

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

ITA No.3257/Del/2014
Assessment Year: 2007-08

With

ITA No.3869/Del/2015
Assessment Year: 2008-09

With

ITA No.3870/Del/2015
Assessment Year: 2009-10

With

ITA No.3871/Del/2015
Assessment Year: 2010-11

With

ITA No.1115/Del/2016
Assessment Year: 2011-12

With

ITA No.287/Del/2017
Assessment Year: 2012-13

M/s. Fraport A.G. Frankfurt Airport Services Worldwide, C/o- Mohinder Puri & Co., CAs, 1-D, Vandhna Building, 11 Tolstoy Marg, New Delhi	Vs.	ACIT/ADIT, International Taxation, Circle-1(2), New Delhi
PAN :AAACF9749E		
(Appellant)		(Respondent)

Appellant by	Sh. Rajan Bhatia, Advocate Ms. Ankita Mehra, CA Ms. Shweta Kapoor, CA
Department by	Ms. Rashmita Jha, CIT(DR) Sh. Sanjay Kumar, Sr. DR

Date of hearing	06.01.2023
Date of pronouncement	03.04.2023

ORDER

PER SAKTIJIT DEY, JM:

This is a bunch of six appeals filed by the same assessee. One of the appeals arises out of final assessment order passed in pursuance to the directions of learned Dispute Resolution Panel (DRP). Whereas, rest of the appeals arise out of separate orders passed by learned Commissioner (Appeals). The appeals relate to assessment years 2007-08, 2008-09, 2009-10, 2010-11, 2011-12 and 2012-13. Since the issues arising in these appeals are more or less common, they have been clubbed together and disposed of in a consolidated order, for the sake of convenience.

2. We propose to take up the appeal relating to assessment year 2007-08 being ITA No. 3257/Del/2014 as lead appeal as the decision taken by us qua the grounds raised therein would apply to rest of the appeals.

ITA No. 3257/Del/2014
Assessment Year: 2007-08

3. At the outset, learned counsel appearing for the assessee did not press ground nos. 1, 2, 4, 8 and 9. Accordingly, these grounds are dismissed as not pressed.

4. In ground no. 3, the assessee has challenged taxability of Rs.1,46,52,283/- representing receipts from services rendered by head office in Germany

5. Briefly the facts are, the assessee is non-resident corporate entity and a tax resident of Germany. As stated, the assessee is a global airport operator offering comprehensive airport management services, including terminal and traffic management, aviation ground handling, baggage and cargo handling, aviation security and consulting etc. The assessee entered into a contract with Delhi International Airport Limited (DIAL) relating to development, modernization, expansion, up-gradation, operation and management of Indira Gandhi International Airport, Delhi. Further, DIAL entered into an Airport Operator Agreement with the assessee to provide airport related services to DIAL. As per the terms of Airport Operator Agreement, the assessee was required to provide airport management services to DIAL for providing following areas:

- (a) General services;
- (b) Manger Services;
- (c) Consultancy services.

6. While providing such services, the assessee had deputed its employees, given guarantees, indemnity, provided consultancy services, undertaken liability for liquidated damages and lent its Intellectual Property Rights (IPR). For performing its activities under the contract with DIAL, the assessee has received various types of fees as under:

- (a) Performance fees;
- (b) Milestone fees;
- (c) Consulting Charges; and
- (d) Secondment Fees,
- (e) Mobilization fees
- (f) Fees for cost of infrastructure

7. For providing the services to DIAL, the assessee has set up a project office in India, which is treated as Permanent Establishment (PE) of the assessee. For providing the aforesaid services, the assessee received an amount of Rs.1,46,52,283/-. However, the aforesaid receipt was not offered to tax in India. When called upon to explain the reason for not doing so, the assessee submitted that the said amount received by the project office is in respect of consultancy services directly provided by head office in Germany, hence, not taxable in India in terms of

India – Germany DTAA. The Assessing Officer, however, did not accept assessee's claim. Treating the receipt as Fee for Technical Services (FTS) under Article 12 of India – Germany DTAA as well as section 9(1)(vii) of the Act, the Assessing Officer held that the amount is taxable in India. While doing so, he held that such receipts are not effectively connected to the PE of the assessee. The assessee contested the aforesaid decision of the Assessing Officer by raising objections before learned DRP. However, learned DRP accepted the reasoning of the Assessing Officer.

8. Before us, learned counsel appearing for the assessee submitted, the activities under the airport operator agreement is to be carried out by the assessee through its employees deputed in India as well as from the head office in Germany. He submitted, the PE is dependent on head office regarding planning, information, data-base and know-how. He submitted, head office provides technical advice to DIAL as well as PE and fully supports PE. He submitted, additionally, head office does all tasks of human resources including payroll, invoicing, legal and administration etc. in relation to the PE in India. Thus, learned counsel submitted, the activity of the head office and PE are single and integrated activity of airport management and is

complementary in nature as services cannot be exclusively rendered as both are supporting each other and dependent on each other. Accordingly, the receipts are taxable under Article 7 of the tax treaty, in view of exceptions provided under Article 12(5) of the treaty. He submitted, the PE is able to function because of Head Office. Hence, in relation to work performed by head office, both activity test and economic connection test are satisfied, since, the work has been done by Head Office through active participation of PE. He submitted, the entire activity of airport management services is a single integrated activity, hence, cannot be bifurcated between PE and the Head Office. He submitted, applying the dominant purpose test, which is to manage the airport, it has to be held that the services are rendered through PE, as, the pith and substance of services was inextricably connected to the management of the airport. In this context, he relied upon the decision of the Hon'ble Supreme Court in case of Oil & Natural Gas Corporation Ltd. Vs. CIT [2015] 59 taxmann.com 1 (SC). He submitted, once it is held that the receipts are in the nature of income falling under Article 7 of the tax treaty, then, in terms with protocol 1(b) of India – Germany tax treaty, the receipts are not taxable in India as the services

were rendered in connection with the PE in India. Thus, he submitted, the receipts are not taxable in India in terms with treaty provision. In support of such contention, learned counsel relied upon the following decisions:

1. *Oil & Natural Gas Corporation Ltd. Vs. CIT [2015] 59 taxmann.com 1 (SC)*
2. *Intergrafica Print & Pack, GmbH Vs. Deputy Director of Income Tax (Intl. Taxation) [2011] 47 SOT 134 (Delhi – Tribunal)*
3. *Germanischer Lloyd A.G. Vs. Deputy Director of Income-tax (IT) [2013] 35 taxmann.com 347 (Delhi – Tribunal)*
4. *Ishikawajma-Harima Heavy Industries Ltd. Vs. DIT [2007] 288 ITR 408 (SC)*
5. *Hyundai Heavy Industries Co. Ltd. Vs. CIT [2007] 161 Taxman 191 (SC)*
6. *Union of India Vs. Azadi bachao Andolan [2003] 363 ITR 706 (SC)*
9. Strongly relying upon the observations of learned DRP, learned Departmental Representative submitted that the services having been rendered directly from the head office are not connected with the PE. It was submitted, since, the nature of

services rendered falls within the category of managerial, technical and consultancy services the receipts are in the nature of FTS, both under Article 12 of India – Germany DTAA as well as section 9(1)(vii) of the Act.

10. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. The fact that the assessee has a PE in India has not been disputed by the Assessing Officer. It is also a fact on record that in terms with airport operator agreement, various kind of services are being rendered in connection with the operation of the airport. Thus, it is evident that such services cannot be rendered from the head office of the assessee without active involvement of the PE. Though, it may be a fact that some of the services rendered can fall in the category of managerial or technical or consultancy services falling within the definition of FTS under Article 12(4) of India – Germany DTAA, however, the treaty carves out an exception in paragraph 5 of Article 12 by providing that the receipts will not fall within the category of royalty or FTS, if the beneficial owner of royalty and FTS being resident of one contracting state carries on business in the other contracting state through a PE or fixed place of business in respect of which

the royalty and FTS are paid. Article 12(5) further makes it clear, in such a situation, the provisions of Article 7 or Article 14 may apply. The receipts certainly cannot fall within the definition of independent personal services under Article 14 of the tax treaty. Therefore, the only provision under which the receipts can fall is business profits as provided under Article 7 of the tax treaty. Thus, since, the receipts are attributable to the PE, we have to examine whether such receipts are taxable in India. In this context, we have to refer to paragraph 1(b) under protocol appended to India – Germany tax treaty, which reads as under:

“(b) Income derived by a resident of a Contracting State from planning, project, construction or research activities as well as income from technical services exercised in that State in connection with a permanent establishment situated in the other Contracting State, shall not attributed to that permanent establishment.”

11. The aforesaid protocol makes it clear that income derived by a resident of a Contracting State from certain specified activities including technical services provided in the other Contracting State through a PE situated in that State shall not be attributable to that PE. In other words, even though, the receipt/income is earned from services rendered through the PE, however, they cannot be attributed to the PE for the purpose of taxability. In

sum and substance, it means such income will not be taxable in India but in the country of residence of recipient of income. In our view, while negating assessee's claim made under paragraph 1(b) of the protocol, learned DRP made a fundamental error by observing that it only applies to Article 7. While doing so, learned DRP completely overlooked the fact that once the receipts, even though, may be in the nature of FTS are connected to PE, Article 12(5) get triggered. Hence, the receipts are not taxable as FTS under Article 12 and have to be treated, either as business profit under Article 7 or independent personal services under Article 14. Once the receipts fall under Article 7 of the treaty, the protocol comes into play. That being the case in terms of protocol 1(b) of the tax treaty, the receipts even though connected to the PE cannot be made taxable in India. However, protocol 1(b) of the tax treaty specifically refers to income from planning, project, construction or research activities and technical services. In other words, income derived from aforesaid activities will be protected under protocol 1(b) of the treaty, hence, not taxable in India. Whereas, the rest of the income will be taxable under Article 7 of the tax treaty. Accordingly, the Assessing Officer is directed to

examine the nature of income and not to tax the income of the nature specified in protocol 1(b) of the tax treaty.

12. In ground no. 5, the assessee has challenged disallowance of office and administrative cost. Briefly the facts are, in course of assessment proceeding, the Assessing Officer noticed that the assessee has debited expenses of Rs.1,92,91,585/- to the profit and loss account. While verifying the Audit Report, the Assessing Officer noticed that the Auditor has reported that the amount represents office and administrative overhead expenses charged by the head office on the basis of certification by the management and based on actual cost with no profit margin embedded therein. Alleging that the assessee neither furnished any evidence, nor justified the claim, the Assessing Officer disallowed the amount. The assessee contested the disallowance before the DRP. After examining assessee's claim in the context of facts and materials on record, learned DRP found that the amount, in reality, represents a markup of 19% on the expenses under various heads debited to the profit and loss account. However, learned DRP found that out of the deduction claimed, an amount of Rs.45,96,723/- forms part of mobilization expenses, which has

already been disallowed. Accordingly, learned DRP restricted the disallowance to Rs.1,46,94,562/-.

13. As regards assessee's claim that the expenditure directly related to the PE is allowable under Article 7, learned DRP held that the amount charged by the head office is a fee of 19% on various expenditure claimed on notional basis, hence, cannot be allowed under Article 7 of the DTAA. Further, learned DRP has alleged that the assessee did not furnish any evidence to establish that the expenses were incurred by the PE at all.

14. Before us, learned counsel appearing for the assessee submitted that the expenditure relates to various tasks undertaken by the head office, such as, human resources, payroll, invoicing, legal and administration etc. in relation to the PE in India. Therefore, the expenditure incurred by the head office is directly related to the PE. As such, he submitted, the expenditure is to be allowed without applying the restrictions of section 44C of the Act. In support of such contention, learned counsel relied upon the following decisions:

- (i) Bank of America NT & SA Vs. DCIT [2009] 27 SOT 97
(Mumbai- Trib.)

- (ii) DDIT Vs. Samsung Engg. Co. Ltd. [2011] 43 SOT 38
(Mumbai – Trib.)

15. Learned Departmental Representative strongly relied upon the observations of the departmental authorities.

16. We have considered rival submissions and perused the materials on record. From the materials on record, we find that both the Assessing Officer as well as learned DRP have given a concurrent finding that the assessee has not furnished any evidence to establish that the expenses were incurred by the head office exclusively for the PE. Additionally, in paragraph 8.4.2 of learned DRP's order, it has been clearly and categorically stated that the expenditure claimed by the assessee, in reality, is 19% markup on certain expenses. The aforesaid factual finding of the departmental authorities has not been controverted by the assessee through any cogent material/evidence even before us. Though, in principle, we agree that the expenditure incurred by the head office directly connected to the PE has to be allowed without imposing the restrictions of section 44C of the Act, however, burden is entirely on the assessee to establish on record through authentic evidence that such expenditure was actually

incurred by head office for the PE. In the present case, the assessee has failed to do so. Further, Article 7(3) of the tax treaty speaks of allowance of expenditure subject to the limitation prescribed in domestic law. Therefore, we do not find any reason to interfere with the decision of learned DRP on the issue. Ground raised is dismissed.

17. In ground no. 6, the assessee has raised the issue of levy of interest under section 234A, 234B and 234D of the Act.

18. Insofar as levy of interest under section 234A and 234B is concerned, such levy being consequential in nature, there is no need to adjudicate the issue. Insofar as the levy of interest under section 234D is concerned, the same is consequential in nature, does not require adjudication. Ground is dismissed.

19. Ground no. 7, being consequential in nature, does not require adjudication.

20. In the result, the appeal is partly allowed.

ITA No.3869/Del/2015
Assessment Year: 2008-09

21. Ground nos. 1, 6 and 7 are not pressed, hence, dismissed.

22. Ground nos. 2 and 3 are identical to ground no. 3 of ITA No.3257/Del/2014. Accordingly, we direct the Assessing Officer to compute income, if any, following our direction therein.

23. The issue raised in ground no. 4 is identical to the issue raised in ground no. 5 of ITA No. 3257/Del/2014. Following our decision therein, we uphold the disallowance. This ground is dismissed.

24. Ground no. 5, being consequential in nature, does not require adjudication.

25. In the result, the appeal is partly allowed.

ITA No.3870/Del/2015
Assessment Year: 2009-10

26. Ground nos. 1, 5 and 6 are not pressed, hence, dismissed.

27. The issue raised in ground no. 2 and 3 are identical to ground no. 3 of ITA No.3257/Del/2014. Accordingly, we direct the Assessing Officer to compute income, if any, following our direction therein.

28. The issue raised in ground no. 4 is identical to ground no. 5 of ITA No.3257/Del/2014. Following our decision therein, we uphold the disallowance. The ground is dismissed.

29. In the result, the appeal is partly allowed.

ITA No.3871/Del/2015
Assessment Year: 2010-11

30. Ground no. 1, 5 and 7 are not pressed, hence, dismissed.

31. The issue raised in ground nos. 2 and 3 are identical to issue raised in ground no. 3 of ITA No.3257/Del/2014. Accordingly, we direct the Assessing Officer to compute income, if any, following our direction therein.

32. The issue raised in ground no. 4 is identical to ground no. 5 of ITA No.3257/Del/2014. Following our decision therein, we uphold the disallowance. This ground is dismissed.

33. In the result, appeal is partly allowed.

ITA No.1115/Del/2016
Assessment Year 2011-12

34. Ground no. 1 and 4 are not pressed, hence, dismissed.

35. The issue raised in ground no. 2 is identical to the issue raised in ground no. 3 of ITA No.3257/Del/2014. Accordingly, we direct the Assessing Officer to compute income, if any, following our direction therein.

36. In ground no. 3, the assessee has challenged the taxation of interest on income tax refund by applying the rate of 40% by treating it at par with profits of business, as against the

assessee's claim of tax rates of 10% under Article 11(2) of India – Germany DTAA.

37. Having considered rival submissions, we find that the decision of learned Commissioner (Appeals) in upholding the taxation of interest on income tax refund under Article 7 of the treaty is for the reason that it is effectively connected with the PE in terms of Article 11(5) of India – Germany tax treaty. On going through the Article 11(5) of the treaty, we agree with the decision of learned Commissioner (Appeals) as the said Article specifically carves out an exception by providing that in case the debt claim in respect of which interest is paid is effectively connected with the Permanent Establishment, the provisions of Article 7 or Article 14 would apply. We are conscious of the fact that in case of ACIT Vs. Clough Engineering Ltd. [2011] 11 taxmann.com 70 (Delhi) (SB) a view favourable to the assessee has been taken. However, in case of B.J. Services Co. Middle East Ltd. Vs. ACIT [2015] 60 taxmann.com 246, the Hon'ble Uttarakhand High Court, while examining *pari materia* provision contained in Article 12(6) of India – UK Treaty has held that interest on income tax refund is taxable as business profits under Article 7 of the treaty. In our humble opinion, the decision of the Hon'ble Uttarakhand

High Court will carry greater precedentiary value. In view of the aforesaid, we uphold the decision of learned Commissioner (Appeals) on the issue. This ground is dismissed.

38. Ground no. 4 is not pressed, hence, dismissed.

39. In the result, the appeal is partly allowed.

ITA No. 287/Del/2017
Assessment Year: 2012-13

40. Ground no.1 is not pressed, hence, dismissed.

41. The issue raised in ground no. 2 is identical to the issue raised in ground no.3 of ITA No.1115/Del/2016. Following our decision therein, we uphold the decision of learned Commissioner (Appeals)

42. In the result, the appeal is dismissed.

43. To sum up, the appeals for assessment years 2007-08, 2008-09, 2009-10, 2010-11 and 2011-12 are partly allowed, whereas, appeal for assessment year 2012-13 is dismissed.

Order pronounced in the open court on 3rd April, 2023

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 3rd April, 2023.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT

*ITA Nos.3257/Del/2014;3869/Del/2015;
3870/Del/2015; 3871/Del/2015;
1115/Del/2016 & 287/Del/2017*

4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi