in Clause 12 of the agreement. The remuneration has been agreed between the parties as payment of the cost plus Route Model to the appellant company in accordance with Annexure 1. As per Annexure 1, the Air Seychelles Ltd. should pay cost plus Route including expenses due to GSA The addendum to GSA contract has amended the remuneration, which is reproduced as under-*

#### **ADDENDUM TO GSA CONTRACT**

*Point 6 is amended to read as follows:*

#### **6. STANDARD AGENCY COST+ ROUTE PAYMENT**

*6.1 For this purpose, the cost + route payment is an amount equal to*

*(A) GST @ 18% - JETAIR WILL RAISE A DEBIT NOTE ON TOTAL GSA COST*

*(B) TO MEET COST OF LIVING INDEX 10% INCREASE IN STAFF COST IN APRIL EVERY YEAR (Staff Cost is based on 100% 2 Sales/2 Res/1 Admin and shared Accounts staff+60% Assistant GM Sales & Marketing*

*Thus, in the cases of All Nippon Airways Co. Ltd and Air Seychelles Ltd., the cost plus method has been adopted to arrive at ORC rates whereas in the case of Jet Air (India) Ltd.. ORC rates have been decided on the basis of fixed percentage of the turnover. Therefore. the comparison of ORC rates of All Nippon Airways Co. Ltd and Air Seychelles Ltd, made by the AO is not a valid comparison*

Further, in the case of Kenya Airways Ltd. All Nippon Airways Co. Ltd and Air Seychelles Ltd., the appellant was required to provide bank guarantee or to maintain 45 days of gross revenue as bank guarantee. Thus, the comparison of ORC rates of Kenya Airways, All Nippon Airways Co. Ltd and Air Seychelles Ltd. with the ORC rates of Jet Airways India Ltd. is also not a valid comparison

Further, the turnover with the different airlines also plays an important role to decide the rate of ORC commission. The comparison of turnover of 6 different airlines for AY 2018-19 and commission earned from them, is as under:-

Sr. No	Client	Passenger Turnover	Commission earned	Commission (%)
1	Jet Airways (1) Limited	7457,43,56,402	44,74,46,140	0.60%
2	Kenya Airways Ltd.	12,01,03,459	28,93,234	2.41%
3	The Royal Jordanian Airline	4,90,99,976	14,90,533	3.04%
4	All Nippon Airways Co.	82,99,18,597	1,70,72,629	2.06%
5	Air Australia	99,26,184	46,92,099	47.27%
6	Air Seychelles Ltd	37, 93,42,109	66,50,442	1.75%
	<b>Total</b>	<b>7596,27,46,727</b>	<b>48,02,45,077</b>	

Jet Airways (1) Ltd has always been a major source of revenue in form of ORC commission for the appellant company. As per the details provided by the appellant, during the appellate proceedings, the comparison of percentage of turnover with Jet

*Airways (1) Ltd. and other airlines from A. Ys. 2012-13 to 2018-19 is as under-*

Assessment Year	2018-19	2017-18	2016-17	2015-16	2014-15	2013-14	2012-13
Jet Airways Pax T/o (%)	98.17	97.57	98.17	97.75	97.26	98.41	97.46
Other Airlines Pax T/o (%)	1.83	2.43	1.83	2.25	2.74	1.59	2.54

*From the working of the ORC commission made by the AO, it is seen that the AO has tried to apply Comparable Uncontrolled Price (CUP) method to determine the ALP of commission income earned by the appellant from Jet Airways (India) Ltd. It is a general rule that while applying CUP method, the comparison should be made between similar entities and similar conditions to arrive at the ALP of a particular transaction.*

*As discussed above, the AO has not taken into consideration various aspects such as turnover, area of territorial operation, method of fixation of ORC rates, bank guarantee, etc. to arrive at the ALP. A common rule applied for determining ALP is to factor out the extra ordinary items to arrive at the correct ALP. The AO has not factored out various aspects such as turnover, area of territorial operation, method of fixation of ORC rates, bank guarantee, etc. Thus, the rate of commission of ORC adopted by the AO at 6% of total passenger turnover with different airlines is not based on correct appreciation of facts and correct application of the principle of ALP.*

13. Thus, Ld. CIT(A) held that even in the CUP method, various factors and adjustments have to be made while making the comparison, i.e., the type and quality of the products, delivery terms, volume of sales and related discounts, product characteristics, contractual terms and geographical factors etc.,

and on these facts the CUP cannot be the proper comparable analysis. Finally, he deleted the addition after observing as under:-

*4.3.5.4 In the case of the appellant company, there was vast difference in the turnover of the appellant company with Jet Airways (India) Ltd, and the turnover with other five Airlines. During the year, the turnover of the appellant with Jet Airways (India) Ltd. was Rs.7457.43,56,402/- whereas that with All Nippon Airways Co. Ltd. Rs.82,99 18.597 Air Seychelles Ltd. Rs.37,93,42, 109/-, Kenya Airways Ltd. Rs.12.01.03.459 The Royal Jordanian Airline Rs.4,90,99,976/- and Air Austral Rs.99,26,184/-, respectively. Therefore, due to huge difference in turnover with Jet Airways (India) Ltd, and the turnover with other five Airlines, the rate of ORC with other Airlines cannot be compared.*

*There is difference in the geographical areas of services rendered by the appellant to various Airlines. The appellant company was acting as a GSA agent for the whole of India in the case of The Royal Jordanian Airline, All Nippon Airways Co. Ltd., Air Austral and Air Seychelles Ltd. Whereas in the case of Kenya Airways Ltd., the appellant acted as a GSA agent for the state of Maharashtra (excluding Mumbai, Navi Mumbai and Thane), Madhya Pradesh, Rajasthan, Punjab and Uttar Pradesh (excluding Noida and Ghaziabad). With respect to GSA agent for Jet Airways (India) Ltd., the appellant acted as GSA Agent for the territories of India excluding Jammu & Kashmir and Andaman & Nicobar. Therefore, comparison of the ORC rates of different Airlines for which the territorial areas were different also cannot be made to determine the ORC rates.*

*The rate of ORC commission adopted by the AO at 6% of passenger turnover is not in accordance with the principles of ALP. Therefore; the addition based on adopting the comparative rate of commission at 6% by the AO cannot be sustained.*

*4.3.5.5 It is also important to take note of that in the case of Jet Airways (India) Limited for AY 2015-16, the transaction of commission was reported by Jet Airways (India) Limited in its Tax*

*Audit Report in Form 3CD and Form 3CEB. In the Assessment Order of Jet Airways (India) Limited for A.Y 2015-16, the ORC Rate was accepted by the AO. There is no change in the facts of ORC commission with Jet Air (1) Ltd. during A.Y. 2018-19.*

*4.3.5.6 The appellant has also raised its contention relating to the commercial expediency of the transaction and taxing the real income. However, as discussed above, the ALP method adopted by the AO is not a proper comparison to determining percentage of ORC commission. Therefore, these issues raised by the appellant are not of much relevance.*

*In view of the above discussion, the addition of Rs. 141,69,12,770/- made by the AO in respect of ORC commission is deleted.*

14. Before us ld. DR submitted his written submissions as stated as under:-

3. *The main issue involved in the case relates to Online Reservation commission(ORC) received by assessee from its “related party” i.e. Jet Airways (India) Ltd. which was relatively low as compared to other “unrelated parties”. The Ld. AO applied CUP method to determine the Arm’s Length Price and ORC rate at the rate of 2.5% to work out the amount of commission.*

4. *There is no dispute that both Jet Airways (India) Ltd and Jetair Pvt. Ltd are related parties and the rather low rates of 0.2% to 0.9% as ORC for M/s Jet Airways (India) Ltd. are indicative of mechanism deliberately employed to lower the payment of commission to M/s Jetair Pvt. Ltd. supported by the fact that M/s Jet Airways is a loss making enterprises, its liability to pay tax may not get affected as much as the payment of ORC to M/s Jet air at lower rates would affect the revenues, and consequently the tax liability of Jet Air which incidentally is a profit-making company. Further, in the case of assessee, the statement of Smt Vidyagauri was recorded u/s 131 of the IT Act in her statement she had stated that the rate of ORC commission from Jet Airways (India) Ltd. was reduced for FY*

*2011-12 and 2012-13 and it was reduced to assist Jet Airways (India) Ltd which was in financial crisis.*

*5. The Ld CIT(A) stated in his order that there is difference in the geographical areas of services rendered by the appellant to various airlines. Therefore, comparison of the ORC rates of different airlines for which the territorial areas were different also cannot be made to determine the ORC rates. He further held that the rate of ORC commission adopted by the AO at 6% of passenger turnover is not in accordance with the principles of ALP. Therefore, the addition based on adopting the comparative rate of commission at 6% by the AO cannot be sustained.*

*6. The Ld. CIT(A), in his order has in fact agreed with the view of the AO that statement of Smt. Vidyagauri Samant recorded during survey proceedings has evidentiary value and it could be utilized as an important piece of evidence during the assessment proceedings. The Ld CIT(A) has also rejected the CUP method used by AO without appreciating the fact that for internal comparison CUP is one of the best method and In the present case as the difference in ORC commission received by assessee was clearly visible and it requires adjustment for differences. The assessee has not been able to explain with any corroborative evidence as to why there is difference in 'rate' of commission/ORC in 'related' and 'unrelated' parties. The "related" parties can easily manage & arrange to pay lesser tax to suit financials of group companies under the garb of planning but in fact this is more of colourable device with an aim of tax evasion. Hence, it is prayed that the order of the Ld AO may kindly be restored.*

15. Before us ld. Counsel for the assessee submitted that firstly this issue is fully covered by the judgment of the Hon'ble Bombay High Court in assessee's own case for A.Y.2013-14 to 2017-18. Apart from that he made various submissions which can be summarised as under: –

- Statement of Smt. Vidyagauri Samant, heavily relied upon by the Assessing Officer, is not relevant as it pertains to AY 2012-13 and 2013-14
- The Department has to appreciate the commercial expediency behind the transaction
- Only real income can be taxed and there is no provision to notional income under the Income-tax Act tax
  - India Finance and Construction Co P Ltd. [200 ITR 710 (Bom)]
  - CIT v Shivakami Co P Ltd [159 ITR 71/25 Taxman 80 (SC)]
- Transfer pricing provisions are not applicable to the facts of the case
- In any case, the transactions are not comparable as:
  - (a) The passenger turnover with Jetairways (Rs. 7,457 crores) is 53.71 times of the combined passenger turnover of all other airlines (Rs. 138 crores);
  - (b) The assessee earns 98.17% of its commission from Jetairways as against 1.83% from all other airlines;
  - (c) It is extremely difficult to generate business for foreign airlines from India as against generation of business from India for the domestic airlines; and
  - (d) In respect of few airlines the assessee has agreed to cost plus method which is not comparable with that of Jetairways.

- Following the principles of consistency, the addition cannot be sustained in the year under consideration ignoring the fact that in no other years the addition has been sustained.

16. We have heard rival submissions and perused the relevant finding given in the impugned order as well as material referred to before us. The entire case of the department is that assessee has been charging lower rate of ORC from Jet Airways India Ltd / Jet Air Pvt. Ltd. which is ranging between 0.2% to 0.9%, whereas from the other entities assessee has been charging commission @ 2.5% and therefore, AO held that amount which should have been paid by M/s. Jet Airways India Ltd. and Jet Air Pvt. Ltd. @ 2.5% and has calculated the average ORC and worked out the addition of Rs.141.69 Crores. It is relevant to mention that this issue had already been decided by the Hon'ble Bombay High Court in the Writ Petition Nos.3446 of 2022, 1901 of 2022, 1996 of 2022, 2393 of 2022 & 2828 of 2022 vide judgment dated 08/03/2023. This was in respect to writ petition filed against notice u/s.148 for the a.Yrs.2013-14 to 2017-18. In those years, similar reasons were recorded by the ld. AO based on same statement of oath of Smt. Vidyagauri Samant and assessee has been receiving commission on the ORC from group

entities at a lesser rate as compared to the other entities. The submissions on behalf of the assessee as well as the department are reproduced hereunder:-

*“10. He submitted that the main reason for the reassessment is that, as per survey findings, the range of commission received by the petitioner in respect of passengers was 0.2% to 0.99% averaging to about 0.6%, while for other unrelated airlines it averages to around 2.5%. Consequently, a huge variation between the average rates for the related party and the unrelated party was discovered. He submitted that merely on the basis that the petitioner is charging less commission for rendering services as sales agent from Jet Airways (related party) than from others cannot be a basis for a belief that income chargeable to tax has escaped assessment. He submitted that the rates of commission cannot be compared without considering the surrounding circumstances under which the rate has been agreed between the parties. He submitted that the passenger turnover of Jet Airways was 61.74 times the combined passenger turnover of all other airlines with whom the petitioner had executed General Sales Agreement (GSA). He submitted that considering the turnover given by Jet Airways, the lower rate charged by the petitioner for providing service as the sole selling agent was justified and cannot be compared with the rate charged to the other airlines which gave a very small fractions to the work to the petitioner.*

*11. He submitted that only real income is chargeable to tax. The respondent had not alleged that the petitioner had disclosed lesser income than what was actually earned by the petitioner. The allegation is that the petitioner has earned less income than what the petitioner ought to have earned. It is submitted that even if it is suggested that the petitioner ought to have earned more income than what the petitioner has actually earned, no income can be said to have escaped assessment so as to justify the impugned notice as there are no provisions in the Act for taxing such alleged income. He submitted that notional income can be assessed to tax only when the case of an assessee falls under the provision which provides for taxing deemed income in the hands of an assessee such as u/s 50C of the Act transfer pricing provision. It is*

submitted that transfer pricing provision prescribes for deeming income in the hands of an assessee when an assessee has entered into an international transaction, or a specified domestic transaction and such transactions are not at arm's length price which the present transaction does not attract. He submitted that there is no other provision which requires the petitioner to determine the income of the petitioner on the basis of arm's length price. He submitted that the agreement between the petitioner and Jet Airways has been approved by the Central Government u/s 297 (1) of the Companies Act, 1956 and consequently it is not open to the AO to allege that Jet Airways has paid a lesser commission than required as per law as it would amount to one department of Government taking a contrary stand to another department of the Government.

12. He submitted that there was also no failure to disclose in as much as all material facts necessary for the assessment were disclosed during the course of original assessment proceedings. He submitted based on all documents the AO had passed assessment order u/s. 143(3) of the Act after considering all the petitioner's submissions. He submitted that the statement of the employee of the petitioner cannot be said to be any tangible material to justify the reopening in as much as it does not contain any information which could be regarded as new material to justify reopening. It was lastly submitted that since no approval was provided to the petitioner, it must be presumed that no approval was obtained by respondent no. 1 from respondent no. 2 so as to justify reopening of petitioner's assessment. He submitted that the Petition be made absolute.

13. Per Contra, Mr. Kumar, learned counsel for the respondent submitted that Jet Airways (India) Limited and Jetair Private Limited are related party's under the Act. He submitted that considering the size and financial standing, Jet Airways has considerable weight for fixing ORC rate to its own benefit thereby lowering the tax liability and to the benefit of the whole group thereby lowering the tax liability of the entire group. The lower rates charged by the petitioner are indicative of a mechanism deliberately employed to lower the payment of commission to Jetair Private Limited coupled with the fact that Jet Airways is a loss-making enterprise and its liability to pay tax may not get

affected as much as payment of ORC to Jetair at lower rate would affect the revenues, and consequently the tax liability of the petitioner which is a profit-making company. He submitted that the transaction in the nature of commission payment between the related entities appear to be an arranged one and to conclude that there has been deviation from the usual practice of commission payment, which reduces the overall tax liability of the petitioner which is a group entity of Jetair Private Limited. He submitted that this arrangement of charging lower rates has reduced the tax burden of the petitioner which is related party. Learned counsel submitted that based on the information gathered during the survey and post survey and upon careful perusal and examination of the agreements with 'related' and 'unrelated' parties and after having considered the statements of various senior management executives and also study of the comparative chart of ORC have with various airlines, it was concluded that such variation in ORC rates between related and unrelated entities have ostensible reasons that would tantamount to violation of arms' length principles. He submitted that the petitioner was regularly and consistently being underpaid by its sister concern Jet Airways thereby resulting in lesser revenues and leading to its lower profits and thereby resulting into lower tax liability. It was accordingly concluded that there was no reasonable justification, and it appears to be a device for evasion of taxes in complete deviation of the arm's length principle. He submits that had Jet Airways India Limited paid higher rate of commission to the petitioner, the total amount of commission that would have been received by the petitioner would be Rs. 1,66,27,37,461/-. In support of his submission, he relied upon the decision in the case of *Mc. Dowell & Co. Ltd. v. Commercial Tax Officer* [1985] 22 Taxman 11/154 ITR 148 (SC) which held as under:-

"... colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges. Courts are not concerning themselves not merely with the genuineness of a transaction, but with the intended effect of it for fiscal purposes. No one can now get away with a tax avoidance project with the mere statement that there is nothing illegal about it."

14. The Learned counsel for the respondent submitted that under the garb of tax planning, related parties had managed and arranged to pay lesser rate of commission to suit finance/revenues of the group companies. This was a colourable device, with aim to evade tax. He submitted that this issue was not examined at the time of original assessment and therefore it would not amount to change of opinion and consequently refer the reopening bad in law. He thus submitted that the petition be dismissed.

17. The Hon'ble High Court on these facts, quashed the notice u/s. 148 on various grounds, however, on merits the Hon'ble High Court has made the following observations:-

**23. We are of the view that the petitioner was right in charging lower commission rates to its sister concern/related party jet airways India Limited on account of it being a sole selling agent as well as client giving more than 98% of its total turnover.**

**24. In our view, it is business call/decision for a party and is certainly not colourable device/mechanism as contended by the respondents. In fact, if the sister concern/related party namely Jet Airways India Limited which is loss making company were to pay the same rates as paid by other clients of the assessee then such transaction in normal business parlance would have been colourable device or mechanism to increase the expenses of the sister concern, the fact that Jet India Private Limited is a loss making company is not a valid criteria to determine escapement of income.**

**25. Since this transaction is neither an international transaction nor a specified domestic transaction, the transfer provisions do not apply.**

18. Thus, the Hon'ble High Court has very categorically decided this issue on exactly similar set of facts and reasoning of the

department has held that **“The assessee was right in charging lower commission rates to its sister concern / related party on account of it being a sole selling agent as well as client giving more than 98% of its total turnover”**. Thus, it is purely a business decision and not colourable device as contended by the respondents. In fact, if the sister concern namely Jet Airways India Limited which is loss making company were to pay the same rates as paid by other clients of the assessee then such transaction in normal business parlance would have been colourable device or mechanism to increase the expenses of the sister concern, the fact that Jet India Private Limited is a loss making company is not a valid criteria.

19. Lastly, the Hon’ble High Court held that it is neither the international transaction nor a specified domestic transaction therefore, transfer pricing provisions do not apply. The aforesaid judgment of the Hon’ble High Court clearly clinches the issue in favour of the assessee that there is no scope for applying in arm’s length principle and assuming that assessee should have received commission at higher rate. In any case, if the ld. CIT (A) has analysed each and every GSA agreement with such entities as well as with the Jet Airways India Ltd and categorically recorded finding that despite nature of services were similar but other condition such as territorial operations within India, provision of the bank guarantee, method of computation of commission etc. varied from airlines to airlines within the territory jurisdiction of India. The assessee had a major

passenger ticket booking from Jet Airways India Ltd and it is also evident from the fact that more than 98% of the commission has been received from Jet Airways (India) Ltd as compared to other airlines which was at 1.83%. When assessee is receiving a huge volume of business from one particular entity and that to be for domestic airlines, then we do not find any reason as to why such a comparison should be made with other airlines operating on international flight with such a less volume. Apart from that ld. CIT (A) as incorporated above, has noted various differences and fixation of ORC rates with other airlines operating in international traffic which was un-comparable to the Jet Airways (India) Ltd. Thus, there is no reason as to why any kind of CUP method can be applied, as it is applicable while analyzing arm's length price under transfer pricing provision which is not the case here. Otherwise also, what is to be seen is the business prudence and commercial expediency and if assessee has got more financial benefits and more business from a particular entity or a party and there is nothing on record which has come that it has some kind of a 'make belief arrangement', then ld. AO cannot question as to how much commission should have been charged.

20. In so far as reliance placed on statement of Manager (finance), Smt. Vidyagauri Samant, firstly, is not relevant for the present assessment year as it pertains to A.Yrs. 2012-13 and 2013-14 and such a statement cannot be applied for deciding the issue in A.Y.2018-19. Moreover, nowhere the statement is incriminating. It just mentions the factum that assessee has

been charging different commission rates from domestic airlines i.e. Jet Airways (India) Ltd. and foreign airlines and such statement is nowhere incriminating and has not been demonstrated by the department that any adverse inference could have been drawn from the statement sans any incriminating documents found. Apart from that, this issue is squarely covered by the decision of the Hon'ble High Court in similar set of facts and also we do not find any infirmity on the analysis done by the ld. CIT (A) and the finding recorded by him as enumerated in detail in the foregoing paragraphs. Accordingly, we hold that addition has rightly been deleted and the order of the ld. CIT (A) is confirmed and grounds taken by the Revenue are dismissed.

21. In so far as cross objection is concerned, it is merely on various aspects on which Ld.CIT(A) ought to have given certain findings while giving relief, therefore they are purely academic and are accordingly dismissed as infructuous.

**22. In the result, appeal of the Revenue is dismissed and Cross Objection of the assessee is dismissed as infructuous.**

Order pronounced on 24<sup>th</sup> July, 2023.

**Sd/-**  
**(GAGAN GOYAL)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

Mumbai; Dated 24/07/2023  
KARUNA, sr.ps

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**

		Date	Initial	
1.	Draft dictated on			Sr.PS
2.	Draft placed before author			Sr.PS
3.	Draft proposed & placed before the second member			JM/AM
4.	Draft discussed/approved by Second Member.			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/P S
6.	Kept for pronouncement on			Sr.PS
7.	File sent to the Bench Clerk			Sr.PS
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			
11.	Dictation Pad is enclosed	Yes		