आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल' मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

सर्व श्री बी. रामकोटय, लेखा सदस्य एवं श्री विजयपाल राव, न्या.स ।

BEFORE SHRI B. RAMAKOTAIAH, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./I.T.A. No.7813/Mum/2010

(निर्धारण वर्ष / Assessment Year: 2005-06)

M/s Federal Express Corporation, Chemtex House, Main Street, Hiranandani Gardens, Powai Mumbai-400076	बनाम/ Vs.	DDIT (IT)-3(2), Scindia House, R. No.132, 1st Floor, N. M. Road, Mumbai-400038
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.7880/Mum/2010

(निर्धारण वर्ष / Assessment Year: 2005-06)

DDIT (IT)-3(2), Scindia House, R. No.132, 1st Floor, N. M. Road, Mumbai-400038	बनाम/ Vs.	M/s Federal Express Corporation, Chemtex House, Main Street, Hiranandani Gardens, Powai Mumbai-400076
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACF4135E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / **Appellant by :**	Mr. Narender Kumar
प्रत्यर्थी की ओर से/**Respondent by :**	Mr. Porus Kaka & Mr. Manish Kantu
सुनवाई की तारीख / **Date of Hearing :**	25th July 2013
घोषणा कीतारीख/**Date of Pronouncement:**	31st July 2013

आदेश / O R D E R

PER : विजयपाल राव, न्या.स. / VIJAY PAL RAO, JM

These cross appeals are directed against the order dated 31.8.2010 of the Commissioner of Income Tax(Appeals) for the assessment year 2005-06.

2. The assessee has raised the following grounds in this appeal:

"A. Based on the facts and circumstances of the case, the Appellant respectfully submits that the learned Commissioner of Income-tax (Appeals) — 10 has in his order under Section 250 of the Income-tax Act, 1961 (the 'Act') erred:

1. In denying the exemption under Article 8 of the India-US Double Taxation Avoidance Agreement ('Treaty') on revenue attributable to transportation of cargo in the international traffic through aircrafts owned by third party airlines (including any ground transportation associated thereto), thereby taxing the same as per the provisions of Article 7 of the Treaty.

2. In arbitrarily enhancing the ratio of commercial linehaul charges ('CLC') to total linehaul charges ('TLC'), used for computing the revenue and consequently the income associated with transportation through third party airlines, from 6.4 percent (provided by the Appellant which was supported by an Chartered Accountant's report) to 10 percent; which is contrary to the provisions of Rule 10 of the Income-tax Rules, 1962 ('Rules').

3. In enhancing the profit rate, used to determine the income attributable to transportation of cargo in the international traffic through aircrafts owned by third party airlines, from 6.14 percent [determined on a pro-rata basis and under support of the provisions of Rule 10 of the Rules] to 6.74 percent.

4. In upholding the disallowance of Rs 147,716,213 made by the Assistant Director of Income-tax (International Taxation) — Range 3(2) ('Assessing Officer') on account of non deduction of tax under Section 40(a)(ia) of the Act in relation to payments made to following parties:

Particulars	*Amount (Rs)*
Prakash Air Freight Private Limited ('Pafex')	*100,858,696*
Jet Airways and Indian Airlines	*46,857,517*

5. In disallowing the entire amount of payments made to Pafex, Jet Airways and Indian Airlines under Section 40(a)(ia) of the Act instead of a proportionate disallowance in respect of transportation of cargo using third party aircrafts on which benefit of Article 8 of the Treaty has been denied.

B. Based on the facts and circumstances of the case, the Appellant respectfully submits that the learned Assessing Officer has erred in disregarding the provisions of Section 208 of the Act and *consequently, levying interest under Section 2348 of the Act."*

3. Ground No. 1 to 3: At the time of hearing the Ld. Senior Counsel for the assessee has submitted for the issue regarding benefit of Article 8 of the Indo-US DTAA in respect of the revenue attributable to transport of cargo through the space booked with other airlines has been settled under Mutual Agreement Procedure (MAP) whereby it was agreed between the parties/states that the revenue attributable to transportation by third party plane/aircraft is taxable. The Ld. Counsel has filed the letter dated 12.4.2012 of Assistant DIT (international taxation) along with the mutual agreement by the competent authorities and submitted that in view of the settlement under MAP, the Ground No. 1 to 3 become infractious and accordingly the assessee does not press the same. The Ld. DR has not disputed the fact that the issue raised in Ground No. 1 to 3 has been settled under MAP. Accordingly, Ground No. 1 to 3 are dismissed as not pressed in view of the settlement under MAP.

4. Ground No. 4 and 5 regarding disallowance u/s 40(a)(ia) of the Income Tax Act in relation to the payment made to Prakash Air Freight Pvt. Ltd., Jet Airways and Indian Airlines. The assessee is a tax resident of USA and engaged in the business activity to undertake scheduled air cargo operations in India as per the approval granted by DGCA and RBI. The business of the assessee comprises of a combination of door to door and airport to airport transportation of goods/packages. All domestic handling operations have been contracted to an independent entity M/s

Prakash Air Freight Pvt. Ltd. The assessee has entered into a contract in this respect. The assessee also booked space in the aircrafts of Jet Airways and Indian Airlines for transportation of goods/packages. The AO has disallowed *inter alia* the payment made to M/s Prakash Air Freight Pvt. Ltd. (supra) of ₹ 1,08,58,696/- and the payment to Jet Airways and Indian Airlines of ₹ 4,68,57,517/- u/s 40(a)(ia) for non-deduction of tax because the assessee failed to produce the relevant evidence to show that the tax has been deducted at sources on the payments made to them. On appeal, before CIT(A) the assessee contended that the TDS was deducted in respects the payment made to Prakash Air Freight Pvt. Ltd., however, due to the relevant record destroyed in flood the copy of TDS return could not submitted. The assessee filed a copy of Panchnama lodged with the Police Authorities in this respect that the relevant record was destroyed in flood. The assessee has also filed a letter from Prakash Air Freight Pvt. Ltd. to confirm that TDS was done on payment made by the assessee. However, the CIT(A) did not entertain the additional evidence and confirm the disallowance made by the AO on the ground that the assessee has failed to submit the required information, supporting documentary evidence such as copies of TDS deduction from Prakash Air Freight Pvt. Ltd. As regards the payment made to Jet Airways and Indian Airlines, the CIT(A) confirm the disallowance by holding that the payments are in the nature of contractual payment liable for deduction of tax at source u/s 194C of the Income Tax Act.

5. Before us the Ld. Senior Counsel has submitted that as regard the payment made to the Prakash Air Freight Pvt. Ltd., the assessee has duly deducted the tax at source but due to the relevant record was damaged in the flood, the assessee could not produce the same before the authorities. However, the Panchnama lodged with Police Authorities dated 3.8.2005 and confirmation letter from Prakash Air Freight Pvt. Ltd. were produced before the CIT(A) to show that the payments were made after deduction of tax. He has also filed a copy of return of income, demand u/s 156 and communication of acceptance of return u/s 143(1) in case of M/s Prakash Air Freight Pvt. Ltd. for the assessment year 2005-06 and submitted that a credit of TDS to ₹ 100,37,910/- was given to the Prakash Air Freight Pvt. Ltd. which shows that the payments received by M/s Prakash Air Freight Pvt. Ltd. were after deduction of tax. He has further submitted that when the assessee had produced evidence to show that the relevant record of the assessee was damaged in flood then the AO should have verified the deduction of tax by the assessee from the department's record as well as from the assessment record of Prakash Air Freight Pvt. Ltd. Thus, the Ld. Senior Counsel has submitted that the additional evidence filed by the assessee before the CIT(A) should have been considered by the authorities below and accordingly the fact of deduction of tax by the assessee in respect of the payment of Prakash Air Freight Pvt. Ltd. should have been verified from the relevant record with the department. The Ld. Senior Counsel has pleaded that the necessary directions to be issued to the AO to verify the claim of the assessee that the TDS was deducted on payment to M/s Prakash Air Freight Pvt. Ltd.

6. As regards the payment to Jet Airways and Indian Airlines the Ld. Senior Counsel has submitted that for the assessment years 1998-99, 1999-2000 and 2001-02 this Tribunal vide order dated 29.1.2009 held that the transportation of cargo in the international traffic through aircrafts which were not owned/chartered/leased by the assessee would be outside the scope of Article 8(2) and consequently the revenue from the transportation of such cargo would not be exempt from tax under Article 8(1). Accordingly, the claim of the assessee was directed to examine by the AO. Thus, the issue was remanded to the AO on the question whether the transportation through a space booked with other airlines can be said as transportation by the aircraft chartered by the assessee. In the MAP proceeding it has been agreed that the said revenue for transportation of cargo by booking the space in other airlines is taxable because the transportation was not by the aircraft chartered by the assessee. The Ld. Senior Counsel has submitted that when both the parties have agreed on this fact the provisions of Section 194C are not applicable in respect of such payment in view of the CBDT Circular No. 713 dated 2.8.1995 whereby the Board has clarified that the provisions of Section 194C do not apply to the payments made to the airlines or travel agents for purchase of tickets for air travel of passengers of individuals. It has been further clarified that the provision shall apply only when the payments are made for chartering an aircraft for carriage of passengers or goods. When the assessee has not chartered the aircraft then Section 194C would not apply. Thus, the Ld. Senior Counsel has submitted that when the

exemption under Article 8(2) of the DTAA is denied by holding that the arrangements of the assessee with third party carriers do not amount to chartering then the provisions of Section 194C are not applicable and consequently there is no in question of disallowance u/s 40(a)(ia).

7. On the other hand, the Ld. DR has submitted that despite the specific queries by the AO the assessee did not furnish the relevant record to show that the tax was deducted at source in respect of the payment made to Prakash Air Freight Pvt. Ltd. He has further submitted that the assessee could have obtained the copies of the TDS from the Prakash Air Freight Pvt. Ltd. to substantiate its claim that the TDS was deducted. The Ld. DR has further contended that from the return of income and communication of acceptance of return u/s 143(1), it is not clear that the TDS credit given relates to the payments made by the assessee. Therefore, the said record cannot be relied upon. As regards the payment to Jet Airways and Indian Airlines the same were not for booking the space only for a single occasion or some occasions but it was a regular ongoing arrangements by the assessee with these airlines and therefore the nature of arrangements with third party is nothing but a contract and payments made on account of contractual obligation are liable for deduction of tax at source u/s 194C of the Income Tax Act. He has relied upon the orders of the authorities below.

8. Having considered the rival submissions as well as relevant material produced before us we find that the payment made to Prakash Air Freight

Pvt. Ltd. is undisputedly under an agreement and therefore, subject to deduction of tax u/s 194C. The assessee did not file any record before the AO to show that TDS was deducted in respect of the payment made to Prakash Air Freight Pvt. Ltd. However, before the CIT(A) the assessee filed a copy of complaint lodge with the Police Authorities regarding destroy of record in flood as well as a letter from Prakash Air Freight Pvt. Ltd. confirming deduction of TDS. The CIT(A) did not admit the said evidence filed by the assessee. Before us the assessee has also filed a copy of return of income and communication of Income Tax Computation wherein credit of TDS of ₹ 100,37,910/- as per 143(1) was shown to be given. However, it is not possible to ascertain from the said figure of TDS whether any part of the said amount pertains to the payments made by the assessee to M/s Prakash Air Freight Pvt. Ltd. Thus, from the record produced before us it cannot be ascertain conclusively that the assessee has actually deducted the TDS on the payment made to the Prakash Air Freight Pvt. Ltd. Further the amount of TDS on the payment in question is also not known. In the facts and circumstances of the case and in the interest of justice we set aside this issue to the record of the Assessing Officer to verify the relevant record including the assessment record of Prakash Air Freight Pvt. Ltd. as well as relevant record of the department. The assessee is also directed to file the ledger account of the respective parties in the books of account of each other showing the payment and receipts of the amount after TDS. After examining the relevant record the AO shall decide this issue as per law.

9. As regards the payment to Jet Airways and Indian Airlines are concerned undisputedly the arrangement of the assessee with these airlines/carriers are not for transportation of goods by aircraft chartered by the assessee as it is clear from the order of this Tribunal dated 29.1.2009 for the assessment year 1998-99, 1999-2000 and 2001-02 and subsequent settlement under Mutual Agreement Procedure (MAP). Thus on the point of applicability of Section 194C the Circular No. 713 dated 2.8.1995 is relevant which reads as under:

> ***1258. Clarification regarding applicability of section 194C in case of tickets sold by airlines and travel agents to customers***
>
> *"1. The Finance Act, 1995 has amended the provisions regarding tax deduction at source contained in section 194C of the Income-tax Act. As per the amended provisions, deduction of tax at source is to be made, inter alia, from payments made in respect of contracts for carriage of goods and passengers by any mode of transport other than Railways.*
>
> *2. A number of queries have been received as to whether tax has to be deducted at source from payments to travel agents or the airlines for purchase of tickets for travel by air.*
>
> *3. The matter has been examined by the Board. It is clarified that the provisions of section 194C do not apply to the payments made to the airlines or the travel agents for purchase of tickets for air travel of individuals. The provisions shall, however, apply when payments are made for of goods.*
>
> *4. The clarification in para 3 (above) shall apply mutatis mutandis to the tickets for travel of individual by any other mode of transport also."*

10. As it has been clarified by the Board that the provisions of Section 194C do not apply to the payment made to the airlines or the agents for purchase of tickets for air travel of individuals except the payments are made for chartering an aircraft for carriage of passengers or goods. When

the payments in question are not for transportation of goods by chartering the aircraft and further nothing has been brought on record to show that the assessee has made this payment under a contract then the provisions of Section 194C are not applicable on these payments. Accordingly, the assessee was not under any obligation to deduct tax at source as per Section 194C in respect of payments made to Jet Airways and Indian Airlines and consequently the disallowance u/s 40(a)(ia) is not called for. Hence, we delete the addition made by the AO by invoking the provisions of Section 40(a)(ia) in respect the payment made to Jet Airways and Indian Airlines.

ITA No. 7880/M/2010

11. The Revenue has raised the only ground as under:

> *"On the facts and circumstances of the case and in law, the Ld. CIT(A) has ignored the detailed reasoning of the A.O. and erred in directing the A.O. to estimate the ratio of commercial line haul charges 2 10% instead of @ 25% as estimated by the A.O. ignoring the provisions of Rule 10."*

12. We have heard the Ld. DR as well as Ld. AR and considered the relevant material on record. Both the parties have admitted this fact that the issue involved in the revenues appeal has been settled under MAP and therefore the appeal of the revenue becomes infructuous. In view of the fact that the issue raise in the revenues appeal has already been settled between parties as per the MAP the appeal of the revenue does not survive being infructuous and accordingly dismissed.

13. In the result, the appeal of the assessee is partly allowed and the appeal of the revenue is dismissed.

Order pronounced in the open Court on 31st day of July 2013

आदेश की घोषणा खुले न्यायालय में दिनांकः 31st जुलाई को की गई ।

Sd/-	Sd/-
(बी. रामकोटय) लेखा सदस्य **(B. RAMAKOTAIAH)** Accountant Member	(विजयपाल राव) न्यायिक सदस्य **(VIJAY PAL RAO)** Judicial Member

Place: Mumbai : Dated: 31st July 2013
Subodh

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumbai