

CNK & Associates LLP

News Flash

Technical handling services provided by International Airline under pooling arrangement are exempt from tax in India under Article 8(2) of India-France DTAA

Air France Vs Addl. CIT (TS-246-ITAT-2020 (Del)) – (in favor of assessee)

Facts:

Air France (assessee) is a foreign company engaged in the operation of aircraft in international traffic and is a tax resident of France. The assessee derived income in India from:

- i. carriage of passenger and cargo,
- ii. Interest income from funds directly connected with operation of aircraft in international traffic
- iii. Income from technical handling to other International Airlines Technical Pool (IATP) Pool Members.

During the year under consideration, the assessee filed NIL return of income claiming the entire income earned in India was exempt from taxation under Article 8 of the India-France DTAA r.w. Section 90 of the Income-tax Act, 1961 (the Act). The Assessing Officer (AO) passed the assessment order treating the income from technical services as covered u/s 115A r.w.s 44D and taxed the same at @20% of gross receipts. The Commissioner of Income-tax- Appeals [CIT (A)] held that only service to non-member would be taxable under Article 7 as business profits thereby granting partial relief.

Aggrieved, the assessee filed appeal before the Delhi Tribunal. The assessee contended as under:

- i. Only technical handling services were undertaken and no ground handling activity was undertaken or carried out by the assessee.
- ii. The case of assessee was squarely covered by decision of honorable Delhi High Court in case of Lufthansa German Airlines¹.
- iii. Rendering technical handling services to IATP Members is a pooling activity, not liable to be taxed in India. During the year under consideration, the assessee had serviced only one airline i.e. Iberworld, who was not a member airline but was of the status of a guest airlines covered under the IATP pool.

On the other hand, the contentions of revenue were as under:

- i. Although the assessee had claimed that it had provided 'Technical Handling' services as per the agreements produced, the nature of services has been described as “Ground Handling”.
- ii. The assessee provides its services both to airlines who are members of International Air Transport Association /IATP as well as members who are not members of IATP.

¹ TS-35-HC-2017(DEL)

- iii. 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 was an independent commercial and business activity which was in no way ancillary or connected to the business of operation of aircraft as defined by Article 8(4) of the India-France DTAA.

Held:

On perusal of the Annexure “A” of IATP manual, it was evidently clear that there was no bar on member airline to provide service to non-IATP Pool member. In fact, even if non-IATP Pool members take such service from a pool, it would be considered as a pool service to them.

The Delhi Tribunal also observed that the Indian Branch was merely a branch office of the foreign assessee company, which was engaged in the operation of aircraft in international traffic. There were no specific services referred between the head office (HO) and the branch office. The entire receipts collected by the branch office were remitted to HO, after meeting the local expenditure and the said receipt of the branch office were from the public at large and not from rendering of services to the HO. Thus, the assessee was not having any permanent establishment (PE) in India.

Article 8(2) of the India-France DTAA provides for tax exemption to profits from operation of aircraft in international traffic including participation in a pool, a joint business or an international operating agency. Accordingly, relying on Delhi High Court decision in case of Lufthansa German Airlines¹, Delhi Tribunal held that 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 India-France DTAA, assessee is exempted to pay any tax in India as its services/activities and profit thereof derives from pool participation. The Delhi Tribunal also distinguished the ratio of British Airways Plc² relied on by the revenue on the ground that assessee is a member of IATP and India-France DTAA specifically exempts members of pool from tax in India.

CNK Comments:

This decision may assist foreign airlines in India which provided similar services under a pooling arrangement. However, due care should be given to the fact that the Delhi tribunal has analyzed the facts of the case in detail, including IATP manual, before providing its decision. Accordingly, placing reliance on this decision should be supported by adequate facts and documentation. Also, the observation of the Delhi tribunal in relation to non-existence of PE in India seems directed towards the revenue’s argument of taxing the profits under Article 7 which requires a PE in India. This seems to be the natural explanation; as otherwise, the assessee does have a PE in India in form of its branch office. The reason why the profits of the branch / PE are not taxable in India is on account of the specific exemption provided under Article 8 of the India- France DTAA to activities of operating aircraft in international traffic and other activities related to such activity.

² ITA 3098/del/2009

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