INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE

SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 1004/Del/2020
Asstt. Year: 2016-17

Air France, LB-46, Prakash Deep Building, 7 Tolstoy Marg, New Delhi – 110 001 PAN AAACA5284B	Vs.	DCIT, Circle 1(1)(1), Int. Taxation New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Salil Aggarwal, Advocate
Department by:	Shri Sanjay Kumar, Sr. DR
Date of Hearing:	01.05.2023
Date of pronouncement:	19.07.2023

O R D E R

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order dated 23.01.2020 of the Ld. Commissioner of Income Tax (Appeals) Delhi – 42 **("CIT (A)")** pertaining to Assessment Year **("AY")** 2016-17.

2. The assessee has taken 20 grounds of appeal. Out of them ground No. 1 to 17 relate to taxability of income from technical handling services received from IATP members and ground No. 18 relates to interest income. Ground No. 19 is regarding initiation of penalty proceedings under section 271(1)(c)/271A & 271B of the Income Tax Act, 1961 **(the "Act")** and ground No. 20 pertains to levy of interest under section 254 of the Act.

3. At the very outset, the Ld. AR submitted that it is a matter covered by the decision of the Tribunal in the assessee's own case for AY(s) 2007-08, 2008-09, 2009-10, 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16. A copy of the Tribunal's decision rendered on 24.02.2023 was brought on record. The Ld. DR agreed.

4. We have perused the record and the order (supra) of the Tribunal. The Ld. Representative of the parties have also been heard.

5 On the issue relating to taxability of income from technical handling services received from IATP members (ground No. 1 to 17) the Tribunal in its decision (supra) held that the impugned income is not taxable in India as it is covered under Article 8(2) r.w. Article 8(1) of India-France DTAA. Accordingly, the addition(s) were deleted by recording the following findings in para 8 and 9 which is reproduced below:-

"8. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. It is evident, the assessee has derived income from providing technical handling services to other airlines in India. The technical handling services, as discussed earlier, involve verification of air worthiness of the aircrafts flying into Indian airports to take the next journey. Undisputedly, assessee has claimed exemption of the income derived from technical handling services taking recourse to Article 8(2) of the India – France DTAA. It is the case of the assessee that since as a member of IATP the assessee has provided such services to other pool members, it is covered under Article 8(2). Notably, identical nature of dispute arising in assessee's own case in assessment years 2004-05, 2005-06 and 2006-07 came up for consideration before the Tribunal earlier. While deciding the issue in ITA No.5008/Del/2011 and others dated 22.05.2020, the Tribunal has held as under:

> *"8. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the assessee company is claimed benefit under the DTAA under Article 8 of the Treaty, since the entire revenue receipts are from operation of aircraft in international traffic as per the assessee before the Assessing Officer. The assessee also submitted during the assessment proceedings that the Indian Branch office is merely a branch office of the foreign company, which is engaged in the operation of aircraft in international traffic. There are no specific services referred between the head office and the branch office as per the submissions of the assessee. The entire*

receipts collected by the branch office are remitted to the head office, after meeting the local expenditure and the said receipt of the branch office are from the public at large and not from rendering of services to the head office as per the assessee. The Assessing Officer asked the assessee to submit sources of income including from ground handling, flight maintenance etc. and asked to explain the taxability of the same vis-à-vis judgments of the authorities in the cases of British Airways and Luftansa Airlines of the Tribunal. The assessee submitted that during the year under consideration Air France has provided technical handling services to other IATP pool members aggregating to Rs. 1,81,79,476/-. The same is covered under Article 8 of the provisions of Double Taxation Avoidance Agreement between India and France (DTAA). The assessee further submitted that it is part and parcel of the Income covered under operation of aircraft of international traffic. The technical handling services are provided by Air France to only ITAP pool members. The Assessing Officer further asked the following queries:

(i) The nature of technical handling services and the steps involved in the same?
(ii) Basis of figure of Rs. 1,81,79,476/-
(iii) Taxability of the same vis-à-vis decisions of the ITAT in the case of British Airways and Lufthansa Airlines and also to show cause, why the receipts should not be taxed in India?
(iv) The extent of technical services provided to its own aircrafts and the aircrafts of the other airlines.

The assessee provided the copies of invoices, contracts for technical handling to the Assessing Officer. The Assessing Officer after going through the contracts and invoices observed that the services are not mentioned in Annexure – B of the agreement. The Assessee explained technical handling services as nothing, but verifying the technical parameters of the aircraft, after it has taken a journey to verify that the same is in an airworthy and safe conditions to fly again. Such examination airworthiness certificate is provided to the airlines by AF basis which flying is allowed. The assessee is member of "International Airlines Technical Pool" (IATP). As an IATP member the assessee extends technical facilities (line maintenance facilities) to other IATP Members only during the year under consideration. No such facility or service has been provided by assessee to any non IATP Member during the year under consideration. The services as per the Standard Ground Handling Agreement 1998 Main Agreement along with Annexure A and Annexure B is as under:

"IATP FORM-55 LINE MAINTENANCE POOLING
ANNEXURE B.12/OS-DEL
LOCATION, AGREED SERVICES AND CHARGES
To the Standard Ground Handling Agreement of April 1998

Between

AIR FRANCE	*AUSTRIAN AIRLINES*
having its principal office at And	*having its principal office at*
45 Rue de PARIS	*Fortanastrasse:P.O.Boax 50*
95747 ROISSY CDG CEDEX	*A-1107, Vienna*
FRANCE	*Austria*
And hereinafter referred to as	*and hereinafter referred to as*
"the Handling Company"	*"the Carrier"*

Holding EASA PART 145 approval

Certificate Nbr : FR.145 010
Effective from: October 25,1998
This Annex B for the location: Delhi (DEL)
Is valid from: April 1 2006*
And replaces: Annex B11valid from April 01,2005
PREAMBLE:
This Annex B is prepared in accordance with the simplified procedure whereby the Parties agree that the terms of the Main Agreement and Annex A of the SGHA of April 1998 as published by the International Air Transport Association shall apply as if such terms were repeated here in full.

By signing this Annex B, the parties confirm that they are familiar with the aforementioned Main Agreement, Annex A and International Airline Technical Pool Rules.
PARAGRAPH 1 – SERVICES CONTRACTED

1.1 For a single ground handling consisting of the arrival and the subsequent departure at agreed timings of the same aircraft, the Handling Company shall provide the following services of Annex A at the following rates.

1.1.1 Section 2 2.2.1, 2.2.2.
Section 6 6.3.1, 6.3.2.(a), (b), 6.6.1(c)
Section 7 7.1.3
Section 8 8.1.1., 8.1.2(b), 8.1.4, 8.1.5, 8.1.6, 8.1.9, 8.1.10, 8.1.11, 8.1.12, 8.2.1, 8.2.2, 8.2.3
Section 9 9.1.1, 9.1.2, 9.1.3, 9.1.4 (a), 9b), 9.2.1 (see 1.2), 9.2.2, 9.2.3, 9.2.4, 9.2.5, 9.3.1(b), 9.3.2, 9.3.3 (to a limited extent).

Section 14 14.4.2(b5) (if required)

Aircraft Type / Engine Type	*Turnaround Inspection Line Transit (Grd. Time < 5hrs.)*
A-330/PW 4168	*Euros 340*
A-340/CFM56	*Euros 340*

1.2 Service 9.2.1 is limited to a maximum of 2 man-hour – Additional work beyond the provision included in the flat rate will be charged at Euros 84 per man-hour."

Now we are quoting the relevant Article 8 of DTAA between India and France as follows:

" Article 8 AIR TRANSPORT

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

2. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

3. For the purpose of this article, 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 12 shall not apply in relation to such interest.

4. The term "operation of aircraft" shall mean business of transportation by air of passengers, mail, livestock or goods carried on by the owners or lessees or charterers of aircraft, including the sale of tickets for such transportation on behalf of other enterprises, the incidental lease of aircraft and any other activity directly connected with such transportation."

The Revenue contended that the assessee provides its services both to airlines who are members of IATA/IATP as well as members who are not members of IATP. The Ld. DR pointed out that the assessee does not receive any reciprocal services in India and considering the scale of activities both inside India as well as outside and the collaborations with KLM & Air France Ground Handling Pvt. Ltd. to provide the services and facilities, it can be safely concluded that it is an independent commercial and business activity which is in no way ancillary or connected to the business in the operation of aircraft as defined by Article 8(4) of the DTAA between India & France. Therefore, the Ld. DR submitted that the Assessing Officer was right in rejecting the claim of the Assessee under Article 8 of the DTAA between India and France.

While going through the submissions of both the parties, it is pertinent to note the relevant points of the decision in case of the Hon'ble High Court in case of DIT vs. KLM Royal Dutch Airlines & Lufthansa German Airlines (2017) 392 ITR 218 (Del.) wherein while dismissing the appeals, the Hon'ble High Court held that the assessee participated in the international Airlines Technical Pool and earned certain revenues from such activities and also incurred expenditure. There was clear reciprocity as to the extension of services; membership was premised upon each participating member being able to provide facilities for which it was formed. As there was reciprocity in the rendering and availing of services, there was clearly participation in the Pool; in terms of two Double Taxation Avoidance Agreements (between India and Germany and between India and the Netherlands) the profits from such participation were not taxable in India. While distinguishing the British Airways (supra) the Hon'ble High Court in case of KLM Royal Dutch Airlines & Lufthansa German Airlines (supra) extracted the Tribunal's decision as follows in para 31:

".....:

(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 permanent establishment in India was taxable as the same was not covered under the double taxation avoidance agreement.

(v) Article 8(2) of the Double Taxation Avoidance Agreement between India and UK provided that paragraph 1 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 Income-tax Appellate Tribunal by taking the dictionary meaning of the word "pool". These are missing in the two the double taxation avoidance agreements in question.

(vi) Article 8(3) of the Double Taxation Avoidance Agreement 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 activity directly connected with such transportation". These terms are not present in the two double taxation avoidance agreements 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.

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 or 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 double taxation avoidance agreements 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."

In the present case from the records, it can be seen that the Indian Branch office is merely a branch office of the foreign/assessee company, which is engaged in the operation of aircraft in international traffic. There are no specific services referred between the head office and the branch office as per the submissions of the assessee which appears to be correct and no distinguishing facts were brought on record by the Revenue before us. The entire receipts collected by the branch office are remitted to the head office, after meeting the local expenditure and the said receipt of the branch office are from the public at large and not from rendering of services to the head office. Thus, the assessee company is not having any permanent establishment in India. Therefore, the observation of the Assessing Officer that the assessee company is having permanent establishment in India and hence income arrived in India is taxable, is not correct finding according to the facts on record. Further, from the perusal of the submissions of both the parties and after going through the "International Airlines Technical Pool" (IATP) Agreement along with the Standard Handling Agreement in consonance with the DTAA between India and France, it can be seen that the assessee company is a member of IATP and the services provided by the assessee company to the relevant air companies were also the member of the IATP. There is no dispute on this aspect by the Assessing Officer in the assessment order though the Ld. DR is contending contrary that some of the airlines whom the services provided were not members of IATP. But that is not the case in the present Assessment Year. In fact as per Annexure "A" of IATP manual, it is evidently clear that there is no bar on member airline to provide service to non IATP Pool member and in fact, even non IATP Pool members if takes such service from a pool would be considered as a pool service to them. Thus the submission of the Ld. DR is factually incorrect. Now coming to the DTAA between India and France, it can be seen that Article 8(2) specifically mentions that the DTAA will apply to the profits derived by an enterprise of a Contracting State from the operation of aircraft in

international traffic from the participation in a pool, a joint business or an international operating agency and shall be taxable only in that Contracting States. In the present case, the contracting state is France and though under domestic law the assessee has to pay tax in India while deriving income from Indian territory, yet because of Article 8(2) of the DTAA agreement, Air France is exempted to pay any tax in India as its services/activities and profit thereof derives from pool participation. The Hon'ble High Court in case of KLM Royal Dutch Airlines & Lufthansa German Airlines (supra) clearly set out how the facts of the British Airways are distinguishable. In the present case, as well the ratio laid down in British Airways will not be applicable, as the assessee company is a member of IATP and the DTAA between India & France clearly set out that those who are members of pool are exempt from tax in India. Thus, the Assessing Officer was not right in rejecting the claim of the assessee that profit from technical handling services is covered by Article 8 and in treating the Technical Income as "fee for technical services" at Rs. 1,81,79,476/- covered u/s 115A read with Section 44D and taxed the same at 20% of the gross receipts. The CIT(A) rightly held that the assessee's income from ground handling and technical handling services is covered by Article 8 of the Indo-French DTAA. But the CIT(A) further held that income earned from rendering service to Iberworld a non IATP member amounting to Rs. 3,70,098 would be taxed under Article 7, that is what challenged before us by the assessee. The IATP manual clearly set out that there is no bar on member airline to provide service to non IATP Pool member and in fact, even non IATP Pool members if takes such service from a pool would be considered as a pool service to them. Thus, the assessee being a pool member and providing service in that capacity to the guest members comes under the purview of Article 8(2) of the DTAA between India and France. Therefore, the CIT(A) was not right in sustaining the taxability to the extent of Rs. 3,70,098 under Article 7 of the DTAA. Thus, appeal of the assessee is allowed."

9. No material difference in factual position has been brought to our notice by learned Departmental Representative between assessment years 2004-05, 2005-06 and 2006-07 and the present assessment years. Therefore, respectfully following the decision of the Coordinate Bench in assessee's own case, as discussed above, we hold that the income from technical handling services is not taxable in India as it is covered under Article 8(2) read with Article 8(1) of India – France DTAA. Accordingly, the additions made in all theses assessment years are directed to be deleted."

6. Respectfully following the decision (supra), the impugned addition is hereby deleted.

7. On the issue of taxability of interest income (ground No. 18) the Tribunal in its decision (supra) held that the fixed deposits made by the assessee are out of funds connected with the operation of aircraft in international traffic covered under Article 8(1) of India-France DTAA as the assessee has no other business. Therefore, the interest income will be covered under Article 8(3) of the India-France DTAA and hence not taxable. The findings of the Tribunal are recorded in para 16 and 17 of its order which are reproduced below:-

> *"16. We have considered rival submissions and perused the materials on record. It is evident, in course of proceedings before the departmental authorities, the assessee had emphasized that the interest income earned is on fixed deposits, either made out of surplus funds generated from its business of operating airlines in international traffic or from fixed deposits kept as security deposit with Airport Authority of India Ltd. The departmental authorities have not doubted or disputed this factual position. Assessee's claim has been rejected only on the ground that the interest income is not connected with the operation of aircraft in international traffic. Article 8(3) of Indian – France DTAA reads as under*
>
> > *"For the purpose of this Article, 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 12 shall not apply in relation to such interest."*
>
> *17. Undisputedly, it is a fact on record that the fixed deposits made by the assessee are out of funds connected with the operation of aircraft in international traffic, hence, covered under Article 8(1) as the assessee has no other business. Therefore, in our view, the interest earned on such fixed deposits will be covered under Article 8(3), hence, not taxable. Therefore, the Assessing Officer is directed to delete these additions in all the assessment years. These grounds are allowed. "*

8. Respectfully following the decision (supra) the Ld. Assessing Officer is directed to delete the impugned addition.

9. Initiation of penalty proceedings under section 271(1)(c)/271A & 271B (ground No. 19) being pre-mature does not require adjudication at this stage.

10. Levy of interest under section 234 of the Act (ground No. 20) is only consequential.

11. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 19th July, 2023.

sd/-	**sd/-**
(G.S. PANNU)	**(ASTHA CHANDRA)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 19/07/2023

Veena

Copy forwarded to -

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	