

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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER  
AND  
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

ITA No.216/Del/2000  
Assessment Year: 1996-97

**And**

ITA No.217/Del/2000  
Assessment Year: 1997-98

**And**

ITA No.1691/Del/2008  
Assessment Year: 1998-99

**And**

ITA No.1692/Del/2008  
Assessment Year: 1999-00

**And**

ITA No.1693/Del/2008  
Assessment Year: 2000-01

**And**

ITA No.1694/Del/2008  
Assessment Year: 2001-02

**And**

ITA No.1695/Del/2008  
Assessment Year: 2002-03

United Airlines, Amba Deep Building, 14, K.G. Marg, New Delhi	<b>Vs.</b>	DCIT/DDIT Non-resident Circle, New Delhi
<b>PAN : AAACU4427C</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

**And**

ITA No.954/Del/2014  
Assessment Year: 1998-99

**And**

ITA No.955/Del/2014  
Assessment Year: 1999-00

**And**

ITA No.956/Del/2014  
Assessment Year: 2000-01

**And**

ITA No.957/Del/2014  
Assessment Year: 2001-02

**And**

ITA No.958/Del/2014  
Assessment Year: 2002-03

United Airlines Inc., Mohan Dev Building (1 <sup>st</sup> Floor), 13, Tolstoy Marg, New Delhi	<b>Vs.</b>	DDIT, Circle-2(2), New Delhi
<b>PAN :AAACU4427C</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	Sh. Ajay Vohra, Sr. Advocate Sh. Anshul Sacchar, Advocate Sh. Saksham Singhal, Advocate
Department by	Sh. Sanjay Kumar, Sr. DR

Date of hearing	12.01.2022
Date of pronouncement	12.04.2022

**ORDER****PER SAKTIJIT DEY, JM:**

Captioned appeals relate to the same assessee and arise out of separate appellate orders of learned first appellate authority pertaining to assessment years 1996-97, 1997-98, 1998-99, 1999-2000, 2000-01, 2001-02 and 2002-03.

**2.** The first seven appeals, as mentioned in the cause title, arise out of quantum proceedings. Whereas, the rest five appeals

are against the imposition of penalty under section 271(1)(c) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'). At the outset, we propose to deal with the quantum appeals.

### **QUANTUM APPEALS**

**ITA No.216/Del/2000 for AY: 1996-97**

**ITA No.217/Del/2000 for AY: 1997-98**

**ITA No.1691/Del/2008 for AY: 1998-99**

**ITA No.1692/Del/2008 for AY: 1999-00**

**ITA No.1693/Del/2008 for AY: 2000-01**

**ITA No.1694/Del/2008 for AY: 2001-02**

**ITA No.1695/Del/2008 for AY: 2002-03**

**3.** Before we proceed to deal with the issues arising in the appeals, it is necessary to observe, assessee's appeals in assessment years 1996-97 and 1997-98 were earlier disposed of by the Tribunal vide order dated 9<sup>th</sup> September, 2005. The appeals were allowed in favour of the assessee on the limited legal and jurisdictional issue that notices issued under section 142(1)(i) after the end of the relevant assessment years being invalid, the assessments made pursuant thereto are also invalid. Against the aforesaid decision of the Tribunal, the Revenue went in appeal before Hon'ble Jurisdictional High Court. Vide order dated 21.11.2006, in ITA No. 1303/2006, the Hon'ble Jurisdiction High Court remanded the matter back to the Tribunal for deciding the

appeals on merit. This is how the appeals came up for hearing before us.

**4.** The first common issue arising in all these appeals relate to assessee's claim of exemption in respect of certain income by taking shelter under Article 8 of India-USA Double Taxation Avoidance Agreement (DTAA). Since, relevant facts relating to this issue are more or less common in all these appeals, we propose to take up ITA No. 216/Del/2000 pertaining to assessment year 1996-97 as the lead appeal and discuss the facts involved therein.

**5.** Briefly the facts are, the assessee is a company incorporated in United States of America (USA) and is a tax resident of the said country. As stated, the assessee is engaged in the business of operating airlines in international traffic for carriage of passengers and goods and in providing services incidental to such operation. As submitted by the assessee, it started its operation in India with flights from Indira Gandhi International (IGI) Airport, New Delhi, in December, 1995. During the same time, Delta Airlines, another USA based company, engaged in the business of operation of airlines closed its operation in India. The baggage screening, including equipment and fixtures at IGI Airport which was earlier in possession of Delta Airlines was taken over by the

assessee. Subsequently, the assessee also acquired its own technologically advanced equipments. In course of assessment proceeding in assessment year 1996-97, the Assessing Officer noticed that in course of investigation carried out by the zonal unit of Directorate of Revenue Intelligence (DRI) in assessment year 1996-97, it was found that assessee had earned revenue of more than Rs. 1 crore in India which was not offered to tax. Basis such information, the Assessing Officer called upon the assessee to explain the reason for not showing such income. In response to the query raised by the Assessing Officer, the assessee submitted that in addition to income earned by it from operation of airlines in international traffic for carriage of passengers and goods, it has also earned income from other airlines in India by providing baggage screening services and engineering and aircraft handling services. The assessee submitted, in terms of Article 8 of the Tax Treaty between India and USA, profits derived by assessee from operation of aircraft in international traffic can be taxed only in USA. Thus, the assessee submitted that the amount received from other airlines for providing baggage screening services and engineering and aircraft handling services, being incidental to operation of aircraft in international traffic, is not taxable in India.

After considering the submissions of the assessee, the Assessing Officer agreed that the income/profit earned by assessee from operation of aircraft in international traffic is covered under Article 8(1) of the Tax Treaty, hence, not taxable in India. However, insofar as income/profit earned by the assessee from other airlines while providing baggage screening services and engineering and aircraft services, he held it as separate business activity, hence, cannot be considered to be either directly connected to operation of aircraft in international traffic for transportation of passengers and goods or incidental to the activity. Thus, he concluded that the amount received by the assessee from other airlines towards baggage screening services and engineering and aircraft handling services being not covered under Article 8 would be taxable in India under Article 7 of the DTAA as business profit, since, the assessee has Permanent Establishment (PE) in India. While coming to such conclusion, the Assessing Officer held that expenses claimed by the assessee will be allowed to the extent directly related to the PE in India, whereas, the head office expenses will be allowed subject to the limitation prescribed under section 44C of the Act. Accordingly, he completed the assessment.

**5.1** Being aggrieved with the aforesaid decision of the Assessing Officer, assessee preferred appeals before learned Commissioner (Appeals.)

**5.2** Though, the assessee made detailed submissions before learned first appellate authority reiterating its claim that the income earned from other airlines by rendering baggage screening services and aircraft handling services are covered under Article 8(1) and 8(2), however, learned Commissioner (Appeals) was not convinced. Accepting the reasoning of the Assessing Officer, he held that the income received from other airlines is not covered under Article 8 of the Tax Treaty. Thus, he confirmed the additions made by the Assessing Officer.

**5.3** As regards the allowance of expenses attributable to the PE, learned Commissioner (Appeals) held that since the expenditure incurred is in relation to operation of aircraft in international traffic, there is no need to treat the services rendered to other airlines as a separate business activity and apportion part of the expenditure to that account. Thus, he held that assessee is not entitled for deduction of expenditure on apportionment basis.

**6.** Sh. Ajay Vohra, learned Senior Counsel, appearing of the assessee drew our attention to Article 8 of India–USA DTAA and

submitted that as per paragraph 1, profit derived by an enterprise of Contracting State from operation of aircraft in international traffic can only be taxed in the country of residence. He submitted, since, the assessee is a tax resident of USA, the profit derived from operation of its airline business is taxable only in USA. Laying emphasis on paragraph 2 of Article 8, he submitted, apart from profit derived from transportation by carriage of passengers, mail, livestock or goods, either as owner or lessees or charterers, the profit derived from various ancillary and incidental activities, such as profits from sale of tickets on behalf of other enterprise, rental of ship or aircraft incidental to any activity directly connected with such transportation, profit from the use, maintenance, or rental of containers used in connection with the operation of ships or aircraft in international traffic shall be taxable only in that State or profit from any other activity directly connected with transportation of passengers, mail, livestock or goods would also qualify for exemption from taxation in India under Article 8 of the Treaty. He submitted, Tax Treaty between countries are drafted broadly adhering to either OECD Model or UN Model or US Model. However, some variation is made based on negotiations between the countries on the taxability of various

kinds of activities and services. Making a comparative analysis of OECD Model Convention, UN Model Convention and US Model Convention, learned counsel for the assessee submitted all of them have expressed that ancillary and incidental activities connected to operation of aircraft in international traffic also qualify for beneficial treatment under Article 8(2). Drawing our attention to Article 8(2) of India – USA Treaty, he submitted, it specifically provides that profits derived from operation of aircraft in international traffic shall include any activity directly connected with such transportation. Whereas, he submitted no such provision is contained in India-Japan Treaty. He submitted, in India-Japan treaty the benefit of treaty provisions have not expressly been extended to unspecified activities directly linked to the transportation of passengers and goods etc. by air. He submitted, Treaty with Germany contains provisions similar to the Treaty with Japan, inasmuch as, it makes no specific inclusion of activities directly linked to the transportation of passengers and goods by air in the treaty itself nor do such services find a mention in the protocol clarifying various provisions of the said Treaty. Thus, he submitted, compared to the provisions in India-Japan and India-Germany Treaty, Article 8

of India–USA Treaty is wider in scope and encompasses the profit derived from ancillary activities which are directly connected to operation of aircraft in international traffic. In this context, he drew our attention to the technical explanation and the statement of performance of US Model Convention as issued by Treasury Department of US Government, which reads as under:

*“Finally, certain non-transport activities that are an integral part of the services performed by a transport company are understood to be covered paragraph 1, though they are not specified in paragraph 2. These include, for example, the performance of some maintenance or catering services by one airline for another airline, if these services are incidental to the provision of those services by the airline for itself.”*

**6.1** Learned counsel submitted, the baggage screening services and technical & engineering services provided by the assessee to other airlines are sine qua non for the operation of aircraft or transportation of passengers and goods by air. As various countries, including India, have made Rules keeping in view the safety and security of passengers, airports and aircraft which make it mandatory that every person boarding an aircraft and every baggage or cargo carried in an aircraft must undergo screening to ensure that they do not carry or contain any firearms, explosives etc. Further, without maintenance of the

aircraft at the ground level after its arrival from one destination and before its departure to the next and without refueling and ensuring the presence of various oils and fluids, it is not possible for an aircraft to take off. Therefore, such activities are certainly directly connected to the operation of aircraft for transportation of passenger and goods. He submitted, without the services being rendered by the assessee to itself and to other airlines, it will not be possible for any aircraft to be air-borne with passengers or goods. He submitted, apart from utilizing these services for its own operation, it provides such services to other airlines to fully utilize its technical manpower as well as the equipment. In this context, he also referred to commentary of Klaus Vogel. He submitted, since the baggage screening and technical and engineering services provided to other airlines are preparatory and auxiliary services related to transportation of passengers and goods, the profit derived from such activities can only be taxed in the country of residence under Article 8(1) read with Article 8(2) of the Treaty. Thus, he submitted, the income earned by the assessee from baggage screening, technical and engineering services provided to other airlines would not be taxable in India.

**6.2** Without prejudice, he submitted, even otherwise also such

income is not taxable in India, since, the assessee is a member of a pool in terms of Article 8(4) of India – USA DTAA. Drawing our attention to Article 8(4) of the Treaty, he submitted, profit derived by an enterprise from participation in a pool shall be taxable only in the country of residence. Proceeding further, he submitted, the only pool known to the international aviation industry is the International Airlines Technical Pool (IATP). In this context, he drew our attention to IATP Manual, a copy of which is placed in the paper book. He submitted, IATP is a non-profit, independent, non-political global organization of airlines formed for the purpose of providing reciprocal and technical support at line stations throughout the world. He submitted, technical support includes, aircraft spare parts, ground and ramp handling equipment and manpower. The primary goal of IATP is to provide general economic savings to participating airlines by minimizing investments otherwise required for purchase of equipment and spare parts for positioning at various stations in support of aircraft operations. He submitted, the IATP Manual clearly states that the organization is dedicated to a spirit of cooperation between members which extends the mutual assistance and support in a common effort to maintain a high degree of technical

performance in aircraft operations. He submitted, as a pool member of IATP for the services provided and received, there is no actual payment by the airlines rendering or receiving services and only notional credits and debits are made through pool accounting mechanism, i.e., IATA Clearing House. Explaining the functions of pool, he submitted, under the IATP there are various pools formation for various categories of services which are denoted by different alphabets. By way of illustration, he submitted, for example pool 'D' relates to ground handling equipment, pool 'F' relates to technical facilities and services, pool 'L' relates to line maintenance, etc. He submitted, the services rendered relating to baggage and cargo cleaning and aircraft maintenance fall within the ambit of 'L' Pool. He submitted, Form 53 of the IATP is a contract that is used for technical facilities and services and Form 55 of IATP is used for line maintenance. He submitted, assessee is a member of IATP since November, 1967 and being part of IATP pool provides parts, equipments and services and also receives various services from pool members. He submitted, the baggage screening services provided in India are to airlines which are members of IATP. He submitted, assessee has also received reciprocal services from other IATP member airlines.

He submitted, while providing services to other airlines, the assessee did not employ any additional manpower to render the services and the manpower employed was to the extent required for baggage handling and aircraft maintenance of its own aircraft landing in and taking off from Delhi. This, according to learned counsel for the assessee, clearly demonstrates that the provision of services to other airlines was not carried out on commercial lines, hence, cannot be treated as separate business activity. He submitted, for providing such services, assessee has entered into specific agreement in Form No.55/53 of the IATP, which are standard agreements entered into between the members of IATP for receiving and rendering services. Referring to OECD Model Convention, he submitted, where an airlines enterprise agrees under an IATP agreement to provide spare parts or maintenance services to other airlines landing at a particular location, activities carried out pursuant to that agreement will be ancillary to the operation of aircraft in international traffic. He submitted, the only requirement is, there must be reciprocity of services. He submitted, the assessee participated in the IATP pool, wherein, there was reciprocity of services and earned certain revenues from such activities and also incurred expenditure. Thus, he

submitted, the income received from providing baggage screening, technical and engineering services clearly fall within the ambit of Article 8(4) of Tax Treaty, hence, not taxable in India. In support of his submissions, learned Counsel relied upon the following decisions:

- i. DIT Vs. KLM Royal Dutch Airlines, 392 ITR 218 (Del. HC)*
- ii. Air France Vs. ACIT, 82 ITR (T) 301 (Del. ITAT)*
- iii. KLM Royal Dutch Airlines Vs. DDIT, [2013] 33 taxmann.com 373 (Delhi – Trib.)*
- iv. DDIT Vs. KLM Royal Dutch Airlines [2012] 19 taxmann.com 302 (Delhi)*
- v. Lufthansa German Airlines Vs. DCIT [2004] 90 ITD 310 (Delhi)*
- vi. DCIT Vs. KLM Royal Dutch Airlines (ITA No.403 & 404/Del/2010, Dt.19.11.2010) (Delhi – Trib.)*
- vii. KLM Royal Dutch Airlines Vs. DIT ( ITA No. 4811/Del/2010, dt. 28.01.2011) (Delhi – Trib.)*
- viii. Daimler Chrysler India Pvt. Ltd. Vs. DCIT, 120 TTJ 803 (Pune – Trib.)*
- ix. DDIT Vs. Safmarine Container Lines N.V., 120 ITD 71 (Mumbai – Trib.)*

**7.** Sh. Surender Pal, learned Departmental Representative submitted, insofar as the profits directly derived by the assessee from operation of aircraft in the international traffic, the Assessing Officer has not disputed that such income is covered under Article 8(1) of the Tax Treaty. He submitted, the profit/income derived by the assessee from baggage screening,

technical and engineering services provided to other airlines at international airport in Delhi in no way are connected to operation of aircraft in international traffic. He submitted, passengers or goods travelling in other airlines are not transported by the assessee. He submitted, receipts from baggage screening services and technical and engineering services provided to other airlines do not form part of the cost of ticket that the assessee charges for its own passengers or goods. Therefore, it is altogether a separate commercial activity undertaken by the assessee without having any connection, either direct or otherwise, with assessee's activity of operating airlines in international traffic for transportation of passengers/goods. He submitted, the issue now stands well settled by virtue of the decision of the Tribunal in case of British Airways Vs. DCIT, (2002) 80 ITD 90 (Delhi). He submitted, even in case of Delta Airlines, whose business in India was taken over by the assessee subsequently, the Tribunal has held that the income received from providing ground handling services and other services to other airlines are not covered under Article 8 of India-USA DTAA. Thus, he submitted, the profit derived from these activities, being neither directly connected to assessee's business of operating

aircraft in international traffic nor being ancillary or incidental to the said activity, would not come within the ambit of Article 8(1) and 8(2). He submitted, assessee's case will not also be covered under Article 8(4) as there is no pooling arrangement in real sense of the term, as, there is neither pooling of funds nor resources between the members. Therefore, he submitted, the income derived by the assessee from provision of baggage screening services and technical and aircraft handling services to other airlines are not covered under Article 8 of the Tax Treaty. He submitted, since, the assessee has a permanent establishment in India, the receipts will be taxable under Article 7 of the Tax Treaty. In support of his contention, learned Departmental Representative relied upon the following decisions:

1. *CIT Vs Zoom Communication (P.) Ltd. [191 Taxman 179 (Delhi)/[2010] 327 ITR 510 (Delhi)/[2010] 233 CTR 465]*
2. *CIT Vs Escorts Finance Ltd [183 Taxman 453 (Delhi)/[2010] 328 ITR 44 (Delhi)/[2009] 226 CTR 105]*
3. *Union of India v. Dharamendra Textile Processors [(2007) 295 ITR 244]*
4. *CIT Vs Moser Bear India ltd. (184 Taxman 8(SC)/[2009] 315 ITR 460 (SC)/[2009] 222 CTR 213)*
5. *CIT Vs Gold Coin Health Food (P.) Ltd (172 Taxman 386 (SC)/[2008] 304 ITR 308 (SC)/[2008] 218 CTR 359)*
6. *MAK Data P. Ltd vs. CIT [38 taxmann.com448 (SC)/[2013] 358 ITR 593 (SC)/[2013] 263 CTR 1 ]*

7. *B.A. Balasubramaniam & Bros. Co Vs CIT [116 Taxman 842, 236 ITR 977, 157 CTR 556]*
8. *CIT Vs R.M.P. Plasto (P.) Ltd [184 Taxman 372 (SC)/[2009] 313 ITR 397 (SC)/[2009] 227 CTR 635]*
9. *K.P. Madhusudhanan Vs CIT [[2001] 118 Taxman 324 (SC)/[2001] 251 ITR 99 (SC)/[2001] 169 CTR 489 (SC)]*
10. *Delta Airlines, Inc. Vs. ADIT, [2015] 57 taxmann.com 1 (Mumbai – Trib.)*
11. *ADIT Vs. Delta Airlines Inc. (ITA No. 2801/Mum/2002 & Ors., dt. 29.09.2008)*

**8.** In rejoinder, learned counsel for the assessee submitted, the ratio laid down by the Tribunal in case of British Airways (supra) is not applicable to assessee's case. Rather, assessee's case is similar to the case of KLM Royal Dutch Airlines (supra). In this context, he drew our attention to a chart showing distinguishing features of both the decisions. Further, he submitted, the decision rendered by the Tribunal in case of ADIT Vs. Delta Airlines Inc., 26 SOT 514 (Mum.) would not be applicable to assessee's case, as, in case of Delta Airlines the Tribunal held that neither the OECD Commentary, nor the US technical explanation could be looked into while considering the scope of paragraph 2 of Article 8 of India-USA Tax Treaty. He submitted, OECD Commentary definitely holds a persuasive value insofar as the interpretation of terms contained in the Tax Treaty. In this context, he drew out

attention to the decision of the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence (P.) Ltd. Vs. CIT, 432 ITR 471 (SC). He submitted, as per Article 31 of the Vienna Convention of the Law of Treaties, 1969, Treaties are to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose. Referring to the decision of KLM Royal Dutch Airlines (supra), he submitted, technical explanation given by one of the Treaty partners, i.e., US Treasure Department could be used as an aid to interpretation. In this context, he also referred to a decision of the Tribunal in case of DDIT Vs. Preroy A.G., 39 SOT 187 (Mum.). Thus, he submitted, while interpreting Article 8 of the India–USA Tax Treaty, reliance can be placed on the OECD Commentary and Technical Explanation to the US Model Convention issued by the Treasure Department of US. To buttress his submission that all ancillary and incidental activities relating to operation of airlines in international traffic come within the ambit of Article 8, learned counsel for the assessee relied upon a decision of the Hon'ble Bombay High Court in case of DIT Vs. Balaji Shipping UK Ltd. [2012] 253 CTR 460 (Bombay).

**9.** We have patiently and carefully heard the parties and have given a thoughtful consideration to the detailed submissions made, both, orally as well as in writing, in the light of ratio laid down in the judicial precedents cited before us. We have also perused the materials placed on record. Undisputedly, the assessee is engaged in the business of operating aircraft in international traffic for transportation of passengers, goods etc. Also, there is no dispute that the assessee, being a tax resident of USA, is governed under India-USA DTAA. Before the departmental authorities, it is the claim of the assessee that as per Article 8(1) of the India-USA Tax Treaty, profits derived by the assessee from operation of aircraft in international traffic is taxable in USA. Meaning thereby, such profit is not exigible to tax in India. The Assessing Officer, admittedly, has accepted the aforesaid claim of the assessee, insofar as, profit earned from transportation of passengers, goods etc. in aircraft operated by the assessee. The only point of dispute between the assessee and Revenue is with regard to the income earned by the assessee from providing baggage screening services and aircraft handling services to other airlines at IGI airport, Delhi. The departmental authorities have observed that the income derived by the assessee

from providing these services to other airlines do not come within the ambit of Article 8(1) read with Article 8(2) of the Tax Treaty, as, these are not activities which are directly connected to transportation of passengers, goods etc. by air by engaging assessee's aircraft.

**9.1** Before we proceed to deal with the disputed issue, it is necessary to bear in mind that interpretation of Bilateral Treaties entered into by two sovereign nations cannot be made in the mode or manner adopted for interpreting statutory legislation. This observation has been made by the Hon'ble Supreme Court in case of Union of India Vs. Azadi Bachao Andolan, [2003] 132 taxmann.com 373 (SC). While dealing with the issue of interpretation of a Tax Treaty, the Hon'ble Supreme Court has further observed that while interpreting the provisions of any international Treaty, including Treaty for avoidance of double taxation, it has to be borne in mind that Treaties are negotiated and entered into at a political level for several considerations as their basis. The main function of a double taxation avoidance treaty should be seen in the context of aiding commercial relations between treaty partners as being essentially a bargain

between two treaty countries as to the division of tax/revenues between them falling to be taxed in both jurisdictions.

**9.2** Therefore, the provisions of a Treaty relating to taxation of a particular item of income may differ from country to country as treaties are negotiated at political level between two countries based on various considerations, including commercial consideration. Keeping in perspective these salutary principles, we will proceed to deal with the issue.

**9.3** As discussed earlier, the main thrust of assessee's contention is, the income derived from baggage screening services and aircraft handling services provided to other airlines, being ancillary and incidental to its main activities of transportation of passengers, goods etc. by air will also fall within the four corners of Article 8(1) read with Article 8(2) of the Tax Treaty. For this purpose, it is necessary to look into Article 8 of India–USA DTAA which read as under:

#### **ARTICLE 8**

##### **SHIPPING AND AIR TRANSPORT**

*1. Profits derived by an enterprise of a Contracting State from the operation by that enterprise of ships or aircraft in international traffic shall be taxable only in that State.*

*2. For the purposes of this Article, profits from the operation of ships or aircraft in international traffic shall mean profits derived by an enterprise described in paragraph 1 from the transportation by sea or air respectively of passengers, mail, livestock or goods carried on by the owners or lessees or charterers of ships or aircraft including—*

- (a) the sale of tickets for such transportation on behalf of other enterprises;*
  - (b) other activity directly connected with such transportation ; and*
  - (c) the rental of ships or aircraft incidental to any activity directly connected with such transportation.*
- 3. Profits of an enterprise of a Contracting State described in paragraph 1 from the use, maintenance, or rental of containers (including trailers, barges, and related equipment for the transport of containers) used in connection with the operation of ships or aircraft in international traffic shall be taxable only in that State.*
- 4. The provisions of paragraphs 1 and 3 shall also apply to profits from participation in a pool, a joint business, or an international operating agency.*
- 5. 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 provisions of Article 11 (Interest) shall not apply in relation to such interest.*
- 6. Gains derived by an enterprise of a Contracting State described in paragraph 1 from the alienation of ships, aircraft or containers owned and operated by the enterprise, the income from which is taxable only in that State, shall be taxed only in that State.”*

**9.4** On a careful reading of Article 8 of the Tax Treaty, as reproduced above, it is to be seen that as per paragraph 1 of Article 8, profits derived from the operation of ships or aircraft in international traffic shall be taxable only in the country of residence of the entity/enterprise engaged in the business of operation of ships or aircraft. Paragraph 2 of Article 8 explains the meaning of the expression “profits from operation of ships or aircraft in international traffic”. This expression means, profit derived from transportation by sea or air of passengers, mail, livestock or goods carried on by the owners or lessees or charterer of ships or aircrafts. However, in addition to transportation of

passengers, mail, livestock or goods, the following three activities are also considered to be coming within the expression “profits derived by an enterprise from operation of ships or aircraft in international traffic”:

- (a) the sale of tickets for such transportation on behalf of other enterprises;
- (b) other activities directly connected with such transportation; and
- (c) the rental of ships or aircraft incidental to any activity directly connected with such transportation.

**9.5** If the provisions contained under Article 8 of India–US Tax Treaty are juxtaposed to similar provisions contained under UN Model Convention, OECD Model Convention and US Model Convention, it can be seen that the expression **‘other activity directly connected with such transportation’** as incorporated in clause (b) of Article 8(2) of India-USA Tax Treaty is absent in OECD Model Convention, UN Model Convention and US Model Convention. Thus, essentially, Article 8(2) of India-USA Tax Treaty narrows down the scope and ambit of expression **‘profits from the operation of ships or aircraft in international traffic’** by restricting it to specific activities. For this reason, if we may say

so, the meaning of expression **‘profits from operation of ships or aircraft in international traffic’** as finds place in Article 8(2) makes it different from the other Model Conventions, referred to above. Hence, the commentaries/technical explanation explaining the provisions of OECD Model Convention or US Model convention may not be of much help in interpreting Article 8(1) read with Article 8(2) of the India-US Tax Treaty.

**9.6** Admittedly, the income derived by the assessee from providing baggage screening services and aircraft handling services to other airlines do not fall either under clause (a) or (c) of paragraph 2 of Article 8 of the Tax Treaty. The only clause under which these activities can fit in is clause (b). Therefore, as per paragraph 2(b) of Article 8, the expression **‘other activity’** has to be read in conjunction with **‘directly connected with such transportation’**. The words **‘such transportation’** certainly, in turn, refers to transportation by sea or air respectively of passenger, mail, livestock or goods carried on by the owners or lessees or charterers of ships or aircrafts. In other words, profits derived from other activity directly connected to transportation by sea or air of passengers, mail, livestock or goods by the assessee itself would come within the ambit of profit from operation of

ships or aircrafts in international traffic, as per Article 8(1) read with Article 8(2).

**9.7** Interestingly, the expression **‘other activity directly connected with such transportation’** as incorporated in Article 8(2)(b) is not found in similar provision contained in India-Germany, India-Japan and India-Netherlands DTAA, which were referred to before us by learned counsel for the assessee at the time of hearing. Thus, if we read Article 8(2) of India–USA Tax Treaty contextually in conjunction with paragraph 1 of Article 8 of the treaty, it is to be seen that in addition to transportation of passengers, mail, livestock or goods by sea or air, any other activity has to be considered with reference to such transportation as aiding it, supporting it and incidental thereto. Two activities, viz., sale of tickets for such transportation on behalf of other enterprise and the rental of ships or aircrafts incidental to any activity directly connected with such transportation have been specifically included within the meaning of **‘profits from the operation of ships or aircrafts in the international traffic’**. Therefore, any activity which can aid and assist the transportation of passengers, mail, livestock or goods etc. by the assessee by air or sea can come within the ambit of

**‘other activity directly connected to such transportation’**. As given by way of illustration by the Assessing Officer, such activity can be the operation of bus service connecting a town with its airport for transporting the passengers, transportation of goods by truck connecting a depot with a port or airport etc. These activities, undoubtedly, aid and assist the transportation of passenger, mail, goods, livestock etc. by the assessee itself, hence, would come within the ambit of Article 8(1) read with Article 8(2) Of India-USA Tax Treaty.

**9.8** Thus, according to our understanding, the use of expression **‘other activity directly connected with such transportation’** in Article 8(2)(b) of the India-USA Tax Treaty restricts the applicability of Article 8(1) only to a specific category of profit/income which is directly connected to the transportation of passengers, mail, livestock or goods etc. by the enterprise by air or sea. Article 31(1) of the Vienna Convention on the law of treaties, 1969 says that treaties shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Thus, when the phraseology used in India-USA Tax Treaty is clear and unambiguous in its terms and can be

understood according to the ordinary meaning of the words used therein, there is no need for interpreting the provisions with external aid of OECD Commentary or Technical Explanation to US Model Convention.

**9.9** As regards various judicial precedents cited before us by learned counsel for the assessee, on careful examination, we find, mostly these decisions were rendered in the context of benefit of exemption under Article 8(1) read with Article 8(4) by participating in a pool. Hence, in our humble opinion, they are not applicable for deciding whether the profit derived from providing baggage screening services and aircraft handling services to other airlines would come within the ambit of Article 8(2). Insofar as, the decision of the Hon'ble Bombay High Court in case of DCIT Vs. Balaji Shipping UK Ltd. (supra). The facts of the case reveal that the assessee was operating vessels for carriage of cargo from India to international ports. However, since the vessels chartered by the assessee did not ply the Indian territorial waters, the assessee entered into slot hire agreement with another entity under which the other entity provided container slot spaces on the feeder vessels operated by it to transport the cargo of the assessee from Indian ports to the international ports or hubs

from where the cargo was transported by charter vessels of the assessee for onward journey to the final destination. Thus, as could be seen from the aforesaid facts, ultimately, by entering into the slot hire agreement the assessee transported its own cargo from India to the final destination. Therefore, the Hon'ble Court held that the income derived from transportation of cargo would not be taxable in India in terms of India-UK DTAA.

**9.10** However, in the facts of the present appeals, the profit derived by the assessee from baggage screening services and aircraft handling services provided to other airlines is in no way connected to assessee's activity of transportation of passengers, mail, livestock or goods etc. by air in its own aircrafts. In fact, if the assessee does not provide such services to other airlines, in no manner, assessee's activity of transportation of passenger, mail, goods, livestock etc. would be affected. In fact, the assessee itself has stated that when not required by the assessee for its own transportation activity, for optimum use of the equipments and manpower deployed at IGI airport, the services are provided to other airlines. These facts make it clear that, either provision or non provision of certain services to other airlines will not at all have any impact on assessee's activity of transportation of

passenger, mail, goods, livestock etc. That being the case, in our considered opinion, the profit derived by the assessee from baggage screening services and aircraft handling services provided to other airlines will not come within the ambit of **'other activity directly connected to such transport'** as provided under Article 8(2)(b) of India-USA Tax Treaty. Hence, would not be covered under Article 8(1) of the Tax Treaty. Thus, assessee's claim under Article 8(1) read with Article 8(2)(b) must fail.

**9.11** Having held so, it is necessary to examine assessee's claim that it will, otherwise, also be covered under Article 8(4) read with Article 8(1) of the Tax Treaty. Article 8(4) of India-USA DTAA extends benefit provided under Article 8(1) to profits from participation in pool, joint business or international operating agency. It is the contention of the assessee that in view of Article 8(4), the profits derived by an enterprise from participation in pool shall be taxable only in the country of which the enterprise is a resident. This argument was not taken by the assessee before the departmental authorities in the initial two assessment years, i.e., assessment years 1996-97 and 1997-98. However, from assessment year 1998-99 onwards, the assessee has also staked its claim of exemption under Article 8(4) read with Article 8(1) of

the Tax Treaty. It is the say of the assessee that the only pool known to the international aviation industry is IATP and the assessee, being a member of the pool, having provided services to other airlines on reciprocal basis, the profit from baggage screening services and aircraft handling services can only be taxed in USA, the country of residence, in terms of Article 8(1) of the Treaty. The learned Commissioner (Appeals) has negated assessee's claim under Article 8(4) primarily for the following reasons:

- (a) The assessee failed to furnish any evidence of existence of IATP and had not filed names of airlines who are members of the pool.
- (b) Assessee could not prove that it had become a member of IATP by contributing assets for baggage screening and aircrafts handling services acquired by it from M/s. Delta Airlines in 1995.
- (c) Assessee could not file any evidence to show that the equipment for baggage screening and aircraft handling services was under common control and management of IATP.

- (d) Assessee failed to furnish any evidence to show that identical services/facilities were received by the assessee from other airlines in IATP on reciprocal basis.

**9.12** At this stage, we must observe, in addition to documentary evidences furnished before the departmental authorities, the assessee had furnished certain additional evidences before the Tribunal vide letter dated 2<sup>nd</sup> April, 2018. Vide order dated 17.05.2018, the Tribunal had admitted the additional evidences as part of record. The additional evidences filed by the assessee are as under:

- (i) Documents showing services provided by the assessee to other airlines.
- (ii) Services provided by other airlines to the assessee.
- (iii) The relevant extract of International Airlines Technical Pool (IATP) manual.
- (iv) Specimen of ground handling agreements entered into by the assessee with other airlines.

**9.13** On perusal of the IATP agreement, a copy of which is at page 29 of the paper-book, it is noticed that the assessee became a participant of the IATP pool in November, 1967. There are

various other airlines that are part of the pool, though, from different time periods, to name a few, Air Portuguese, Romanian Air Transport, Thai Airways International Public Company Ltd., Royal Jordanian Airlines, Turkish Airlines Inc., US Airways Inc., Virgin Atlantic Airways Ltd. There is no dispute that the IATP was created based on IATP manual. The IATP manual further provides that provider and user of services should jointly establish a detail specification of users required services. The manual also specifies various categories of agreement in specific form, such as, standard ground handling agreement has to be as per Form 55 or Form 53.

**9.14** It is also universally recognized that the largest pool of airlines know to aviation industry is the IATP and it is in existence since early sixties. Membership of the IATP has increased from 24 in 1962 to 121 in 1997. Basically, IATP is an organization of airlines formed for the purposes of providing reciprocal technical support at line stations throughout the world. Technical support includes aircraft spare parts, ground and ramp handling equipments and manpower. The primary goal of IATP is to generate economic savings to participating airlines by minimizing investments otherwise required for purchase of

equipments and spare parts for positioning at various stations in support of aircraft operation. The advantage of being a member of pool is, suppose a particular service is required by a particular airline in a particular station, which on its own it cannot avail, such service is provided by another airline who may be having the facilities at that airport. Similarly, the other airline can avail the service on reciprocal basis at another airport where it may not be having the facilities on its own. As per the mechanism under IATP, actual payment is not made by the airlines for rendering or receiving the services, but only notional credits or debits are made through pool accounting mechanism, i.e., IATA Clearing House. It is observed, being a member of the pool, assessee has entered into ground handling agreements with various other airlines and provided and received services on reciprocal basis at different airports. To demonstrate the aforesaid fact, the assessee has furnished the documentary evidences indicating services provided to other airlines and availed from other airlines. Thus, aforesaid documentary evidences and materials on record contradict the finding of learned Commissioner (Appeals) that the assessee failed to furnish any evidence to demonstrate the existence of IATP or the fact that it has become a pool member or

it has provided and availed services on reciprocal basis. The material on record clearly demonstrate that as a member of IATP, the assessee has not only provided services to various other airlines but has also availed services from other airlines, though, may not be in India but at various other airports.

**9.15** On a reading of Article 8(4), we are unable to find any restrictive covenant indicating that the reciprocity in services must be in the same country. Therefore, once the assessee derives profit from participating in a pool on reciprocal basis, in terms of Article 8(4), such profit can only be taxed in the country of residence of the enterprise, in the present case USA. While dealing with identical issue relating to taxability of profit derived from participation in a pool, the Hon'ble Jurisdictional High Court in DIT Vs. KLM Royal Dutch Airlines (supra) interpreting pari materia provision contained under Article 8(3) of the India-Netherland Tax Treaty has held as under:

*“30. The Assesseees participated in the IATP pool and earned certain revenues from such activities and also incurred expenditure. There is, in the opinion of the Court, clear reciprocity as to the extension of services; IATP membership is premised upon each participating member being able to provide facilities for which it was formed (line services, OMR services, etc.) of a required mandated standard. As there was reciprocity in the rendering and availing of services, there was clearly participation in the pool; in terms of the two DTAAAs (Indo-German and India-Netherlands) the profits from such participation were not taxable in India.*

31. The terms of the India-UK DTAA as contrasted with the DTAA between India and Germany are dissimilar in some significant ways. The British Airways (*supra*) decision was based on the following facts- as held by the ITAT:

(i) British Airways provided engineering and ground handling services at IGI Airport, New Delhi to 11 other airlines, at Chennai to 5 other airlines and certain other airlines at Mumbai. It has not availed any services/facilities from any airlines in India. Thus, there was no reciprocity in the agreement entered into between British Airways and other airlines;

(ii) British Airways had a separate establishment and separate office set up to monitor ground handling services and different establishment at International Airports New Delhi did not form part and parcel of the operation of British Airways pertaining to the operation of aircrafts in international traffic. There is no such finding in the present appeals.

(iii) British Airways' services and facilities in India to the other airlines was a commercial activity. The excess/idle capacity was provided to various airlines at a price. The services provided in terms of the IATP manual are not based on any consideration paid or received; a system of credits has been created for IATP members.

(iv) British Airways has a branch office in India, which constituted a Permanent Establishment ("PE") in India, and, therefore, the income derived from PE in India was taxable as the same was not covered under DTAA.

(v) Article 8(2) of DTAA between India and UK provided that paragraph I of Article 8 shall likewise apply in respect of participation in pools of any kind. The words "pools of any kind" was interpreted by the ITAT by taking the dictionary meaning of the word "pool". These are missing in the two DTAA's in question.

(vi) Article 8(3) of DTAA between India and UK provided that the terms "operation of aircraft" shall include "...3. For the purposes of this article the term "operation of aircraft" shall include transportation by air of persons, live-stock, goods or mail, carried on by the owners or lessees or charterers of aircraft, including the sale of tickets for such transportation on behalf of other enterprise, the incidental lease of aircraft on a charter basis and any , other activity directly connected with such transportation " These terms are not present in the two DTAA's in the present set of appeals.

(vii) After meeting the requirement of its own flights, the services of employees were required for handling other airlines' operation for generating income.

32. Having regard to these facts, this Court is of opinion that the amplification of the term "operation of aircraft" in Article 8 (1) through Article 8 (3), i.e. "...3. For the purposes of this article the term "operation of aircraft" shall include transportation by air of

*persons, live-stock, goods or mail, carried on by the owners or lessees or charterers of aircraft, including the sale of tickets for such transportation on behalf of other enterprise, the incidental lease of aircraft on a charter basis and any other activity directly connected with such transportation..." had the effect of limiting the nature of activities that could be comprehended in the pool envisioned in Article 8 (2): in other words, the expanded meaning of operation of aircraft included those activities in Article 8(3) through the extended definition and no more. On the other hand, there is no such limitation in the DTAAs in question, in these cases. This constituted the most significant difference between the two sets of cases on the one hand, and British Airways (supra) on the other. For these reasons, this Court rejects the Revenue's contentions.*

*33. For the foregoing reasons, this Court answers the questions of law, framed in both sets of appeals, against the Revenue and in favour of the assessee; there is no infirmity in the impugned orders of the ITAT, which are affirmed. The appeals fail and are dismissed.*

**9.16** Identical view has been expressed by the Tribunal in case of DIT Vs. Lufthansa German Airlines (supra). The decision of the Coordinate Bench in case of Air France Vs. ACIT (supra) also expressed similar view. In fact, in case of Air France Vs. ACIT (supra), the Bench has gone a step further by holding that services provided and received from non-IATP members will also come within the ambit of Article 8. Thus, the materials on record not only demonstrate the existence of a pool in terms of Article 8(4), i.e., IATP pool but they also demonstrate that the assessee is a member of the pool and being a member has provided and received services from airlines on reciprocal basis. Thus, in our considered opinion, the profit derived from providing baggage

screening services and aircraft handling services to other airlines as a participant of IATP pool would be covered under Article 8(1) read with Article 8(4) of India–USA Tax Treaty. The ratio laid down in the decisions relied upon by leaned counsel for the assessee, particularly, the decision of Hon’ble Jurisdictional High Court in case of DIT Vs. KLM Royal Dutch Airlines (supra) clearly support this view. Pertinently, while deciding the issue in case of DIT Vs. KLM Royal Dutch Airlines (supra) the Hon’ble Jurisdictional High Court took note of the fact that in India-UK DTAA the words used are ‘pools of any kind’, which are different from the expression used in Article 8(3) of India-Netherland DTAA. At the cost of repetition, we must observe, Article 8(4) of India-USA DTAA and Article 8(3) of the India-Netherland DTAA are, more or less, identically worded. For this very reason also, we are unable to subscribe to the view expressed in case of British Airways (supra) and Delta Airlines (supra), insofar as, they relate to claim of exemption of profit from participation in pool.

**9.17** Thus, to conclude, we hold that the profit derived from providing baggage screening services and aircraft handling services to various other airlines in India will not be taxable in India under Article 8(1) read with Article 8(4) of the India–USA

Tax Treaty. Therefore, the additions made in different assessment years under dispute are hereby deleted.

**10.** Thus, in nutshell, assessee's claim of exemption under Article 8(1) read with Article 8(2)(b) is rejected. Whereas, its claim under Article 8(1) read with Article 8(4) is allowed.

**11.** In view of our foregoing decision, the other ground raised by the assessee concerning attribution of expenditure to the PE have become academic, hence, not required to be adjudicated. For this reason also, the grounds raised on the levy of interest under section 234A and 234B of the Act have also become infructuous. However, in principle, we accept assessee's contention that no interest under section 234B can be levied as the liability is on the payer to deduct tax at source and not on the assessee to pay the advance tax. This is so, in view of the ratio laid down by the Hon'ble Supreme Court in case of DIT Mitsubishi Corporation [2021] 130 taxmann.com 276 (SC).

**12.** In the result, the appeals are partly allowed.

**PENALTY APPEALS**

**ITA No.954/Del/2014 for AY: 1998-99**

**ITA No.955/Del/2014 for AY: 1999-00**

**ITA No.956/Del/2014 for AY: 2000-01**

**ITA No.957/Del/2014 for AY: 2001-02**

**ITA No.958/Del/2014 for AY: 2002-03**

**13.** These appeals are against penalty imposed under section 271(1)(c) of the Act based on addition of income received from baggage screening and aircraft handling services from other airlines. While deciding this particular issue in quantum appeals, we have held that the income is not taxable in India, in terms of Article 8(1) read with Article 8(4) of India-USA Tax Treaty. In view of our aforesaid decision in the quantum appeals, penalty imposed under section 271(1)(c) of the Act in all these assessment years cannot survive. Accordingly, for this very reason, we delete the penalty imposed in all the assessment years under dispute. Even, otherwise also, the income from baggage screening services and aircraft handling services received from other airlines, whether, would be covered under Article 8 of India-USA DTAA is a highly debatable issue on which more than one view is possible. Therefore, consequent to additions made on such a debatable issue, no penalty under section 271(1)(c) of the Act can be imposed, alleging furnishing of inaccurate particulars of income. For this reason also, penalty imposed under Section 271(1)(c) of the Act needs to be deleted. Accordingly, we do so.

**14.** The result of the appeals are as under:

<b>Sl. No.</b>	<b><u>QUANTUM APPEALS</u></b>	<b>Assessment Year</b>	<b>Result</b>
1.	ITA No.216/Del/2000	1996-97	Partly Allowed
2.	ITA No.217/Del/2000	1997-98	Partly Allowed
3.	ITA No.1691/Del/2008	1998-99	Partly Allowed
4.	ITA No.1692/Del/2008	1999-00	Partly Allowed
5.	ITA No.1693/Del/2008	2000-01	Partly Allowed
6.	ITA No.1694/Del/2008	2001-02	Partly Allowed
7.	ITA No.1695/Del/2008	2002-03	Partly Allowed
	<b><u>PENALTY APPEALS</u></b>		
8.	ITA No.954/Del/2014	1998-99	Allowed
9.	ITA No.955/Del/2014	1999-00	Allowed
10.	ITA No.956/Del/2014	2000-01	Allowed
11.	ITA No.957/Del/2014	2001-02	Allowed
12.	ITA No.958/Del/2014	2002-03	Allowed

**Order pronounced in the open court on 12<sup>th</sup> April, 2022**

**Sd/-**  
**(PRADIP KUMAR KEDIA)**  
**ACCOUNTANT MEMBER**

**Sd/**  
**(SAKTIJIT DEY)**  
**JUDICIAL MEMBER**

Dated: 12<sup>th</sup> April, 2022.  
RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi