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TAX FLASH NEWS

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Income from technical handling services provided by a foreign airline company to the International Airlines Technical Pool is not taxable in India under the India-France tax treaty

The Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Air France[1] (the taxpayer) dealt with an issue of taxability of income from rendering 'technical handling' services to the International Airlines Technical Pool (IATP) through branch office in India. The Tribunal held that the profit from technical handling services is covered under Article 8(2)[2] of the India-France tax treaty (tax treaty) and the taxpayer is exempt to pay any tax in India as its services/activities and profit thereof were derived from a pool participation. Therefore, it is not taxable as Fee for Technical Services (FTS) in India.

Facts of the case

The taxpayer is a foreign company, engaged in the operation of aircraft in international traffic. The taxpayer is member of IATP. As an IATP member, the taxpayer extends technical facilities (line maintenance facilities) to other IATP Members only. No such facility or service has been provided by the taxpayer to any non-IATP Member. The taxpayer rendered services through branch office. Indian branch is merely a branch office of the foreign company, which is engaged in the operation of aircraft in international traffic. There were no specific services rendered between the head office and the branch office. During the assessment year 2006-07, the taxpayer derived income from the following sources:

- Carriage of passage
- Carriage of cargo
- Interest income from funds directly connected with the operation of aircraft in International Traffic
- Income from technical handling to other IATP Pool Members.

The taxpayer claimed that the above income was not taxable under Article 8 of the tax treaty since the entire revenue receipts were from operation of aircraft in international traffic. The technical handling services were provided by the taxpayer to only ITAP pool members and thus not liable to tax in India under Article 8 of the tax treaty.

The AO taxed the income from technical handling as FTS under Section 115A read with Section 44D of the Income-tax Act, 1961 at 20 per cent of the gross receipts. The Commissioner of Income-tax (Appeals) [CIT(A) held the decision in favour of the taxpayer.

Tribunal's decision

The Tribunal observed that no specific services were rendered between the head office and the branch office. The entire receipts collected by the branch office were 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 taxpayer was not having any PE in India.

The Delhi High Court in case of KLM Royal Dutch Airlines & Lufthansa German Airlines[3] had observed that the taxpayer participated in the international Airlines Technical Pool and earned certain revenues from such activities. 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. There was clearly a participation in the Pool and the profits from such participation were not taxable in India under the relevant tax treaties[4]. The Court distinguished the decision in the case of British Airways[5].

[1] Air France v. ACIT [I.T.A. No. 5008/DEL/2011 (A.Y 2004-05)] -Taxsutra.com
[2] Article 8 - 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. These provisions shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

[3] DIT v. KLM Royal Dutch Airlines & Lufthansa German Airlines [2017] 392 ITR 218 (Del)
[4] India-Germany and India-Netherlands tax treaty
[5] British Airways PLC v. DCIT (ITA No. 4653 to 4655/DEL/1999, 484 486/DEL/2000 order dated 24 September 2001)

The ratio laid down in the case of British Airways does not apply in the present case because the taxpayer was a member of IATP, and the tax treaty clearly provides that those who are members of pool are exempt from tax in India. Thus, the profit from technical handling services was covered under Article 8 of the tax treaty and it cannot be treated as FTS. Further it was not taxable under Section 115A read with Section 44D at 20 per cent of the gross receipts.

The taxpayer is a member of IATP, and the services provided by the taxpayer to the relevant air companies were also the member of the IATP. On reference to 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 take such service from a pool would be considered as a pool service to them. In the present case, the contracting state is France and though under domestic law the taxpayer has to pay tax in India while deriving income from Indian territory, because of Article 8(2) of the tax treaty, the taxpayer is exempt to pay any tax in India as its services/activities and profit thereof were derived from a pool participation.

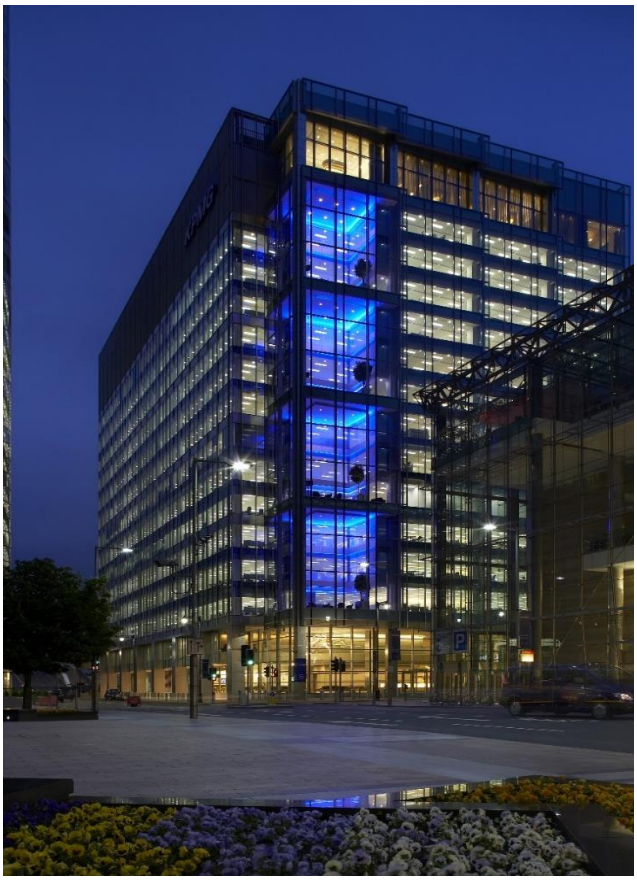
Our comments

The issue that whether the technical handling services are part of the business from the operation of aircraft in international traffic and thus taxable in the resident state of Air Travel company has been a subject matter of debate before the Courts/Tribunal.

The Courts/Tribunal in some of the cases[6] have held that amounts received by foreign airlines from the provision of technical facilities/ services to other airlines at Indian airports were not chargeable to tax in India as per Article 8 of the India-Germany tax treaty and India-Netherlands tax treaty. The Court/Tribunal had held that there was a clear reciprocity between the participating members in rendering and availing of services, and hence, there was a clear participation in a 'pool'. As a result, the income from participation in the 'pool' could not be taxable in India.

However, the Delhi Tribunal[7] had held that such type of income cannot be considered to be operation of aircraft in international traffic or pooling activity and denied the benefit of Article 8 of the India-UK tax treaty.

The Tribunal in the present case, while distinguishing the decision in the case of British Airways PLC, held that the profit from technical handling services is covered by Article 8(2) of the India-France tax treaty and thus not taxable in India.



[6] DIT v. KLM Royal Dutch Airlines & Lufthansa German Airlines [2017] 392 ITR 218 (Del), DIT v. Lufthansa German Airlines (ITA 627/2016) (Del)
[7] British Airways PLC v. DCIT (ITA No. 4653 to 4655/DEL/1999, 484 486/DEL/2000, dated 24 September 2001)

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