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

R-73

\+ **ITA 159/2002**

DIRECTOR OF INCOME TAX ..... Appellant

Through: Mr Rohit Madan, Mr Zoheb Hossain and Mr Akash Vajpai, Advocates.

versus

ROYAL JORDANIAN AIRLINES ..... Respondent

Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate and Mr. Anil
K. Makhija, Advocate.

With

R- 73A

\+ **ITA 278/2006**

ROYAL JORDANIAN AIRLINES ..... Appellant

Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate and Mr. Anil
K. Makhija, Advocate.

versus

COMMISSIONER OF INCOME TAX ..... Respondent

Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate and Mr. Anil
K. Makhija, Advocate.

With

R-73B.

\+ **ITA 279/2006**

ROYAL JORDANIAN AIRLINES ..... Appellant

Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate and Mr. Anil K. Makhija, Advocate.

versus

COMMISSIONER OF INCOME TAX ..... Respondent

Through: Mr Rohit Madan, Mr Zoheb Hossain and Mr Akash Vajpai, Advocates.

With

R-73C.

\+ **ITA 280/2006 & CM 2072/2006**

ROYAL JORDANIAN AIRLINES ..... Appellant

Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate and Mr. Anil K. Makhija, Advocate.

versus

COMMISSIONER OF INCOME TAX ..... Respondent

Through: Mr Rohit Madan, Mr Zoheb Hossain and Mr Akash Vajpai, Advocates.

With

R-73D.

\+ **ITA 580/2006 & CM 4482/2006**

ROYAL JORDANIAN AIRLINES ..... Appellant

Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate and Mr. Anil K. Makhija, Advocate.

versus

COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr Rohit Madan, Mr Zoheb Hossain and Mr Akash Vajpai, Advocates.

With

R-73E.

\+ **W.P.(C) 16060/2006**

ROYAL JORDANIAN AIRLINES & ANR ..... Appellant

Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate and Mr. Anil
K. Makhija, Advocate.

versus

ASSISTANT DIRECTOR OF INCOME TAX ..... Respondent
Through: Mr Rohit Madan, Mr Zoheb Hossain and Mr Akash Vajpai, Advocates.

And

R-73F.

\+ **W.P.(C) 16068/2006**

ROYAL JORDANIAN AIRLINES & ANR ..... Appellant

Through: Mr. C.S. Aggarwal, Senior Advocate with Mr. Prakash Kumar, Advocate and Mr. Anil
K. Makhija, Advocate.

versus

ASSISTANT DIRECTOR OF INCOME TAX ..... Respondent
Through: Mr Rohit Madan, Mr Zoheb Hossain and Mr Akash Vajpai, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R

% 24.11.2015

Dr. S. Muralidhar,J.

Introduction

1. ITA No. 159 of 2002 is an appeal by the Revenue against the order dated 2nd November 2001 of the Income Tax Appellate Tribunal ('ITAT') in ITA Nos.790-794/Del/96 for Assessment Years ('AYs') 1989-90 to 1993-94.

2. ITA No.278 of 2006 by the Assessee, Royal Jordanian Airlines ('RJA') is directed against the order dated 31st August 2005 of the ITAT in ITA No. 1786/De/2000 for the AY 1996-97, ITA No. 279 of 2006 by RJA is directed against the order dated 31st August 2005 of the ITAT in ITA No.5252/Del/98 for the AY 1995-96, ITA No. 280 of 2006 by RJA is directed against the order dated 31st August 2005 of the ITAT in ITA No. 4670/Del/03 for the AY 2000-01 and ITA No. 580 of 2006 by RJA is against the order dated 31st August 2005 of the ITAT in ITA No. 3805/Del/99 for the AYs 1994-95.

3. Apart from the above appeals, two writ petitions have been filed by

RJA, i.e., W.P.(C) No.16060 of 2006 and W.P.(C) No. 16068 of 2006, in which notices dated 27th February 2006 issued by the Assistant Director of Income Tax ('ADIT') under Section 148 of the Act seeking to reopen the assessments for AYs 1989-90 to 1993-94, 1999-2000 and 2001-02 and the orders dated 18th September 2006 rejecting RJA's objections to the said notices have been challenged.

4. Since the appeals and the writ petitions arise from a common set of facts, they are being disposed of by this common order.

Background facts

5. The background facts are that RJA came to existence by Ordinance No. 10 of 1969 issued by the Hashemite Kingdom of Jordan under Article 31 of the Constitution of Jordan. The said Ordinance was published in the Jordanian official gazette dated 10th April 1969. The features of RJA as spelt out in the Ordinance were that it was a body corporate having financial and administrative independence, it was a part of the Ministry of Transport of the Government of Jordan and it was to undertake all the scheduled air transport activities from and to the Kingdom of Jordan. The initial capital of RJA Corporation was two million and two hundred fifty thousand Jordanian Dinars was to be paid out of the State's treasury. The Council of Ministers of Jordan would have the right to terminate the members of the Board of Directors of RJA. The Government of Jordan guaranteed all the obligations of RJA Corporation and it was to be specially exempted from customs and duty fees. A certificate dated 10th October 1995 issued by the Ministry of

Transport of the Kingdom of Jordan that RJA would be directly controlled by the Council of Ministers. It was stated that for all purposes RJA has the status of a Department of the Government in the Kingdom of Jordan.

6. RJA has its principal office in Amman in Jordan. It appointed Jet Air Pvt. Ltd. as its general sales agent in India. RJA commenced its operations in India, carrying passengers and cargo on international flights from and to India from 1989 onwards. Since commencement of operations in India, RJA has been incurring losses. It did not file any return of income in India.

Facts concerning AYs 1989-90 to 1993-94

7. In response to a notice issued to it under Section 148 of the Act in respect of the AYs 1989-90 to 1992-93, stating that RJA has not declared its income in terms of Section 44BBA of the Act and in response to another notice under Section 142(1) in respect of AY 1993-94, RJA filed its return for the aforementioned AYs 1989-90 to 1993-94. RJA disclosed its gross receipts as well as its expenses, apart from the commission paid to its agents. It pointed out that it had been paying income tax to the Government account since September 1993 in order to obtain a 'No Objection Certificate' for remittance of sales proceeds calculated on the basis of gross receipts less commission under Section 44BBA of the Act. The Assessing Officer ('AO'), nevertheless, proceeded to pass orders on 28th February 1994, in respect of AYs 1990-91 to 1993-94 holding that in terms of Section 44BBA, 5% of the

gross receipts were to be deemed to be taxable income on a presumptive basis. For the AY 1989-90, a similar order was passed by the AO on 31st March 1994.

8. Aggrieved by the above assessment orders, RJA filed appeals before the Commissioner of Income Tax (Appeals) ['CIT (A)]. By a common order dated 4th December 1995, the CIT (A) allowed the appeals on the short ground that RJA was not liable to tax as its entire income was in fact the income of the Government of Jordan. It may be mentioned at this stage that RJA has specifically urged other issues before the CIT (A), including challenging the invocation of Section 148 of the Act and that Section 44BBA of the Act did not apply to it.

9. The CIT(A) also referred to the decision of the ITAT in ***Iraqi Airways v. Inspecting Assistant Commissioner 23 ITD 115*** and noticed that there was no distinction between the case of RJA and that of Iraqi Airways. Reference was also made to Note 11 attached to the audited accounts of RJA for the year ending 31st December 1993 which stated that the Kingdom of Jordan was committed to cover the losses incurred by RJA. The CIT (A) also considered the opinion given by the public accountants of Jordan, M/s Saba & Co. The CIT (A) held that the entire income of RJA was exempt from taxation and that the exercise of jurisdiction by the ADIT under Section 147/148 was unsustainable in law. However, the CIT (A) observed that "no refund can be granted with respect to the income already admitted on which tax had been paid. The effect of this appellate order would only be to reduce the additional

demand, if any raised in the reassessment proceedings which should be refunded to the appellant, if already collected".

10. Aggrieved by the above order of the CIT (A), both the Revenue and RJA filed appeals before the ITAT. In RJA's five appeals, the issue raised was the refusal by the CIT (A) to grant refund in respect of the taxes that had already been paid prior to the re-assessment proceedings. The solitary ground in the Revenue's five appeals was a challenge to the invalidation by the CIT (A) of the exercise of jurisdiction under Section 147/148 of the Act. The Revenue's contention was that "the assessee company is a corporation like any other corporation such as Air India Corporation and is liable to pay tax in India".

11. The ITAT in the order dated 2nd November 2011, followed its earlier order in the case of ***Iraqi Airways*** (*supra*) and, therefore, upheld the order of the CIT (A) that the income of RJA was not liable to be assessed to income tax. It was also noticed that between the financial year ending 31st December 1989 to 31st December 1998, RJA has suffered losses and all the losses had been borne by the State treasury. The Revenue's appeals were dismissed.

12. As far as RJA's appeals were concerned, the ITAT held that Section 44BBA could not have been applied to Assessee. Therefore, there was "no alternative but, to cancel the assessment and direct the refund of amount of tax paid". As a result, RJA's appeals were allowed.

13. It is against the above order dated 2nd November 2001 of the ITAT that the Revenue has filed ITA No. 159 of 2002 in this Court. While admitting the said appeal on 15th November 2002, the following question of law was framed by this Court for consideration:

> "Whether the tribunal was correct in law in holding that Royal Jordanian Airlines was not liable to taxed in India under the Income Tax Act, 1961, in respect of the assessment years 1989-90 to 1993-94."

Facts concerning AYs 1994-95 to 1996-97 and 2000-01

14. For the AYs 1994-95, 1995-96, 1996-97 and 2000-01 RJA filed its return of income declaring nil income. Nonetheless, the AO framed assessment under Section 143(3) of the Act on 14th March 1997, holding that RJA is a foreign company and is liable to pay tax in India, in terms of Section 44BBA of the Act. The AO proceeded to determine income @5% of the net sales and assessed the income of RJA for AY 1994-95 at Rs.2,09,01,800. For AY 1995-96, a similar order was passed on 6th March 1998, determining the income at Rs.1,91,63,360. Another order dated 28th December 1998 was passed by the AO under Section 143(3) of the Act for AY 1996-97, assessing the income of RJA at Rs.2,07,08,260. For AY 2000-01, the AO passed an order dated 30th October 2002 under Section 143(3) of the Act, determining the income at Rs. 63,13,422.

15. Appeals were filed by RJA against the aforementioned assessment order for AY 1994-95. The CIT (A) passed an order on 4th June 1999 affirming the order of the AO as far as applicability of Section 44BBA

was concerned. However, it felt that the AO had incorrectly allowed deduction from the gross receipts and accordingly its income was enhanced to that extent. Similar orders were passed by the CIT (A) in respect of the appeals against the assessment orders for AYs 1995-96, 1996-97 and 2000-01.

16. Aggrieved by the above orders, appeals were filed by RJA before the ITAT. For AY 1994-95 when the appeal of RJA being 3085/Del/99 was heard by the ITAT, there was a difference of opinion amongst its members, where one of them was inclined to follow the order of the ITAT in ***Iraqi Airlines*** (supra) as well as order dated 2nd November 2001 in the Assessee's own case for AY 1993-94, whereas the other was not. As a result, a Special Bench of the ITAT was constituted.

17. For AY 1995-96, the CIT (A) allowed the appeal of RJA. The Revenue went in appeal before the ITAT. Likewise, for AY 1996-97, the CIT (A) held against the Revenue and therefore the appeal for that year was also filed by the Revenue before the ITAT. However, for AY 2000-01, against the decision of the CIT (A), RJA again filed an appeal before the ITAT.

18. The Special Bench passed a common order dated 31st August 2005 in the four appeals pertaining to the above AYs. The Special Bench held that RJA was liable to be re-assessed to income tax as a foreign company. It was held that there was no immunity from tax to sovereigns unless it was specifically granted by the Parliament. The Special Bench

held that it was unable to subscribe to the view taken by the ITAT in the ***Iraqi Airways case*** (*supra*). It held that RJA is a company under the Jordan company law and was therefore a 'person' under Section 2 (17) read with Section 2 (31) of the Act.

19. The Special Bench then referred to the alternative plea of RJA in its appeals for AYs 1994-95 and 2000-01 that the Income Tax authority had erred, for the purposes of Section 44BBA of the Act, in not reducing the gross sales by the commission paid to its agents and the sums refundable to the customers. It was held that since there was no discussion in the impugned order of the CIT(A) in that regard, RJA should be given a specific opportunity to put forth its arguments in relation to the computation of its income under Section 44BBA. The matter was therefore restored to the file of the AO for that purpose. The AO was also asked to examine the question of levy of interest under Section 234B of the Act.

20. Against the above order dated 31st August 2005 of the Special Bench of the ITAT, RJA filed ITA Nos. 278, 279, 280 and 580 of 2006. While admitting the said appeals on 4th July 2006, the following question of law was framed by the Court:

> "Whether ITAT was correct in law in holding that Royal Jordanian Airlines is liable to be taxed in India under the Income Tax Act, 1961 for the assessment years1994-95, 1995-96, 1996-97 and 2000-0I?"

Facts in the two writ petitions

21. While the aforementioned appeals were pending, a notice under Section 148 of the Act was served upon RJA on 27th February 2006 under Section 148 of the Act asking RJA to file its return for AYs 1999-2000. Similar notices were issued for AYs 1994-95 to 1998-99 and 2001-02. A copy of the reasons for issuance of the said notice has been placed on record. It *inter alia* stated that, in view of the decision of the Special Bench dated 31st August 2005 (relevant portions of which were quoted in the reasons), Section 148 read with Section 147 and Sections 149 and 150 of the Act were being invoked.

22. Pursuant to the objections filed by RJA to the above notices, a hearing was afforded to it in light of the decision of the Supreme Court in ***GKN Driveshafts (India) Ltd. v. ITO 250 ITR 19***. The objections were disposed of by the Dy. Commissioner of Income Tax by an order dated 18th September 2006 in respect of each of the seven AYs, upholding the notices for reopening of the assessments.

23. Aggrieved by the notice dated 27th February 2006 and the order dated 18th September 2006, RJA filed separate writ petitions in this Court being W.P.(C) No. 16062-63/ 2006, 16064/2006, 16066/2006, 16089-90/2006 and 16091-92/2006 in respect of AYs 1989-90 to 1993-94. The said writ petitions were listed before the Court on 24th October 2008 when the following order was passed:

> "Mr. Sabharwal states that he has taken instructions with regard to the withdrawal of the proceedings under Section 147 pursuant to the Section 148 notices. He submits that the said proceedings have already been dropped. He has produced

before us a copy of the letter dated 20.10.2008 issued by the Assistant Director of Income Tax (IT), Circle 2(I), New Delhi issued to the assessee indicating that proceedings pursuant to the notices under Section 148, which had been issued on 27th February 2006 for the assessment years 1989-90 to 1993-94, have been dropped. A signed copy of the said letter is placed in the file of W.P.(C) 16089-90/2006.

In view of the aforesaid, these writ petitions have become infructuous. They are disposed of as such. All pending applications also stand disposed of."

24. However for some reason, it appears that notices under Section 148 issued in respect of the AYs 1999-2000 and 2001-02 were not dropped. The present two writ petitions (W.P.(C) 16060 of 2006 and 16068 of 2006 pertaining to the notice under Section 148 of the Act issued for the said two AYs came up for hearing before the Court on 16th November 2010, when the following order was passed:

"In the course of hearing, Mr.C.S.Aggarwal, learned senior counsel appearing for the petitioner referred to the order dated 24th August, passed in WP(C) No. 16089-90/2006 wherein the revenue has recalled notices issued under Section 148 of the Income Tax Act, 1961 (for brevity 'the Act') for a span of 5 years. It is submitted by Mr. Aggarwal, learned senior counsel that the contents of said letter would reveal that identical reasons have been recorded while issuing notice under Section 148 of the Act.

Mr. Sabharwal, learned counsel appearing for the revenue undertakes to produce the said letter. That apart, learned counsel for the revenue shall also produce the record indicating why the proceedings were dropped.

Be it noted, direction for production of record or the letter that has been referred to hereinabove is without prejudice to the contentions to be raised by the learned counsel for the parties.

Matter be listed on 11th February, 2011.

Interim orders shall remain in force till the date of hearing.

On the next date of hearing, learned counsel for the parties shall formulate the proposition of law and come with relevant citations."

25. It is stated that till date, a letter by which the proceedings under Section 148 of the Act in respect of AYs 1989-90 and 1993-94 has not been produced and the proceedings in respect of the AYs 1999-2000 and 2001-02 has also not been brought.

Subsequent orders of the ITAT

26. Mr. C.S. Aggarwal, learned Senior counsel for the Assessee, has placed before the Court a compilation of the relevant documents. Two of the documents in the said compilation are significant. The first is the order dated 29th August 2008 passed by the ITAT in ITA No. 407/Del/2008 being the appeal filed by RJA for AYs 1995-96, 1997-98 and 2000-2001.

27. The said appeal arose from the consequential orders passed by the AO after order of the Special Bench of the ITAT dated 31st August 2005. For each of the four AYs forming subject matter of the order of the ITAT, the AO by order dated 27th December 2006 held that despite the losses incurred by RJA both in India as well as globally, the income had to be computed at 5% of the gross receipts in terms of Section 44BBA of the Act.

28. In the appeals filed by RJA against the said orders, the CIT (A) by order dated 14th January 2008 confirmed the computation of income made by the AO. It was held, *inter alia*, that Section 44BBA of the Act did not entitle RJA to claim deductions of any other expenditure or a lower rate of profit even if it had maintained books of accounts. It was further observed that the decision of the Supreme Court in ***CIT v. Hyundai Heavy Industries Ltd. 291 ITR 482*** would not apply to the facts of the case since the said decision was not rendered in the context of Section 44BBA of the Act.

29. The order dated 29th August 2008 of the ITAT was essentially on the interpretation and applicability of Section 44BBA of the Act. After discussing the decisions of the Supreme Court in ***Union of India v. A. Sanyasi Rao 219 ITR 330*** (rendered in the context of Section 44AC of the Act) and ***CIT v. Hyundai Heavy Industries Ltd. 291 ITR 482*** (*supra*), it was concluded by the ITAT that "the purpose of presumptive provisions is to provide a simple manner of calculation and not to bring to tax an income when there is no income". It was further held as under:

> "though there is no specific provision in the Act to compute the income at a lower rate in Section 448BA of the Act, yet in a case where there are losses to an Assessee, firstly, the provisions are not applicable, and assuming they are applicable then too, the provisions for lower rate of taxation have to be understood within the scheme of the Act as has been held by the apex Court in the case of *Hyundai Heavy Industries Co. Ltd*. (*supra*), wherein at p. 494, it was observed as under:

> 'Thirdly, it is important to note that Chapter IV of the Act contains provisions for presumptive taxation of business income in certain cases as prescribed in Sections 44B, 44BB, 44BA and 44BBB of the Act. In the scheme of presumptive taxation, the Assessee is presumed to have earned income at the rate of a certain percentage of his total turnover or gross receipts. If the Assessee agrees to be taxed on presumed income, he is not required to maintain books of account. If, however, he claims that his income is less than the presumed figure, he is required to support his claim by producing books of account."

30. After noting that RJA had been consistently reporting losses, the ITAT held that the "income could not have been artificially computed by invoking provisions of Section 44BBA particularly when the assessee has shown his book results showing loss. We, therefore, direct the AO to compute income on the basis of books of accounts maintained by the assessee." Section 234B could not be invoked to levy interest to charge interest and that was deleted. The ITAT held that RJA would produce its books of accounts to justify its claims that it had incurred losses in the business of operation of aircrafts. Accordingly the matter was restored to the file of the AO. On the basis of the above order, a separate order was passed on 22nd March 2009 in the same terms in respect of AY 1994-95.

31. Consequent upon the above order dated 29th August 2008, the AO passed separate orders for each of the AYs 1994-95 to 1998-99 and 2000-01 on 16th October 2009 noting that RJA had produced all the

necessary bills and invoices etc, in support of the computation of losses in its profit and loss accounts. Accordingly, the AO accepted the income to be nil.

32. It is significant that the Revenue has accepted the order dated 29th August 2008 as well as 29th March 2009 passed by the ITAT and not challenged the said orders by filing appeals before this Court. As a result, the consequential order of the AO dated 16th October 2009 accepting the income of RJA to be nil for AYs 1994-95 to 1998-99 and 2000-01 has also attained finality.

33. Consequently, the question framed in these appeals for AYs 1994-95 to 1996-97 and 2000-01 as regards the liability of RJA to tax under the Act has been rendered academic.

34. As regards the appeal of the Revenue for the AYs 1989-90 to 1993-94, with the Revenue having accepted the interpretation of Section 44BBA qua RJA for the AYs 1994-95 to 2000-01, the same would apply even as regards AYs 1989-90 to 1993-94.

Legal position qua Section 44 BBA

35. In this regard, it is necessary for the Court to discuss the legal position as regards Section 44BBA of the Act, which reads as under:

"44BBA. Special provision for computing profits and gains of the business of operation of aircraft in the case of non-residents.-

(1) Notwithstanding anything to the contrary contained in sections 28 to 43A, in the case of an assessee, being a non-resident, engaged in the business of operation of aircraft, a sum equal to five per cent of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession.

(2) The amounts referred to in sub-section (1) shall be the following, namely:

> (a) the amount paid or payable (whether in or out of India) to the assessee or to any person on his behalf on account of the carriage of passengers, livestock, mail or goods from any place in India; and
>
> (b) the amount received or deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods from any place outside India."

36. In ***Sanyasi Rao*** (*supra*), the Supreme Court was interpreting Section 44AC which provides for taxation of presumptive income based on the gross receipts. The Supreme Court in the said case held that even where Section 44AC is sought to be applied to a trader, it was only a machinery provision and could not deny the normal relief afforded to all Assessees. It was accordingly held in such instance an option would be available to the Assessee to produce the books of accounts to show that the assessable income is in fact less than the presumptive income.

37. In ***Hyundai Heavy Industries*** (*supra*) the question that was addressed was "what are the profits reasonably attributable to the

assessee's permanent establishment in India?" In that context, the Court observed as under:

> "Thirdly, it is important to note that Chapter IV of the Act contains provisions for presumptive taxation of business income in certain cases as prescribed in Sections 44B, 44BB, 44BA and 44BBB of the Act. In the scheme of presumptive taxation, the Assessee is presumed to have earned income at the rate of a certain percentage of his total turnover or gross receipts. If the Assessee agrees to be taxed on presumed income, he is not required to maintain books of account. If, however, he claims that his income is less than the presumed figure, he is required to support his claim by producing books of account."

38. In as much as Section 44BBA is not charging provision, but only a machinery provision, it cannot preclude an Assessee from producing books of accounts to show that in any particular AY there is no taxable income. The Court, therefore, concurs with the view expressed in this regard by the ITAT in its order dated 29th August 2008, which in any event has not been challenged by the Revenue and has attained finality. In other words, the Court concurs with a view that where there is no income, Section 44BBA cannot be applied to bring to tax the presumptive income constituting 5% of the gross receipts in terms of Section 44BBA(2) of the Act. No doubt, for that purpose the Assessee has to produce books of accounts to substantiate that it has incurred losses or that its assessable income is less than its presumptive income, as the case may be.

39. It was then submitted by Mr.Madan that as far as AYs 1989-90 to 1993-94 are concerned, RJA is yet to produce books of accounts to show that it has been incurring losses and these are yet to be verified by the AO. In response Mr. Aggarwal pointed out that RJA had ceased its operations from India and the working sheets for the aforementioned AYs 1989-90 to 1993-94, copies of which were placed before this Court in a compilation filed by RJA, show that it had consistently been suffering losses for all these AYs.

40. While it is correct that for the aforementioned AYs 1989-90 to 1993-94, RJA's accounts showing losses do not appear to have been verified by the AO, the Court finds that the ITAT has in para 14 of its order dated 2nd November 2001 referred to this fact as under:

> "14. We have heard both the parties at length and have also carefully perused the orders of both the lower income-tax authorities. We have also gone through the voluminous paper book filed by the assessee and we find the facts of the instant case appear to almost identical to the facts of the Iraqi Airways on which a heavy reliance was placed by the assessee's learned counsel and which is reported in 23 lTD 115. In ours considered opinion, it cannot be denied that assessee is a part of Ministry of Transport of Government of Jordan as has duly been certified both by the Government of Jordan and Ambassador of Jordan in Their certificates filed. In our opinion once the Government of Jordan has duly certified that Royal Jordanian Airlines is part of Ministry of Transport and its income belongs to sovereign state of Jordan, we do not find any justification to hold that it is a separate corporation. The assessee has specifically brought to our notice that between financial year's ending 31. 12. 1989 to 31.12.1998 it has suffered the losses and all these losses have been borne by the State Treasury. The aforesaid

figures are given on pages No. 241-242 of the paper Book and are as under:-

S. No.	Date	(Dinar Jordan)
1.	31st December, 1989	84383645
2.	31st December, 1990	94792193
3.	31st December, 1991	133137074
4.	31st December, 1992	144788000
5.	31st December, 1993	143876783
6.	31st December, 1994	203579000
7.	31st December, 1995	220493000
8.	31st December, 1996	288172000
9.	31st December, 1997	315742000
10.	31st December, 1998	348557000

In our opinion therefore, there is no merit in the contention of the revenue that assessee was liable to be assessed as it is not an income of sovereign state. In arriving at the aforesaid conclusion we find ourselves in agreement with the order of ITAT in the case of Iraqi Airways (supra). In the instant case we also find that there is a certificate of Government of Jordan and also that of the Ambassador of Jordan in India. In view of these material submissions we dismiss the appeals of the department and uphold the order of the CIT(A) who is correct in holding that the purported income is not liable for assessment."

41. The ITAT has thus noted the factual position regarding the losses incurred by RJA for the above years. This has not been disputed by the Revenue in its appeal against the aforesaid order. Consequently, the question of RJA being asked to pay tax on presumptive basis under Section 44BBA for the said year, or the matters being sent to the AO for verifying the said facts does not arise.

42. The offshoot of the above discussion is that the only question framed in the Revenue's appeal, ITA No. 159 of 2002, and in the Assessee's appeals, ITA No. 278, 279 and 280 of 2006, has been rendered academic. On application of Section 44BBA of the Act, there is no taxable income of RJA for the AYs covered by the said appeals.

The writ petitions

43. Now turning to W.P.(C) Nos. 16060 of 2006 and 16068 of 2006, it is seen that apart from the fact that no particular reason has been shown by the Revenue for not dropping the notice under Section 148 of the Act for AYs 1999-2000 and 2001-02, the Revenue also appears to have overlooked the fact that effective from 1st April 1999, there is a Double Taxation Avoidance Agreement ('DTAA') between Jordan and India. The financial position as regards the relevant financial year 2001-02 is also one where RJA has suffered losses. Therefore, in any event, the question of RJA having any taxable income for AY 2001-02 or being amenable to income tax does not arise.

44. As regards the notice under Section 148 for AY 1999-2000, the Court finds that it was issued even while the proceedings which commenced with the notice under Section 143(2) of the Act issued on 26th December 2000 were not yet closed. In other words, even without passing the further consequential order under Section 143(3) of the Act, a notice under Section 148 of the Act was issued to RJA on 23rd February 2006 asking it to file a return for AY 1999-2000. This was impermissible in law and there are at least two decisions of this Court

that support the Assessee. These are ***KLM Royal Dutch Airlines v. Additional Director of Income Tax (2007) 292 ITR 49 (Del)*** and ***Commissioner of Income Tax v. Ved & Co. (2008) 302 ITR 328(Del)***. This is, therefore, another reason why the notice under Section 148 of the Act for AY 1999-2000 is unsustainable in law.

Conclusion

45. Consequently, the notices dated 23rd February 2006 issued to RJA under Section 148 of the Act and the rejection of the objections of RJA to the said notices by the order dated 18th September 2006 for AYs 1999-2000 and 2001-02, are held unsustainable in law and are hereby quashed.

46. The appeals are disposed of and the writ petitions are allowed in the above terms, but in the circumstances, with no orders as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

NOVEMBER 24, 2015
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