

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

+ **W.P.(C) 8761/2010**

% **Reserved on : 12th April, 2012**

Date of Decision: 10th July, 2012

GO AIRLINES PRIVATE LIMITED

..... Petitioner

Through

Mr. Soli Dastur, Sr. Advocate with Mr.
R. Muralidhar, Ms. Pragya Ohri & Mr.
Jatin Mongia, Advocates.

versus

UNION OF INDIA

..... Respondent

Through

Mr. N.P. Sahni, Sr. Standing Counsel
with Mr. Ruchesh Sinha, Advocate for
Revenue.
Mr. R. Kaul and Mr. Sandeep Khatri,
Advocates for UOI.

+ **W.P.(C) 6429/2011 & 6438/2011**

% **Reserved on : 9th May, 2012**

Date of Decision: 10th July, 2012

KINGFISHER AIRLINES LTD.

..... Petitioner

Through

Mr. Harish V. Shankar, Advocate.

versus

UNION OF INDIA

..... Respondent

Through

Mr. P.S. Parmar, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V.EASWAR

SANJIV KHANNA, J.

The aforesaid three writ petitions involve interpretation of Section 10 (15A) of the Income Tax Act, 1961 (Act, for short). The writ-petitioners are two companies engaged in the business of operation of aircrafts and are aggrieved by orders passed by the, Union of India, Ministry of Finance, Central Board of Direct Taxes rejecting their applications under the aforesaid section.

2. Go Airlines (India) Pvt. Ltd. in W.P.(C) 8761/2010 has impugned two orders passed by the Union of India dated 7th August, 2009 and 29th October, 2009. The order dated 7th August, 2009 rejects their application *inter alia* recording as under:-

“2. Upon examination of your application for approval u/s 10(15A) and the supporting documents furnished along with it, it is seen that the aircrafts for which lease Agreements were signed were not existing on the date of the agreement and therefore these agreements were not valid lease agreement.

3. In view of the above, your application seeking approvals u/s 10(15A) of the Income Tax Act, 1961 in respect of four lease Agreements is hereby rejected.”

3. By order dated 29th October, 2009, the said petitioner was informed that their application has already been rejected by the Central Board of Direct Taxes on 7th August, 2009.

4. The writ-petitioner Kingfisher Airlines Pvt. Ltd. in W.P.(C) No. 6429/2011 has impugned order dated 28th June, 2010 passed by the Central Board of Direct Taxes, *inter alia*, recording as under:-

“3. Under Section 10(15A) of the I.T. Act, exemption can be granted only in such a case in which a valid lease agreement was signed before 1.4.2007. Further the provisions of the Transfer of Property Act, the existence of the property is must for a valid lease agreement. Therefore in this case, since the aircraft was not in existence on the date of signing of the Agreements, the agreement cannot be said to be a valid lease Agreement.

4. In view of the above mentioned facts and circumstances of the case, I am directed to convey that your application seeking approval u/s 10 (15A) of the Income Tax Act, 1961 is hereby rejected.”

5. In W.P.(C) No. 6429/2011, the petitioner- Kingfisher Airlines Pvt. Ltd. has impugned order dated 23rd September, 2009 passed by the Central Board of Direct Taxes, *inter alia*, recording as under:-

“3. Under the provisions of the Transfer of Property Act, existence of the property is must for a valid lease agreement. In this case, since the aircraft was not in existence on the date of signing of the agreements, the agreement cannot be said to be valid lease Agreement. Under Section 10(15A) of the I.T. Act, exemption can be granted only in such a case in which a lease agreement was signed before 1.4.2007.

4. In view of the abovementioned facts and circumstances of the case, I am directed to convey that your application seeking approval u/s 10(15A) of the Income Tax Act, 1961 is hereby rejected.”

6. The contention of the writ-petitioners is that rejection/impugned orders are bad as Section 10 (15A) of the Act does not postulate and mandate an existing aircraft. The Section operates when an agreement to acquire an aircraft on lease is entered into or executed. The aircraft need not be in existence on the

date when the agreement is entered into and the lease period can begin from a future date. It is the date of the agreement which is material and determinative, on whether an assessee is entitled to benefit of Section 10 (15A) of the Act.

7. In order to appreciate the contention, we have to examine and interpret Section 10(15A) of the Act, which reads:-

“10. Incomes not included in total income.—In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—

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(15-A) any payment made, by an Indian company engaged in the business of operation of aircraft, to acquire an aircraft or an aircraft engine (other than a payment for providing spares, facilities or services in connection with the operation of leased aircraft) on lease from the Government of a foreign State or a foreign enterprise under an agreement not being an agreement entered into between the 1st day of April, 1997 and the 31st day of March, 1999 and approved by the Central Government in this behalf:

Provided that nothing contained in this clause shall apply to any such agreement entered into on or after the 1st day of April, 2007.

Explanation.—For the purposes of this clause, the expression “foreign enterprise” means a person who is a non-resident;”

8. The aforesaid Section was inserted with effect from 24th January, 1989. Initially it was only applicable and confined to payments made to acquire an aircraft on lease. Subsequently, by Finance Act, 1995, benefit under the said section was extended to leases of aircraft engine. Finance Bill, 1997, proposed omission/deletion of Section 10(15A) with effect from 1st April, 1997.

However, the Finance Act, 1997 when passed restricted the exemption under Section 10(15A) to agreements entered into prior to 1st April, 1997. The Finance Act, 1999 amended Section 10(15A) with effect from 1st April, 2000, benefit was not extended to agreements entered into between 1st April, 1997 and 31st March, 1999. In other words, benefit was again extended to agreements after 1st April, 2000. By Finance (No.2) Act, 2004, a proviso is inserted to Section 10(15A) to restrict benefit to such agreements entered into on or before 1st April, 2005. This was to become applicable with effect from 1st April, 2006. Finance Act, 2005, however, amended the proviso and extended the benefit to agreements entered into before 1st October, 2005 and was to be applicable with effect from 1st April, 2006. Taxation Laws (Amendment) Act, 2005, again amended the proviso to Section 10(15A) and relief was extended to agreements entered into before 1st April, 2006 and was applicable with effect from 1st April, 2006. By Finance Act, 2006 again the proviso to Section 10(15A) was amended and relief was extended to agreements entered into on or before 1st April, 2007.

9. The aforesaid legislative history of the proviso and the extension granted from time to time are relevant and important. By the Finance (No.2) Act, 2004, proviso was inserted to Section 10(15A) stipulating that benefit under the said section shall be available to the agreements entered into on or before 1st April, 2005. This date 1st April, 2005 was changed to 1st October, 2005 and then 1st

April, 2006 and lastly to 1st April, 2007. The last amendment was made by W.P.(C) Nos.8761/2010, 6429/2011 & 6438/2011

Finance Act, 2006, which was passed by the Parliament on 18th April, 2006. The petitioners, therefore, were fully cautious and aware of the sunset clause in the form of the date in the proviso and when the agreements in question were entered into and that after the particular date, the benefit/advantage would not be available.

10. It is now important to refer to the factual matrix of each writ petition.

W.P.(C) 8761/2010 (filed by Go Airlines (India) Pvt. Ltd.)

11. The petitioner claims that it had entered into an agreement dated 17th July, 2006 with Airbus S.A.S., a French company for purchase of 10 aircrafts, which were to be manufactured and then sold in future, between the period August, 2007 to June, 2009. Delivery schedule was subject to clauses relating to delay and alteration of the date of supply. The clauses for postponement of supply were invoked. The petitioner states that on 28th March, 2007 it had entered into two aircrafts lease agreements with Osprey Aircraft Leasing Limited (Fifteen), Cayman Islands and Osprey Aircraft Leasing Limited (Sixteen), Cayman Islands in respect of two Airbus A320 each Aircrafts scheduled for delivery in May, 2009 and June, 2009 and November, 2009 and December, 2009, respectively. The petitioner states that these agreements had a pre cursor in form of an earlier agreement dated 29th November, 2006 with Aviation Lease and Finance Company (K.S.C) Closed. It is stated that the said company had assigned their rights to its subsidiaries, namely, Osprey Aircraft

Leasing Limited (Fifteen) and (Sixteen) with whom the petitioner subsequently entered into agreements dated 28th March, 2007.

12. The petitioner vide letter dated 26th March, 2007 filed on 29th March, 2007 made an application for grant of approval under Section 10 (15A) of the Act in respect of the two agreements with Osprey Aircraft Leasing Limited (Fifteen) and Osprey Aircraft Leasing Limited (Sixteen). As per the terms and conditions of the said agreements, the leasing company was to finance upto 15% of the PDP reference price in the purchase agreement to be paid in accordance with PDP schedule agreed between Airbus and the petitioner. The financing cost was to be calculated at three months' USD LIBOR plus 2.5% margin. The lessee i.e. the petitioner was liable to pay PDP financing cost at delivery of each aircraft. It is noted that the aircrafts were scheduled to be delivered in future. The lease period was to be commenced from the date of delivery of the aircraft and was for a period of 72 months.

13. It is an accepted position that the aircrafts were granted registration certificate on 14th May, 2009, 5th June, 2009, 18th August, 2010 and 30th September, 2010 and were issued bill of entry on the said dates.

W.P.(C) 6429/2011 (filed by Kingfisher Airlines Ltd.)

14. It is stated that the petitioner had entered into an agreement dated 27th March, 2006 with International Lease Finance Corporation, a USA based company for taking on lease one Airbus aircraft with a scheduled date of

delivery in May, 2007. On 13th October, 2006, the petitioner filed an application for grant of exemption under Section 10 (15A). Further documents were filed on 17th December, 2007 and clarification was given by the petitioner on 4th March, 2008. No objection certificate was issued for import of the aircraft on 11th April, 2007 and approval for home consumption was issued vide bill of entry dated 17th May, 2007. As noticed above, vide letter dated 28th June, 2010, the application of the petitioner was rejected.

W.P.(C) 6438/2011 (filed by Kingfisher Airlines Ltd.)

15. The petitioner had entered into an agreement dated 18th July, 2006 with International Lease Finance Corporation, a USA based company for taking a new Airbus on rent with a schedule date of delivery in October, 2007. The said aircraft was to be manufactured. On 13th October, 2006, an application for exemption was filed by the petitioner under Section 10 (15A) of the Act. Subsequently, documents and clarifications were furnished by the petitioner on 17th December, 2007 and 7th March, 2008. On 23rd September, 2009, the application was rejected. The petitioner got 'No Objection Certificate' for import of the aircraft from the Director General of Civil Aviation on 4th October, 2007 and the bill of entry of the aircraft is dated 17th October, 2007.

16. Section 10 (15A) has been quoted above. Section 10 (15A) stipulates that while computing total income of a non- resident, payments made by an Indian company engaged in the business of operation of aircrafts to acquire an aircraft

or an aircraft engine on lease from the non-resident shall be excluded from his total income. The relevant words are “any payment made to acquire an aircraft or an aircraft engine on lease”. The proviso stipulates that this clause shall not apply to any such agreement entered into on or after 1st April, 2007. The provision/section applies if the recipient of the payment is a non-resident.

17. The petitioners had entered into contracts with non-residents and no doubt that the said contracts are agreements. However, the issue in question is whether these are agreements to acquire aircraft on lease and satisfy the requirement of Section 10 (15A) as the aircrafts were to be manufactured to be inducted/leased in future on or after 1st April, 2007. A lease, as understood in law, requires transfer of interest/right in the property by the owner to a third person. A lease cannot be created in favour of a third person unless the good/property is transferred to the lessee and the lessee is in a position to use and utilize the said good/property. When goods are not in existence, good/property cannot be transferred to lessee. There is a clear distinction between a lease or a sale and an agreement to sell/lease in respect of a good, which will come into existence in future or an agreement to enter into a sale/lease in future.

18. Our attention was drawn to Section 5 of the Transfer of Property Act, 1882, which reads:

“5. “Transfer of property” defined.—

In the following sections “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, and one or more other living persons; and “to transfer property” is to perform such act.

In this section “living person” includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.”

19. The said Section does not assist or support the contention of the petitioners. Transfer of Property as per Section 5 of the Transfer of Property Act may take place in present or in future but the property must be in existence. The words “in present” or “in future” refer to the conveyance and do not relate to the word “property” (*JugalKishore Saraf versus Raw Cotton Company*, (1955) 1 SCR 1369). Till a property comes into existence and is capable of being identified, it cannot be transferred or conveyed. Once a property comes into existence and can be identified, it can be made subject matter of conveyance, which is operative from a future date. When property is not in existence, the contract operates as an agreement to be performed in future. It can be enforced as soon as the property comes into existence.

20. Sections 4 and 6 of the Sales of Goods Act, 1930 are as under:-

“4. Sale and agreement to sell.- (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

xxx

6. Existing or future goods.- (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

(2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.”

21. An aircraft is a “good”. It is a moveable property.

22. Section 4 stipulates that when the property i.e. goods are transferred to a buyer, the contract is called a sale, but when the transfer of property is to take place at a future time, the contract is called an agreement to sell. The agreement to sell becomes a sale when the time lapses and the conditions are fulfilled. Section 6 states that future goods can be made subject matter of a contract of sale, but as per sub-section (3) the contract operates as an agreement to sell.

23. Thus, as per Sections 4 and 6 of the Sales of Good Act, 1930, there cannot be any sale till the property in the good is transferred to the buyer. Therefore, the goods must be in existence, for the title in goods cannot be

transferred without them i.e. the goods, being in existence. Future goods, which are to be manufactured, can be made a subject of agreement to sell as title in the said goods cannot be passed till they are manufactured and come into existence. Future goods include potential future goods. In legal sense, the term “sale” does not include contracts for sale of future goods. Contracts of the said nature are only agreements to sell future goods and the property is not transferred in praesenti. The purchaser does not get title in praesenti as the goods are not in existence. There is no transfer of ownership or other rights. Such contracts are executory in nature and in case of breach, certain rights can flow, including right to claim damages. The right and title in the property cannot pass and be conferred on the purchaser till the goods come into existence. In Halsbury Law of England, Volume 29, Page 15, para 13, it has been observed as under:

“An agreement to sell, or, as it is often stated, an executory contract of sale, is a contract pure and simple, whereas a sale, or, as it is called for distinction, an executed contract of sale, is a contract plus a conveyance. Thus, by an agreement to sell *a mere jus in personam* is created, by a sale a *jus in rem* is transferred. Where goods have been sold, and the buyer makes default in payment, the seller may sue for the contract price, but where an agreement to buy is broken, usually the seller’s only remedy in an action for unliquidated damages. Similarly, if an agreement to sell be broken by the seller, the buyer has only a personal remedy against the seller. The goods are the property of the seller and he can dispose of them. They may be taken in execution for his debts, and if he becomes bankrupt they pass to his trustee in bankruptcy. But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against the seller, but also the usual proprietary remedies in respect of

the goods themselves, such as the actions for conversion and detinue. Again, if there be an agreement for sale and the goods perish, the loss as a rule fall on the seller, while if there has been a sale the loss, as a rule, falls upon the buyer.”

24. Similarly, in Benjamin’s Sale of Goods, 8th Edition it has been elucidated that when the seller neither owns nor possesses the goods, they can be made subject matter of a contract but such contract operates only as an agreement to sell and no property passes in the future goods.

25. Lease does not result in transfer of ownership but right to enjoy the property is given by the lessor to the lessee. The lessor remains the owner though it may be that in some cases the right of enjoyment secures to the lessee the ownership of the usufruct (See ***Dan Singh Bisht versus Firm Janki Saran Kailash Chander Dhampur***, AIR 1948 Allahabad 396). A lease is not a mere contract, but it is a transfer of interest that creates a *right in rem*. The estate which is transferred entitles the lessee to use the said estate and what remains with the owner is the residuary interest. However, there cannot be a lease of a property which is not in existence and is still to be manufactured because till the time property is manufactured, there cannot be any transfer of interest. If the subject matter “good” or the property is only not in possession of the lessor but the property to which he may never establish title, the so called lease will be construed as an agreement to lease upon happening of a contingency (See

Mohendra Nath Mookerjee vs. Kali Proshad Johuri, (1903) ILR 30 Calcutta 265).

26. In the present case, there was no lease but only a possibility or an expectancy as the property or goods in question were not in existence on the date of the so called agreements. The agreements cannot be treated as leases but only as agreements for leases which will/may operate in future. This will not satisfy the need and requirements of Section 10(15A) of the Act. The said provision stipulates that there should be an agreement to acquire an aircraft on lease. The aircraft should be in existence for a lease to be executed and implemented. It will not apply to cases where the aircraft is not in existence and still to be manufactured. The use of the word “lease” is significant and signifies transfer of rights by the lessor to the lessee in praesenti, i.e., on or before 1st April, 2007, which is not possible unless the aircraft is in existence. A contract for a lease is to be distinguished from a lease because lease is actually a conveyance of interest in the goods/property, whereas a contract for lease is merely an agreement that such conveyance shall be entered into or begin/operationalize on a future date (see observations of the Supreme Court in ***State of Maharashtra Vs. Atur India (P) Ltd.*** (1994) 2 SCC 497) wherein Woodfall on Landlord and Tenant has been quoted).

27. On reading of Section 10 (15A) of the Act it is apparent to us that for this Section, an Indian company engaged in the business of operation of aircrafts

should have acquired aircraft(s) on lease under an agreement. It is only when an Indian company acquires aircraft on lease under an agreement, which was entered into on or before the 1st day of April, 2007, benefit under the said Section is available. Thus, the twin conditions; that the agreement should have been entered into on or before 1st April, 2007 and there should be acquisition of aircraft under the lease before the said date, have to be satisfied. If the two conditions are not satisfied, benefit under the said Section cannot be granted. To acquire an aircraft on lease in future after 1st April, 2007, will not meet the requirement of acquiring an aircraft on lease. A lease, which is to operate and begin after 1st April, 2007 would not qualify for advantage and benefit under the said section. The intention behind the said proviso is to restrict and not grant benefit after the particular/specified cut-off date i.e. 1st April, 2007. However, the legislature did not want to deny benefit in respect of earlier agreements, which had fructified and had been entered into and were already in operation before the said date. Thus, earlier operational lease agreements have been protected/saved. The words “to acquire aircraft on lease” mean an existing lease and not the lease, which is to begin or be operative in future on or after 1st April, 2007. To acquire an aircraft on lease means a lease agreement and postulates actual conveyance on/or before the cut of date, i.e., 1st April, 2007.

28. In view of the aforesaid discussion, we do not find any merit in the present writ petitions and the same are dismissed. In the facts of the present cases, there will be no order as to costs.

-sd-
(SANJIV KHANNA)
JUDGE

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(R.V. EASWAR)
JUDGE

JULY 10, 2012
NA/VKR/kkb