

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER**

**आ.अ.सं./I.T.A No.1012/Del/2016
निर्धारणवर्ष/Assessment Year:2012-13**

Malaysian Airline System Berhad 10 th Floor, Dr. Gopal Das Bhawan, 28, Barakhamba Road, New Delhi.	बनाम Vs.	DCIT (International Taxation), Circle 2(2)(1), 4 th Floor, Block E-2, Pratyaksh Kar Bhawan, Civic Centre, J.L. Nehru Marg, New Delhi.
PAN No. AAACM5033C		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

Assessee by	Shri None
Revenue by	Shri Vizay B. Vasanta, CIT DR

सुनवाईकीतारीख/ Date of hearing:	13.09.2023
उद्घोषणाकीतारीख/ Pronouncement on	08.12.2023

आदेश /O R D E R

PER C.N. PRASAD, J.M.

This appeal is filed by the assessee against the final assessment order dated 17.12.2015 passed by the Assessing Officer (for short "AO") u/s 143(3) r.w.s. 144C(1) of the Act pursuant to the

directions of DRP dated 06.11.2015 passed u/s 144C(5) of the Act.

The assessee raised the following grounds:

1. *“The proceeds of ground handling and other services provided in Malaysia by the Head Office of the appellant to Jet Airways and JetLite are not taxable in India. managerial/technical services in terms of Explanation 2 to section 9(1)(vii) of Income Tax Act or Article 13 of DTAA between India and Malaysia.*
 2. *The proceeds of ground handling and other services provided by the appellant’s Head Office in Malaysia to Jet Airways and JetLite are not managerial/technical services in terms of Explanation 2 to section 9(1)(vii) of Income Tax Act or Article 13 of DTAA between India and Malaysia.*
 3. *The Dispute Resolution Panel has not given the appellant an opportunity of being heard, in terms of section 144C(1) on the direction u/s 144C(5) to the Assessing Officer, while departing from the treatment of income of the Head Office in the draft assessment order.*
 4. *The Dispute Resolution Panel is not correct in holding that the profit from services provided by the head office of the appellant in Malaysia is not from operation of aircraft as referred to in section 44BBA of the Income Tax Act or Article 8 of the DTAA between India and Malaysia.*
 5. *The Assessing Officer is not justified in proposing to initiate penalty proceedings u/s 271(1)(c) as the appellant has acted bonafide.”*
2. In spite of several opportunities, the Counsel appeared sought time on one ground or the other. When the matter called for hearing on 08.08.2023 the Ld. Counsel sought adjournment and the

Bench observed that it is an old appeal and multiple adjournments were sought by the assessee in past and Ld. Counsel stated that in the absence of requisite information from the assessee the matter could not be presented and sought an opportunity to file the required information from the assessee company based in Malaysia. Accordingly, the matter was adjourned to 13.09.2023 at the request of the assessee's counsel. When the matter called for hearing on 13.09.2023 none appeared on behalf of the assessee. Therefore, we proceed to dispose of this appeal on hearing the Ld. DR on merits.

3. We have heard the Ld. DR. In ground nos. 1 to 4 of grounds of appeal the assessee challenged the order of the AO/DRP in holding that ground handling and other services provided in Malaysia by the Head Office of the assessee company to Jet Airways and JetLite are taxable in India. In the draft assessment order the AO proposed to treat receipts from Jet Airways India Ltd. and JetLite India Ltd. as taxable in India in the hands of the assessee as the payees namely Jet Airways India Ltd. and JetLite India Ltd. have deducted TDS on the payments made to the assessee observing as under:

“3. During the course of assessment, based on the assessment order for the assessment year 2011-12 and the transactions appearing in F.No. 26 AS, it has been found that the assessee has not offered the following

incomes to tax in India in the return of income filed by it:-

- Receipt of an amount of Rs.2,24,15,365/- and Rs.69,14,531/- against which TDS of Rs.22,41,533/- and Rs.6,91,452/- has been deducted by the Jet Airways India Ltd. and JetLite India Ltd. respectively.*
- Receipt of an amount of Rs.5,66,480/- as User Development Fee (UDF) which has not been offered for taxation in India.*

Therefore, a show cause was raised vide order sheet entry dated 12-02-2015 asking to show cause as to why the amount of collection charges on payment of UDF may not be charged to tax in India being an income not derived from the operation of aircraft in international traffic as in Article 8 of the DTAA. Similarly, a show cause was given asking why the amount received from Jet airways and JetLite on account of Technical support services provided to them in Kulalampore may not be charged to tax for the same reason as that of UDF as discussed above . In response to the show cause relating to UDF the assessee submitted vide letter dated 06-02-2015 and 19-02-2015 that User Development Fee. (UDF) are charged to passengers by the respective Airport Authorities or the Operators of the Airports for construction, management and operation etc of the airports. The Airlines operating from these airports collect such fee as part of the sale of tickets and remit the amounts to the respective airport operators/authorities and for this effort of theirs they are paid commission and this part of the collection they invariably retrain with them and make the rest of the payments to the operators. These are the same amounts of the commissions or charges that have been retained by the assessee. The assessee has further claimed that the UDF is not chargeable to tax in India under Article 8 of DTAA between India and Malaysia as UDF is included in the price of the ticket collected from the passenger and therefore collection charges received on account of UDF is very much related to the operation of Airlines.It has further been explained that the collection charges

are in the nature of discount and not an income in the hands of Indian Branch.”

4. The assessee replied to the proposal of the AO which read as under:

“With regard to payments made by Jet Airways and Jet Lite on which TDS had been deducted, by them, we wish to submit that both these parties had entered into an agreement with Malaysian Airline Head Office in Malaysia and since the Pan No. was to be provided to these parties as that being mandatory and since Head Office does not have a separate PAN No., so the PAN No. of India Branch Office of Malaysia Airlines was provided to them, on account of which the TDS deducted by them is getting reflected in Form 26AS.

It is however further confirmed that India Branch of Malaysian Airlines has nothing to do with this transaction and no service of my nature was provided by India branch office of Malaysian Airline to these parties which attracts any tax in India. The services had been provided by Mdaysim Airline Head Office in Kulalampur”

5. However, the AO rejected the contentions of the assessee and brought to tax the receipts from Jet Airways India Ltd. and JetLite India Ltd. as consideration received in the nature of fee for technical services and taxed at 10% on gross basis as per Article 13(2) of the Indo Malaysia DTAA observing as under: -

“It has further been replied by the assessee that in the assessment year 2011-12, an addition was proposed to be made and on preferring an appeal before Hon’ble DRP, it was held fey them that the payment received by the assessee in consideration of such services is in nature of fee for technical services (FTS) and the A.O. was directed to bring these payments- to tax on gross

basis @ 10% as prescribed in Article 13(2) of the relevant DTAA,, A similar point has been raised in reply dated 03-03-2015 alongwith the copy of the assessment order for the A.Y. 2011-12 where the A.O« has given effect to the findings of the Hon'ble DM9 as discussed above.”

6. The assessee filed objections before DRP and the DRP considering the submissions of the assessee directed the AO to bring the payments received by the assessee to tax on gross basis at 10% as per Article 13(2) of Indo Malaysia DTAA as fees for technical services observing as under:

“4. Grounds of Objection:

Contesting the draft assessment order in question passed u/s 144C(1) of the Act, the applicant has approached the Dispute Resolution Panel, for the settlement of its various grievances stating the following grounds which are simultaneously disposed off by us as under:-

Ground A: *The Assessing Officer is not justified in holding that the payment received by the assessee in consideration of Ground Handling and Technical Services provided in Malaysia by the Head Office of the assessee to Jet Airways and JetLite in the nature of fee for Technical Services and is taxable on gross basis @ 10% as prescribed in Article 13(2) of the Double Taxation Avoidance Agreement between India and Malaysia.*

Ground B: *The Assessing Officer is not correct in stating that for the technical services provided by the Head Office of the Assessee in Kuala Lumpur, Malaysia, the fee has been received in India. It is, therefore, only the income has been brought to tax as ‘Fee for Technical Service’ in India.*

Ground C: *The Assessing Officer has not appreciated that the assessee has not received any income in India for the services provided by their Head Office in Kuala Lumpur, Malaysia but while remitting the fee by Jet Airways and JetLite to Head Office they have considered the PAN No. of the assessee allotted to them in India by virtue of which these transactions of fee for services are appearing in Form 26AS.*

Ground D: *The Assessing Officer has totally gone wrong by bringing to tax the Revenue which has been arisen on account of services provided by the Head Office of the assessee outside India on which income he has no Jurisdiction.*

DRP's Findings: *Grounds A to D being common and complementary to each other are taken up together for disposal by us.*

The assessee's objection is to the treatment of "ground handling and technical Services" provided in Malaysia by the Head Office of the assessee to M/s Jet Airways & JetLite as "Fees for technical Services" taxable on gross basis @ 10% as prescribed under Article 13(2) of the Double Taxable Avoidance Agreement between India & Malaysia. The assessee's contention in support of its argument that the ground handling and technical services provided by the AEs' Head Office in Malaysia were not taxable, was that the income from the above, did not arise or was received in India. The services having been performed in Malaysia were not liable to be brought to tax.

The above arguments of the assessee were given a careful by us. After a careful consideration the Panel is of the firm view that the above receipts were taxable as "Fees for Technical Services".

It is an undisputed fact that the assessee had a project office in India at the relevant point of time. It is also an admitted fact that the assessee had entered into contracts with M/s Jet Airways & M/s JetLite in India. It is also an undisputed fact that the afore mentioned parties of India had entered into contracts with the

assessee for obtaining "handling and other services" in Malaysia from the assessee through their Head Office in Malaysia for their flights to Malaysia.

Further, perusal of Paragraph 1 of the agreement show that various services to be provided by the assessee are in nature of managerial / technical services both as per provisions of Explanation 2 to section 9(1)(vii) of the Act and Article 13 of Indo-Malaysia DTAA. Therefore, payment received by the assessee in consideration of such services is in nature of fee for technical services (FTS). The AO is therefore directed to bring these payments to tax on gross basis @ 10% as prescribed in Article 13(2) of relevant DTAA. This ground is disposed off accordingly.

In the aforesaid promises, the income earned by the assessee abroad is held as "Fees for Technical Services". The AO's interference needs no interference. The same issue was there before the DRP in the case for AY 2011-12, which was decided against the assessee. Following the same, the ground is dismissed."

7. Following the observations of the DRP the AO passed final assessment order bringing to tax the receipts on account of handling and other services provided in Malaysia by head office of the assessee to Jet Airways and JetLite as taxable in India.

8. On careful observations of the directions of the DRP and in the absence of any rebuttal of the findings of either the DRP directions or the final assessment order passed by the AO, we see no merit in the grounds raised by the assessee. Accordingly sustaining the order of the Ld.CIT(A), we reject ground nos. 1 to 4 of the assessee.

9. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 08/12/2023

Sd/-
(G.S. PANNU)
VICE PRESIDENT

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 08/12/2023

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT
(DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi