

**THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 05.09.2008

**+ WP (C) 8834-36/2005**

**AFT TRUST – SUB 1 & OTHERS**

... Petitioners

- versus -

**CHAIRMAN, CENTRAL BOARD OF  
DIRECT TAXES AND OTHERS**

... Respondents

**Advocates who appeared in this case:**

For the Petitioners : Mr S. Ganesh, Sr Advocate with Mr Abhinav Vasisht,  
Ms Harshita Priyanka, Mr Debajyoti Bhattacharya

For the Respondents 1 & 2 : Mr R.D. Jolly

For the Respondent No.3 : Mr A.N. Haksar, Sr Advocate with Mr Sakesh Kumar

**CORAM:-**

**HON'BLE MR JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR JUSTICE RAJIV SHAKDHER**

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in Digest ?

**BADAR DURREZ AHMED, J (ORAL)**

1. This writ petition is directed against the order dated 17.02.2005 passed by the Under Secretary, Department of Revenue, Central Board of Direct Taxes, Ministry of Finance, Government of India (Respondent No.2) whereby the application of the petitioners 1 and 2 under Section 10 (15A) of the Income-tax Act, 1961 (hereinafter referred to as 'the said Act') was rejected. By way of this writ petition,

the petitioners 1 and 2 also pray for an appropriate writ, order or direction directing the respondents 1 and 2 to grant approval to the lease agreements dated 18.10.1999 under Section 10 (15A) of the said Act in respect of two aircrafts leased by the petitioner No.1 to the respondent No.3 (Jet Airways). There is also a prayer for refund of Rs 10,98,42,772/- withheld and paid under Section 195 of the said Act in respect of the lease rents paid by the respondent No.3 to the petitioner No.1 being the owner of the aircrafts. There is also a prayer for striking down the words “not being an agreement entered into between the 1<sup>st</sup> day of April 1997 and the 31<sup>st</sup> day of March 1999” in Section 10 (15A) of the said Act. However, the learned counsel for the petitioners has not pressed this prayer.

2. The factual background is that two companies known as Birds of Paradise-I and Birds of Paradise-II belonging to the General Electric Group of Companies were owners of several aircrafts, including the two Boeing 737 – 400 aircrafts in question. The said two companies being joint owners leased out the said two aircrafts to GE Capital Bank, Austria which was a company registered in Austria. The said GE Capital Bank, Austria entered into a sub-lease with the respondent No.3 (Jet Airways) on 05.10.1999. On the basis of this sub-lease agreement, the aircrafts were imported into India after obtaining the appropriate approvals and were being operated by Jet Airways. It is

pertinent to note that on the date on which the sub-lease was entered into between GE Capital Bank and Jet Airways, i.e., on 05.10.1997, there existed a Double Taxation Avoidance Agreement (DTAA) between India and Austria as a result of which the lease rentals which were payable by Jet Airways to GE Capital Bank, Austria, were not subject to tax in India. This is relevant because at that point of time the question of taking any approval under Section 10 (15A) of the said Act did not arise in view of this exemption which was already available to GE Capital Bank, Austria for the purposes of taxation in India. In any event, it is an admitted position that had the DTAA not been in place on that date, i.e., on 05.10.1999, no approval could have been granted under Section 10 (15A) of the said Act in view of the express provisions of that sub-Section itself.

3. The arrangement between GE Capital, Austria and Jet Airways continued for over a period of about one and a half years. On 05.05.1999, the two companies known as Birds of Paradise-I and Birds of Paradise-II sold 36 aircrafts, including the two Boeing aircrafts in question to the petitioner No.1. This was done by virtue of an agreement dated 05.05.1999 which was termed as the Master Aircraft Purchase Agreement. Consequent upon this transfer, fresh lease agreements were entered into between the petitioner No.1 and Jet Airways on 18.10.1999 after the earlier sub-leases between GE Capital

Bank, Austria and Jet Airways were terminated. In fact, the aircrafts had been taken out of India and then brought back to India pursuant to the termination and execution of the fresh lease agreements.

4. The petitioner No.1 is a company based in United States of America and, therefore, the DTAA between India and Austria was not applicable. The benefit under that agreement was not available to the petitioner No.1. However, the petitioner No.1 realised that it was eligible to claim the benefit under Section 10 (15A) of the said Act and, therefore, it contemplated moving application seeking Central Government approval which was a necessary pre-condition for availing of the benefit. Such an application was moved by Jet Airways on behalf of the petitioner No.1 on 26.11.1999. A non-speaking order was passed on 15.11.2000 rejecting the application. Jet Airways preferred a review and that was also disposed of by an order dated 04.03.2002 which was equally non-speaking in the following terms:-

“As the same does not fall within the provisions of Section 10 (15A) ... ”

5. Being aggrieved by the said order dated 04.03.2002, the petitioners herein filed a writ petition (CWP 1067/2003). In that writ petition, Jet Airways was impleaded as respondent No.3. The Division Bench hearing the said writ petition passed an order dated 10.11.2003 requiring the respondents 1 and 2 to disclose the reasons by filing an

affidavit. Thereafter, an additional affidavit was filed on 24.11.2003.

The reasons indicated were as under:-

“In this case, the issue was whether the agreements entered on 18.10.1999 by Jet Airways should be approved by the Government so that the benefit of exemption under section 10(15A) may be made available on payments made by Jet Airways. The following points emerged in this case:-

- i) The point which is of vital importance is that the terms and conditions of the new lease agreements concluded with AFT Trust Sub-I on 18.10.1999 are identical to those applicable to the previous lease agreements concluded with M/s GE Capital Bank GmbH on 05.10.1997.
- ii) The first agreement was entered when the benefit of Section 10(15A) were not available. Then this agreement was terminated before time and a fresh agreement on the same terms and conditions was entered with AFT Trust Sub-I on 18.10.1999 with only change being the name of owner.
- iii) The ferry of the aircraft and its re-import into India in pursuance to the fresh agreements is of hardly any significance because the same aircraft have virtually remained in continued possession of Jet Airways without a break of even single day.
- iv) The reasons for entering into new agreements submitted is the change in the ownership of aircraft on account of sale of these aircraft to a third party as per Master Aircraft Purchase Agreement dated 05.05.1999. If this is analysed in depth, it will suggest that sale of such aircrafts is subject to the original lease agreements with Jet Airways and because of this, the terms and conditions of the new agreements entered into by Jet Airways are identical to those applicable to previous lease agreements. The same thing could have been achieved even without entering

into new agreements with the new owner just by inserting a clause in the sale agreements to the above effect.

- v) The execution of fresh agreements on 18.10.1999 by terminating earlier agreements by Jet Airways appears mainly to take advantage of Section 10 (15A) because of the net outcome of the entire transactions is the availability of exemption under section 10 (15A) which was hitherto not available since earlier agreements were entered into during the execution period.
- vi) The intention to enter into fresh Master Purchase Agreement also revealed from the fact that at one hand petitioner No.3 mentioned that it has no connection whatsoever with petitioner No.1 whereas it was only petitioner No.3 who had persuaded respondent No.3 to enter into a fresh lease agreement with the new owner i.e. petitioner No.1 and therefore also undertook to indemnify to respondent No.3 by owning the liability of huge amount, which strengthen the fact that Master Purchase Agreement was entered into deliberately with a with an ulterior motive.

In view of this, the intention of the assessee was primarily for the purpose of taking unintended advantage of tax exemption under section 10 (15A). Accordingly, the application was rejected on the ground that the new agreements were only a fence having no other commercial motivation other than tax advantage.”

6. Thereafter, by an order dated 05.10.2004, this court disposed of the said writ petition (CWP 1067/2003) in the following manner:-

“... It will be for the Central Government to examine these aspects. It is under these circumstances, as no cogent reasons have been given, we quash the impugned orders dated 15.11.2000 and 4.3.2002. We direct the Central Government to consider the application of the petitioners. For this purpose, the

petitioners will move a fresh application in this behalf within a period of four weeks. If the application is made within four weeks, the Central Government shall decide the same within a period of six weeks thereafter by passing a speaking order.”

7. It may be noted that while disposing of the writ petition, this court granted the alternative prayer taken by the petitioner and was not inclined to grant the prayers with regard to directing the respondents 1 and 2 to grant approval to the lease agreements dated 18.10.1999 under Section 10 (15A) of the said Act and for directing the refund of the said amount of Rs 10,98,42,772/-. Essentially, the Division Bench required the appropriate authority to have a relook into the matter and to provide cogent reasons in case it was inclined to reject the application of the petitioner.

8. Thereafter, a fresh application was filed by the petitioners before the appropriate authority and subsequent thereto a show cause notice was issued on 18.01.2005 to the petitioner. The said show cause notice essentially indicated that the terms of the new leases of 18.10.1999 were identical to the earlier leases of 05.10.1997 and there was only a change in the name of the owner. It was pointed out that since the earlier lease agreements were of 05.10.1997, when the benefit of Section 10(15A) of the said Act was not available, the new agreements had been entered into merely to circumvent this difficulty.

The petitioners filed their replies and thereafter the impugned order dated 17.02.2005 was passed. The reasons given in this order were that the new lease agreements of 18.10.1999 are identical to the old agreements of 05.10.1997 and the only change is in the ownership of the aircrafts. The reasons indicated in the impugned order are as under:-

“9. From the discussion made in earlier paragraphs it is clear that the terms and conditions of the new lease agreements dated 18.10.1999 are identical to those of the previous (lease agreements concluded with M/s. GE Capital Bank GmbH in October 1997. The only change is in the name of owner of the aircrafts. The reason adduced by the applicant for entering into new agreements, is the change in ownership of aircrafts on account of sale of these aircrafts to a third party as per Master Aircraft Purchase Agreement dated 5.5.1999. However, on an in-depth analysis, it is clear that sale of such aircrafts is subject to the terms of the original lease agreements with Jet Airways and because of this, the terms and conditions including the lease rentals and the date of expiry of the agreements were identical with those in the original agreements. Also the same aircrafts have remained in continued possession of Jet Airways without break of even a single day.

10. The new agreements are in effect, the same old agreements with only change in the name of the aircraft owner and as the original agreements were entered into when the benefit of Sec. 10 (15A) was not available therefore the request for approval u/s 10(15A) of Income Tax, Act, 1961 to the two agreements dated 18/10/1999 each entered into between M/s. Jet Airways (India) Limited and M/s. AFT Trust Sub-I Delaware for acquiring two aircrafts bearing Serial No. 25663 and 25664 on lease cannot be acceded to. The application is accordingly rejected.”

9. The counsel for the parties have been heard at length. Mr Jolly, who appears on behalf of the respondents 1 and 2, has supported the impugned order. His main submission, relying upon the counter-affidavit filed by the respondents 1 and 2 in this writ petition, is that the agreements of 18.10.1999 are identical to the earlier agreements of 05.10.1997 and that there is only a change in the name of the owner. He submitted that this was done only with the purpose of circumventing the difficulty that the petitioners faced inasmuch as the benefit of Section 10 (15A) was not available to the agreements entered into between 01.04.1997 and 31.03.1999. Since the old agreements were entered into on 05.10.1997, the benefit could not be availed by the petitioners. Therefore, they thought it fit to enter into new agreements on 18.10.1999 which were beyond the excluded period.

10. We are not impressed by this argument nor with the reasons given in the impugned order. The fact of the matter is that initially these two aircrafts were owned by Birds of Paradise-I and Birds of Paradise-II. They were leased to GE Capital Bank, Austria which, in turn, sub-leased them to Jet Airways by virtue of the lease agreements dated 05.10.1997. Thereafter, the arrangement continued till there was a change in the ownership of 36 aircrafts, including these two aircrafts whereby the petitioner No.1 became the owner of these two aircrafts by

virtue of the Master Aircraft Purchase Agreement dated 05.05.1999. It is because of this circumstance of the change of ownership, which has not been doubted by the authorities, that it became necessary to execute fresh leases on 18.10.1999 between the new owners and Jet Airways. It might have been an entirely different situation had the ownership not changed and fresh agreements, such as the ones in question here, had been entered into after the expiry of the excluded period on 31.03.1999. In such a situation, the arguments advanced by the learned counsel for the respondents 1 and 2 may have had some significance and the reasons given in the impugned order would also have been logical and reasonable. Because, then it might have been said that the new agreements were a device to take advantage of the provisions of Section 10 (15A). But, in the present case, the new lease agreements of 18.10.1999 were necessitated because of the change in the ownership and were not mere substitutions of new agreements in place of old ones without there being no reason for entering upon new agreements. The change in ownership was not something which was engineered by Jet Airways or by the petitioners so as to take advantage of the end of the exclusion period on 31.03.1999. That is nobody's case. In such a situation, the reasoning adopted in the impugned order cannot be accepted.

11. Mr Jolly, who appeared on behalf of the respondents 1 and 2, also contended that in the first round before this court, while disposing of the earlier writ petition (CWP 1067/2003), this court did not grant the reliefs of directing the respondents to accord approval under Section 10 (15A) as also of directing refund to the petitioners. As such, these prayers cannot be granted in the present writ petition also. A reading of the order dated 05.10.2004 makes it clear that this court was granting the alternative prayer of issuing a direction to the Central Board of Direct Taxes to reconsider the application under Section 10 (15A) of the said Act and, therefore, it did not consider it necessary to grant the reliefs of directing the grant of approval to the lease agreements dated 18.10.1997 under Section 10 (15A) of the said Act or of directing the grant of a refund as prayed for. That was subject to whatever decision would be taken on a reconsideration of the application under Section 10 (15A) of the said Act. Thus, the non-grant of those reliefs by virtue of the order dated 05.10.2004 does not come in the way of the petitioners in this petition seeking the same reliefs after the petitioners' application had been reconsidered pursuant to the said order dated 05.10.2004.

12. We, therefore, set aside the impugned order dated 17.02.2005 as well as the purported reasons in support of the said order. No other reasons are forthcoming and, in fact, the reasons given

in the impugned order are the very same reasons which were given in the earlier orders which were set aside. We direct the respondents 1 and 2 to grant approval to the petitioner No.1 under Section 10 (15A) of the said Act.

13. Insofar as the question of refund as prayed for in para (iii) is concerned, the petitioners shall apply for the same in the appropriate form within two weeks before the appropriate authority. The same shall be processed as expeditiously as possible and preferably within eight weeks.

This writ petition stands disposed of. No order as to costs.

**BADAR DURREZ AHMED, J**

**RAJIV SHAKDHER, J**

**September 05, 2008**

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