

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E", NEW DELHI
BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
AND
SHRI K.N. CHARY, JUDICIAL MEMBER

	I.T.A. No. 644/DEL/2016	
	A.Y. : 2012-13	
M/S KLM ROYAL DUTCH AIRLINES LB-46, PRAKASH DEEP BUILDING, 7, TOLSTOY MARG, NEW DELHI - 110 001 (PAN: AABCK3950H) (APPELLANT)	VS.	DCIT (INTERNATIONAL TAXATION), CIRCLE 2(1)(2), NEW DELHI (RESPONDENT)

Assessee by : Sh. Salil Aggarwal, Adv.,
Sh. Sanjeev Jain, FCA,
Sh. Anil Makhija, Adv, &
Ms. Mansee Jain, Adv.
Department by : Sh. G.K. Dhall, CIT(DR) (Int.
Tax.)

Date of Hearing : 24.09.2018

Date of Order : 27-09-2018

ORDER

PER K.N. CHARY, J.M.

This is an appeal by the Assessee challenging the Order dated 17.12.2015 passed by the Ld. Assessing Officer u/s. 143(3) read with section 144C of the Income-tax Act, 1961 (for short 'the Act') in consonance with the orders passed by the Ld. DRP/TPO qua the assessment year 2011-12 by raising the issue that Ld. Dy. Commissioner of Income Tax/AO has failed to appreciate that the income earned from technical handling is duly covered by Article 8 of the Double Taxation Avoidance Agreement between India and Netherland and as such income

accruing to assessee during the year under consideration is fully exempt from taxation in India and could not have been brought to tax in India.

2. Briefly stated facts are that the assessee filed its return of income for AY 2012-13 on 28.9.2012 claiming a refund of Rs. 2,23,46,310/- declaring total income of Rs. 540,69,70,840/- and thereafter claiming tax relief on the entire amount, thereby reducing the total income to NIL. The case of the assessee was selected for scrutiny and notice u/s. 143(2) of the Act was issued to the assessee on 13.8.2013. Upon change of jurisdiction, again notice u/s. 142(1) of the Act dated 19.11.2014 was issued to the assessee. In response to the notices/ questionnaire, the AR of the assessee attended the proceedings from time to time and furnished the details / submission which were examined by the AO. The assessee is a company incorporated under the laws of Netherlands. The assessee is in the airlines business and operates in all major countries including India. It is engaged in the business of operations of aircraft in international traffic and derives income from providing air services for the carriage of passengers, freight and mail in international traffic. Apart from its normal business of air transport operation, the assessee is also engaged in the business of rendering technical and ground handling services to other airlines within India. Accordingly, the AO asked the assessee to explain that as to why the technical or ground handling charges should not be taxed as per provisions of Income Tax Act, 1961 not under Article 8DTAA as done in orders in earlier years. In response thereto, the Assessee has given its explanation vide submission dated 20.1.2014 and after considering the same, the AO observed that IATP is a pool, which is engaged in the business of supplying spare parts and equipment to various airlines, which are members of IATP. The IATP is not into the business of operation of aircraft anywhere. Therefore, the profit of the assessee from technical handling and ground services would not qualify to be exempt from taxation in India of Article 8 of the DTAA between India and Netherlands and accordingly, held that the amount received by the

assessee on account of 'ground and technical handling services' rendered to IATP pool airlines is taxable in India and assessed the income at Rs. 28,78,35,647/- u/s. 144C(13) r.w.s. 143(3) of the Act vide order dated 17.12.2015. Aggrieved with the assessment order dated 17.12.2015, assessee preferred an appeal before us.

3. At the outset, the Ld. A.R. for the assessee submitted that the issue in dispute is squarely covered by the decision of the Tribunal in the assessee's own case for assessment years 2004-05 & 2005-06, passed in ITA Nos. 403-404/Del/2010 dated 19.11.2010 and placed the copy of the aforesaid decision of the Tribunal.

4. On the other hand, the Ld. D.R., strongly relied upon the order of the AO. Further he submitted that the assessee did not have any additional man power to handle the facilities but the same was provided by exploiting their idle man power. Therefore, the entire receipt of the assessee from providing the services to other airlines was rightly held taxable in India and the claim of the assessee for expenses was not entertained. Ld. DR further submitted that it is very important to note that the assessee has failed to furnish the documentary evidences supporting the expenses incurred in India in earning the technical handling charges and in the absence of vital supporting documents for establishing the genuineness of the expenses claimed by the assessee, such expenses, in any case, will not be allowed.

5. We have duly considered the rival contentions and gone through the record carefully. The sole issue for our adjudication is whether the income earned from technical handling is duly covered by Article 8 of the Double Taxation Avoidance Agreement between India and Netherland and as such income accruing to assessee during the year under consideration is fully exempt from taxation in India and could not have been brought to tax in India. After hearing both the sides we find that Tribunal in assessee's own case for assessment years 2004-05 & 2005-06, passed in ITA Nos. 403-

404/Del/2010 dated 19.11.2010 vide para no. 9 to 11 has dealt and decided the identical issue relating handling services and technical handling services rendered by the assessee to other airlines in India in assessee's own case in the following manner:-

"9. We have duly considered the rival contentions and gone through the record carefully. The sole issue for our adjudication is whether ground handling services and technical handling services rendered by the assessee to other airlines in India are to be considered part of business of assessee from operation of aircraft in international traffic or they are separate distinct activities. In order to appreciate this issue, the Article 8 available in the three treaties referred above has a direct bearing, therefore, it is salutary upon us to take note of this article in all the three treaties in a tabular form for comparative study which reads as under:-

Indo Germany DTAA	Indo-Netherland DTAA	Indo UK DTAA
ARTICLE-B Shipping and air transport	Article 8 - Air Transport	Article 8 - Air transport
1. Profit from the operation of ships or aircraft in international traffic shall be taxable only in the contracting State in which the place of effective management of the enterprise is situated.	1. Profits from the operation of aircraft in international traffic shall be taxable only in the State in which the place of effective management of the enterprise is situated.	1. Profits derived from the operation of aircraft in international traffic by an enterprise of one of the contracting States shall not be taxed in the other Contracting State.

<p>2. If the place of effective management of a shipping enterprise is abroad a ship, then it shall be situated in the contracting state in which the home harbor of the ship is situated, or, if there is no such home harbor, in the contracting state of which the operator of the ship is a resident.</p> <p>3. For the purposes of this Article, interest on funds connected with the operation of ships or aircraft in international traffic shall be regarded as profits derived from the operation of such ships or aircraft and the</p>	<p>2. For the purpose of this Article :</p> <p>(a) profits from the operation in international traffic of aircraft include profits derived from the rental on a bareboat basis of aircraft if operated in international traffic if such rental profits are incidental to the profits described in paragraph 1;</p> <p>(b) interest on funds connected with the operation of aircraft in international traffic shall be regarded as profits derived from the operation of such aircraft and the provisions of Article 11 shall not apply in relation to such interest.</p> <p>3. The provisions of paragraph 1 shall also</p>	<p>2. The provision of paragraph 1 of this Article shall likewise apply in respect of participation in pools of any kind by enterprises engaged in air transport.</p> <p>3. For the purpose of this Article the term "operation of aircraft" shall include transportation by air of persons livestock, goods or mail, carried on by the owners or lessees or characters of aircraft, including the sale of tickets for such transportation on behalf of other enterprise, the incidental lease of aircraft on a character basis and any other activity directly connected with such transportation</p>
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<p>provisions of Article Income Tax Officer, shall not apply in relation to such interest.</p> <p>4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.</p>	<p>apply to profits from the participation in a pool, a joint business or an international operating agency.</p>	<p>n.</p> <p>4. Gains derived by an enterprise of a contracting State from the alienation of air craft owned and operated by the enterprise, the income from which is taxable only in that State, shall be taxed only in that State."</p>
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10. *The expression "profit from the operation of ship or aircraft in international traffic" has not been defined in Indo-Netherlands DTAA. Similarly, it has not been defined in the Indo-German DTAA. However, in sub-article-3 of Article 8 in the treaty between Indo & UK, it has been explained. Thus, there is a distinction between these three sets of DTAA. The position in Indo-German DTAA and Indo-Netherlands DTAA are similar on the one hand whereas the position in the Indo-UK DTAA, it is slightly different. This question arose before the ITAT in the case of Lufthansa German Airlines also. The ITAT while explaining the meaning of profit from the operation of ships and aircrafts in international traffic has took into consideration, the bye laws of international airlines technical pool (IATP) because this organization authorized its members to share air-crafts pooling, ground handling equipment and*

manpower all over the world. The ITAT has considered the relevant clauses of IATP manual and thereafter concluded that any receipt received by the assessee due to participation in the pool as provided in IATP manual and also explained in sub article 4 of Indo German DTAA will not be taxable in India under sub-Article 1 of Article 8. In the present appeals, there is no disparity on facts. Ld. DR except raising an argument that ground handling and technical handling services are different activities then operation of any air-craft in international traffic failed to bring any rules, regulations, bye-laws for substantiating his contentions. The co-ordinate Bench of the ITAT has examined this issue in detail and considered these aspects. Unless some strong circumstances which has not been brought to the notice of the earlier Bench, are available, we cannot take a different stand even if it is possible to take the other view. The revenue is unable to bring any material on record which can pursued us to take a different view then the one earlier taken by the case ITAT in the case of Lufthansa Airlines reported in 90 ITD page 310. The ITAT has distinguished the facts in the case of Lufthansa then British Airways. The Indo-Netherlands treaty is similar to that of Indo German and not in parity with Indo UK Treaty. In view of above discussions, we do not find any merit in these appeals. They are dismissed.

11. In the result, both the appeals of the revenue are dismissed.”

5.1 After perusing the aforesaid finding of the Tribunal, we note that the Tribunal has dismissed the appeals of the Revenue on similar and identical issue in assessee's own case in AY 2004-05 & 2005-06, which finding is applicable on the facts of the present case also, therefore,

following the judicial precedence, we allow the issue in dispute raised by the Assessee.

6. In the result, the Appeal filed by the Assessee stands allowed.

Order pronounced in the Open Court on 27/09/2018.

Sd/-

Sd/-

**[G.D. AGRAWAL]
PRESIDENT**

**[K.N. CHARY]
JUDICIAL MEMBER**

Date 27/09/2018

"SRBHATNAGAR"
Copy forwarded to: -

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

TRUE COPY

By Order,

Assistant Registrar,
ITAT, Delhi Benches

