

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

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 5008/DEL/2011 (A.Y 2004-05)

AND

I.T.A. No. 5009/Del/2011(A. Y 2005-06)

Air France LB-46,Prakash Deep Building 7, Tolstoy Marg New Delhi AAACA5284B (APPELLANT)	Vs	Addl. CIT International Taxation Circle-1 New Delhi (RESPONDENT)
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**ITA No. 1786/DEL/2012
(Assessment Year - 2006-07)**

Air France, LB-46, Prakash Deep Building, 7, Tolstoy Marg New Delhi (PAN : AAACA 5284 B) (APPELLANT)	Vs	ADIT Circle - 1(1), New Delhi. (RESPONDENT)
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**AND
ITA No. 2212/DEL/2012
(Assessment Year - 2006-07)**

ADIT, Circle - 1(1), International Taxation, 204, Drum Shaped Building, I.P. Estate, New Delhi – 110 002 (APPELLANT)	Vs	Air France, LB-46, Prakash Deep Building, 7, Tolstoy Marg New Delhi. (RESPONDENT)
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Appellant by	Sh. Salil Aggarwal, Adv.
Respondent by	Sh. G. K. Dhall, CIT-DR (Int. Tax.)

Date of Hearing	25.02.2020
Date of Pronouncement	22.05.2020

ORDER

PER SUCHITRA KAMBLE, JM

There are two appeals which are filed by the Assessee against the assessment order dated 04/10/2011 passed by the Assessing Officer u/s 143 (3) read with Section 144C of the Income Tax Act, 1961 as confirmed by the DRP vide its order dated 02.08.2011 for Assessment Year 2004-05 & 2005-06 respectively and two appeals are filed by the Assessee and Revenue against the orders dated 06.02.2012 passed by CIT(A)-XI, New Delhi for Assessment Year 2006-07.

2. Firstly we are taking up appeals for A.Y. 2006-07 being ITA No. 1786/Del/2012 and ITA No. 2212/Del/2012 as the same was argued firstly by the both the parties. The Grounds of appeal are as under:-

ITA No. 1786/Del/2012 (assessee's appeal)

1. *"That the Learned CIT (A) has grossly erred in not appreciating the true and correct facts of the case before passing the impugned order.*
2. *That the Learned CIT (A) has grossly erred in not appreciating that the appellant does not render any ground handling services and only render technical handling services even though it has been held that both are covered under Article 8 of the DTAA if rendered to IATP Pool Members.*
3. *That the Learned CIT (A) has grossly erred in concluding that the services rendered to one non IATP pool member would be taxable in the hands of the appellant to the extent of the revenue earned from the said customer under Article 7 of the DTAA.*
4. *That the appellant seeks to alter, modify and add any of the around as the case may be."*

ITA No. 2212/Del/2012 (revenue's appeal)

1. *"On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,78,09,378/- made by the AO, by holding the assessee's income from ground handling and technical*

handling services to third party airlines are within the ambit of 'operation of aircraft' in International traffic and hence covered by Article 8 of Indo-French DTAA.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO on account of receipts from rendering engineering and ground handling services to third party airlines, even though such receipts are not covered under Article 8 of the Double Taxation Avoidance Agreement between India and France.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO on account of receipts from rendering engineering and ground handling services to third party airlines are not directly connected to operation of aircrafts in international traffic as envisaged in Article 8 of the Indo- France DTAA and accordingly, the receipts from such activities are taxable in India.

4. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the addition made by the AO on account of receipts from rendering engineering and ground handling services to third party airlines, by relying upon the decisions of ITAT, New Delhi in the cases of Lufthansa German Airlines and KLM Royal Dutch Airlines, while ignoring the decision of the Hon'ble ITAT in the case of British Airways Plc (ITA 3098/del/2009, dated 30.10.2009), which is squarely applicable in the present case.

5. The appellant craves to add, amend, modify or alter any grounds of appeal at the time or before the hearing of the appeal."

3. During the hearing, the Ld. DR pointed out that tax limit in appeal being ITA No.2212/Del/2012 filed by the Revenue is below Rs. 50 lakhs which squarely falls within the ambit of Circular No. 17/2019 dated 08.08.2019 issued by the Central Board of Direct Taxes prescribing the tax effect for preferring appeals before Tribunal by the revenue and subsequent clarification issued by CBDT on 20th August, 2019. Therefore, ITA No.2212/Del/2012 filed by the Revenue is dismissed.

4. Now we are taking up ITA No. 1786/Del/2012. The assessee is a foreign company, engaged in the operation of aircraft in international traffic. The assessee is a tax resident of France and is liable for taxation in France. The assessee filed its return of income for A.Y. 2006-07 on 31st March 2008, declaring Nil taxable income as the assessee claimed that the entire income earned by the assessee in India is exempt from taxation under Section 90 of the Income Tax Act, 1961. Thereafter, the case of the assessee was fixed for scrutiny u/s 143(2). The assessee in India derives

income from the following sources;

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

During the course of assessment, the assessee was directed to furnish details in respect of the Technical Handling undertaken by it for other carriers along with the details of income from cargo passage and interest etc. The assessee furnished the details. The assessee submitted that the case of the assessee was squarely covered by the judgment of the Tribunal in case of Lufthansa German Airlines (90 ITD 310) and since the assessee was rendering Technical Handling services only to IATP Pool Members, it is a pooling activity and not liable to be taxed in India. The Assessing Officer passed an assessment order thereby 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.

5. Being aggrieved by the assessment order the assessee filed an appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

6. The Ld. AR submitted that as per the general rules specified under the IATP manual, wherein, for activities covered, under “ground maintenance equipment and aircraft recovery” is identified under standard agreements is “E” whereas the identification to be affixed on such standard agreements at the time of entering into such agreements by the member airlines for line maintenance services, the code is to be used “L” and which has been consistently done and followed by the assessee airlines. Everywhere on the agreement and the description of the services being made is that of Technical Services. Thus it is clear that no ‘Ground

Handling Activity' is undertaken or carried out by the assessee Airlines. The Ld. AR further submitted that only 'Technical Handling Services' has been undertaken. Local company with AF (HO) as a shareholder and a Local Indian company as the other shareholder had floated a Pvt. Ltd. Co. in the name and style of Air France Ground Handling India Pvt. Ltd. which was for the object and main purpose of being undertaking 'Ground Handling Activities' and not 'Technical Handling Activities'. This was a separate entity incorporated under Companies Act, 1956 and was for 'Ground Handling Services' which never took off and was wound up subsequently. The assessee airlines is providing services on a per-flight basis. The services offered by the assessee airlines varies in quality and coverage and it is offering facilities like "storage" to some of the airlines, "Loan of Equipment" to some airlines providing "qualified man power" etc. to different airlines. The Ld. AR further submitted that the rates charged by the servicing airlines to the service receiver airlines is dependent on number of flights handled, discount offered due to handling number of flights and determination of cost sharing rules, which is determined according to the general rules of the IATP manual. Wherein, based on number of flights handled, global flights handled and agreement between airlines under the pooling arrangement charge applicable rates, as may be determined by the member airlines and it is not the case wherein, by charging varied rates, the member airlines do not fall part of the IATP pool. The IATP does not prescribe the rates to be charged from other member Airlines. During the Assessment Year 2006-07, the assessee airlines 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. The Ld. AR further submitted that ad-hoc agreements with Etihad Airlines, Air Canada, Jet Airways, Air India, TNT Airways and Cambata Aviation etc. have been entered into, has mentioned by the Revenue. Thus airlines with which commencement of contract with third parties provided technical assistance during F.Y. 2006-07. The Ld. AR submitted that even ad-hoc basis agreements are agreements which are not continuous in

nature and are for a limited time period and entered of and on by the member airlines depending on the requirements and was not without any agreements. The Ld. AR submitted that the IATP Manual provides raising direct invoices between member airlines as per manual and hence such invoices are in accordance with the IATP manual. The Ld. AR further submitted that deduction of TDS is merely a recovery procedure and not a levy of tax. There are only notional credits and debits between the member airlines and there is no transaction of money and provision of TDS does not make any receipt as taxable. The Ld. AR further submitted that service tax is a levy which is different from Income Tax Act and is levied on services being provided by one part to another and such services are chargeable to service tax in India. In the instant case, it is not a dispute and other services being rendered by assessee airlines but on the other hand, the dispute is whether the services rendered by the assessee airlines is part and parcel as pool arrangement and subjected to tax at home base rather than source. It is not a dispute as to whether service has been rendered by assessee airlines to other airlines or not. The Ld. AR further submitted that no monies were paid or received in India on account of services rendered by the assessee airlines to other airlines which are part and parcel of pool. But only notional credits and debits are given through pool accounting mechanism i.e. IATA Clearing House. The facilities extended by the assessee airlines are in the nature of line maintenance facilities and these are predominantly with the view to assist the airlines as a means of collaborating the air transport enterprises. The Ld. AR relied upon the decision of the Tribunal in case of Luftansa German Airlines 90 ITD 310 and since the assessee was rendering Technical Handling Services to IATP Pool Members, it is a pooling activity and not liable to be taxed in India. The Ld. AR also relied upon the decision of KLM Royal Dutch Airlines decided in ITA No. 403 & 404/DEL/2010 and ITA No. 4811/Del/2010 of the Tribunal and the Hon'ble High Court decision in case of DIT vs. KLM Royal Dutch Airlines & Lufthansa German Airlines (2017) 392 ITR 218 (Del.). The Ld. AR also furnished the comparison of the

DTAA between UK, Netherlands, Germany and France. The Ld. AR submitted that the provisions of Article 8(4) of the Indo – German Treaty and Article 8(2) of the Indo – France Treaty and Article 8(3) of the Indo – Netherlands Treaty are identically worded as under:-

“The provisions of paragraph 1 shall also apply from the participation in a joint business or an international operating agency.”

Whereas the Article 8(2) of the Indo – UK Treaty is differently worded as under:-

“The provision of paragraph 1 of this Article shall likewise apply in respect of participation in pools of any kind enterprises engaged in air transport.”

Thus, the Ld. AR submitted that the CIT(A) was not right in sustaining taxability to the extent of Rs. 3,70,098/- under Article 7 of the DTAA and rejecting the claim of Article 8 of the DTAA.

7. The Ld. DR submitted that one of the activities from which assessee derived income during the years under appeal is Technical Handling. Although the assessee has been claiming that it has provided ‘Technical Handling’ services as per the agreements produced, the nature of services has been described as “Ground Handling”. The assessee provides its services on a ‘per-flight’ basis for fixed duration. The services on offer also vary on quality and coverage. The Ld. DR further submitted that the assessee also provides a multitude of other facilities. The assessee does not follow a uniform pricing policy for the services provided by it and the rates charged for the same type of Aircraft i.e. A-330 vary from airlines to airlines. Similarly, there are different rates on the basis of duration of services as well as for additional services as reflected in the table produced during the hearing. The Ld. DR further submitted 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 assessee also provides its services under bilateral service agreements as well as on an ad-hoc

basis without any agreements. The assessee raised direct invoices specifying the amount payable on the basis of actual usage of services as well as the period i.e. 30 days within which such amount is payable. The assessee also receives service charges directly from the service recipients. The agreements for the provision of services with certain Airlines have inbuilt provision for TDS and Austrian Airlines have deducted TDS too. Similarly, amount received from Austrian Airlines and others are subjected to Service Tax. The agreement with Singapore Airlines has inbuilt "Termination Clause" as well as provision for "Annual Pricing Review". The agreement with Singapore Airlines & Austrian Airlines also provides for the sub-contract of the services to KLM. However, while the assessee charges US Dollar 625 & Euro 340 from Singapore & Austrian Airlines respectively for its services. The assessee also promoted a JV named Air France Ground Handling Pvt. Ltd. with Interglobe to assist it in the provision of ground handling services and pays to the said concern for the same. The activities involving provision of services and facilities are not only restricted to Delhi but has also taken commercial space at other airports like Chennai, Banalore & Mumbai as per its website. Thus services are offered at these stations as well. As evident from the above the bilateral agreements between the assessee and other airlines are varied both in terms of the nature and quality of services provided, service charges as well as other services conditions and no two agreements are identical. The result of the above well organized, independent and parallel commercial/business structure is the sure and constant increase in the Revenue earned from the provision of services and facilities over the years. The assessee is also a member of various other pools like IATA Fuel Quality Pool (IFQP), IATA's Safety Audit of Ground Operations (ISAGO) which is an internationally recognized system for assessing the operational management and control systems of an organization that provides ground handling services for airlines and European Line Maintenance Organization (ELMO). The Ld. DR relied upon the decision of British Airways PLC vs. DCIT (ITA No. 4653 to 4655/DEL/1999, 484 to

486/DEL/2000 order dated 24.09.2001) 2003-TII-23-ITAT-DEL-INTL.

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 B 1 1 valid 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)

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

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. In result, appeal being ITA No. 1786/Del/2012 filed by the assessee is allowed and appeal being ITA No. 2212/Del/2012 filed by the Revenue is dismissed.

10. Now we are taking up Grounds of appeal for A.Y. 2004-05 and 2005-06

I.T.A. No. 5008/DEL/2011

The Assessment order dated 04/10/2011 as confirmed by the dispute resolution panel vide its order dated 02/08/2011 wherein the income of the assessee has been assessed at 12,89,056/- is being challenged to by the assessee under the Provisions of Section 253 of the Act, on the following grounds:-

- 1. That the order passed u/s 143(3), as directed under section 144C(13) has been passed without appreciating the true and correct facts and the legal position of the instant case.*
- 2. That the order passed u/s 143(3) along with section 144C(13) is time barred in as much as the order has been received on 17-10-2011 by the appellant company, which is beyond the period of one month as envisaged under the provisions of section 144C(13) and to that extent is bad in law.*
- 3. That the Learned Addl. Director of Income Tax has wrongly assumed*

jurisdiction u/s 148 of the Income Tax in as much there was no reason believe that there has been Income Escaping assessment within the meaning of section 147.

4. That the assessee objects to the passing of the order u/s 148 read with section 143(3) of the Act as there was no fresh material on record by virtue of which it could be said that there has been Income Escaping assessment within the meaning of section 147.

5. That the Learned Addl. Director of Income Tax, in the assessment order as per directions issued by the Dispute Resolution panel have failed to appreciate the true and correct facts and circumstances of the case of the appellant and has framed an assessment by making additions on a issue which is already covered in favour of the appellant company by the judgment of this Hon'ble ITAT in case of Luftansa German Airlines reported in 90 ITD page 310 as also the case of KLM Royal Dutch Airlines.

6. That the Learned Addl. Director of Income Tax in assessment order has grossly erred in holding that the income by way of adjustment of book entries is liable to be taxed in India.

7. That the Learned Addl. Director of Income Tax in assessment order has failed to appreciate the fact that the income earned from technical handling was covered by the Double Taxation Avoidance Agreement between India and France and as such was exempt income and could not have been brought to tax in India.

8. That the Learned Addl. Director of Income Tax in the assessment order has grossly erred in not appreciating the fact that the case of the appellant is pari-materia to the case of Lufthansa German Airways and totally distinguishable from the facts and circumstances of the case of British Airways Pic. and has totally ignored and brushed aside the replies and details filed by the appellant in this regard.

9. That the Learned Addl. Director of Income Tax in assessment order has grossly erred in relying upon the Judgment of the Hon'ble Tribunal in the case of British Airways Pic which Judgment in any case is totally distinguishable from the facts and circumstances of the appellant company

and completely inapplicable to the facts and circumstances of the appellant.

10. *That the Learned Addl. Director of Income Tax has grossly erred in not appreciating the commentary of OECD relied upon by the appellant and has further erred in observing that OECD commentary is not binding on India as India is not a member of OECD. In the process has ignored various judgments and pronouncements passed by various courts upholding the contrary view of the courts and other appellate authorities on the issue.*

11. *That the Learned Addl. Director of Income Tax in assessment order has grossly erred in not appreciating that OECD commentary is the guiding principal for Indian court as has been held in the Judicial pronouncements relied upon by the appellant company.*

12. *That the Addl. Director of Income Tax has grossly erred in interpreting the provisions of the DTAA in a very narrow and one sided manner contrary to various Judgments and pronouncements by various courts on similar issue.*

13. *The learned Addl. Director has completely misread and misunderstood the provisions of Article-8(1), Article-8(1), Article-8(3) and Article - 8(4) of DTAA between India France and has grossly erred in applying the same to the facts and circumstances of the appellant company.*

14. *That Learned Addl. Director in assessment order has grossly erred in concluding that Pool activity of Airlines is not part of Operation of Aircraft in International Traffic.*

15. *That the Learned Addl. Director has completely ignored the fact that only revenue pool envisaged in the aviation industry which affects the appellant company is IATP pool. That too is duly recognized and covered under Article 8 of DTAA and income arising there from is exempt from taxation in India.*

16. *That the Learned Addl. Director and the dispute resolution panel*

has grossly erred in proposing to tax revenue earned by the appellant under the Provisions of Article 7 of the DTAA between India & France. Although the same is covered under Article 8 of the DTAA.

17. *That the Learned Addl. Director in the assessment order notwithstanding and without prejudice has grossly erred in estimating expenses incurred at 40% of the earnings and which in any case is without any basis and is completely arbitrary.*

18. *That the Learned Addl. Director has grossly erred in treating the income, from technical handling accruing to the appellant during the year under consideration, as being covered under Article 7 while as in the A.Y 2007-08 year the same had been taxed by the very same Assessing Officer under Article 13 of the DTAA as fees for technical service.*

19. *That the Learned Addl. Director of Income Tax in assessment order has grossly erred in initiating penalty proceedings u/s 271 (1) (c).*

20. *That the Learned Addl. Commissioner has in assessment order grossly erred in charging interest u/s 234 of the Income Tax Act.*

21. *That the Appellant may add, alter, and amend any of if so required.*

ITA No. 5009/Del/2011

The Assessment order dated 04/10/2011 as confirmed by the dispute resolution panel vide its order dated 02/08/2011 wherein the income of the assessee has been assessed at 12,89,056/- is being challenged to by the assessee under the Provisions of Section 253 of the Act, on the following grounds:-

- 1. That the order passed u/s 143(3), as directed under section 144C(13) has been passed without appreciating the true and correct facts and the legal position of the instant case.*
- 2. That the order passed u/s 143(3) along with section 144C(13) is time barred in as much as the order has been received on 17-10-2011 by the appellant company, which is beyond the period of one month as envisaged under the provisions of section 144C(13) and to that extent is bad in law.*
- 3. That the Learned Addl. Director of Income Tax has wrongly assumed*

jurisdiction u/s 148 of the Income Tax in as much there was no reason believe that there has been Income Escaping assessment within the meaning of section 147.

4. That the assessee objects to the passing of the order u/s 148 read with section 143(3) of the Act as there was no fresh material on record by virtue of which it could be said that there has been Income Escaping assessment within the meaning of section 147.

5. That the Learned Addl. Director of Income Tax, in the assessment order as per directions issued by the Dispute Resolution panel have failed to appreciate the true and correct facts and circumstances of the case of the appellant and has framed an assessment by making additions on a issue which is already covered in favour of the appellant company by the judgment of this Hon'ble ITAT in case of Luftansa German Airlines reported in 90 ITD page 310 as also the case of KLM Royal Dutch Airlines.

6. That the Learned Addl. Director of Income Tax in assessment order has grossly erred in holding that the income by way of adjustment of book entries is liable to be taxed in India.

7. That the Learned Addl. Director of Income Tax in assessment order has failed to appreciate the fact that the income earned from technical handling was covered by the Double Taxation Avoidance Agreement between India and France and as such was exempt income and could not have been brought to tax in India.

8. That the Learned Addl. Director of Income Tax in the assessment order has grossly erred in not appreciating the fact that the case of the appellant is pari-materia to the case of Lufthansa German Airways and totally distinguishable from the facts and circumstances of the case of British Airways Pic. and has totally ignored and brushed aside the replies and details filed by the appellant in this regard.

9. That the Learned Addl. Director of Income Tax in assessment order has grossly erred in relying upon the Judgment of the Hon'ble Tribunal in the case of British Airways Pic which Judgment in any case is totally distinguishable from the facts and circumstances of the appellant company

and completely inapplicable to the facts and circumstances of the appellant.

10. *That the Learned Addl. Director of Income Tax has grossly erred in not appreciating the commentary of OECD relied upon by the appellant and has further erred in observing that OECD commentary is not binding on India as India is not a member of OECD. In the process has ignored various judgments and pronouncements passed by various courts upholding the contrary view of the courts and other appellate authorities on the issue.*

11. *That the Learned Addl. Director of Income Tax in assessment order has grossly erred in not appreciating that OECD commentary is the guiding principal for Indian court as has been held in the Judicial pronouncements relied upon by the appellant company.*

12. *That the Addl. Director of Income Tax has grossly erred in interpreting the provisions of the DTAA in a very narrow and one sided manner contrary to various Judgments and pronouncements by various courts on similar issue.*

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has grossly erred in proposing to tax revenue earned by the appellant under the Provisions of Article 7 of the DTAA between India & France. Although the same is covered under Article 8 of the DTAA.

17. *That the Learned Addl. Director in the assessment order notwithstanding and without prejudice has grossly erred in estimating expenses incurred at 40% of the earnings and which in any case is without any basis and is completely arbitrary.*

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19. *That the Learned Addl. Director of Income Tax in assessment order has grossly erred in initiating penalty proceedings u/s 271 (1) (c).*

20. *That the Learned Addl. Director of Income Tax in assessment order has grossly erred in initiating penalty proceedings u/s 271A and 271B.*

21. *That the Learned Addl. Commissioner has in assessment order grossly erred in charging interest u/s 234 of the Income Tax Act.*

21. *That the Appellant may add, alter, and amend any of if so required.*

11. The facts for both the Assessment Years 2004-05 and 2005-06 are identical, therefore, we are firstly taking up ITA No. 5008/DEL/2011. The assessee renders Technical and Engineering Handling Services to other air lines over and above its regular air transportation business. Engineering and Technical Handling Services are rendered by the assessee through its engineers to other airlines. The Assessing Officer held that these services are not covered under the head air transport business and, therefore, the income of the assessee is not covered under Article 8 of Indo-French DTAA. The Assessing Officer also held that the activity is not a cool activity. The Assessing Officer further held that the term bill and joint business are only related to preservation of passenger and goods transport and by no means

coverer separate business activities. The assessee filed objections to the draft order on 24/1/2011. The DRP vide order dated 2/8/2011 passed direction u/s 144C(5) of the Income Tax Act, 1961 thereby disposing of the objections of the assessee. Vide assumption order dated 4/10/2011. The Assessing Officer rejected the claim of the assessee that profit from Technical Handling Services is covered by Article 8. The Assessing Officer held that since assessee has a permanent establishment in India profits of assessee are taxable in India. The Assessing Officer further held that 'fees for technical services' are effectively connected with the permanent establishment as the services are being rendered by personal located in India, provisions of Article 7 of the DTAA are applicable and thus incurring of expenses is computed on estimated basis as was done in 2007-08 & 2008-09 at 60% of gross receipts of Rs.21,48,427/- from other airlines on account of maintenance and technical services which amounts to Rs.12,089,56/- for Assessment Year 2004-05 and Rs. 34,63,105/- for Assessment Year 2005-06.

12. During the course of arguments, the assessee argued Assessment Year 2006-07 firstly which is dealt on merit hereinabove paras and thereafter argued Assessment Year 2004-05 & 2005-06. The Ld. AR has not pressed Ground No. 2 for A.Y. 2004-05 and 2005-06 in both these appeals. Therefore, Ground No. 2 in both the appeals for A.Y. 2004-05 and 2005-06 are dismissed.

13. The Ld. AR submitted that the assumption of jurisdiction by the Assessing Officer who resorted to passing the impugned orders by initiating proceedings u/s 148 of the Act is bad in law and without jurisdiction on the ground that the reasons recorded were not cogent. On merits, the Ld. AR contended that profits earned by way of receipts from technical handling services during Assessment Year 2004-05 & 2005-06 are duly covered by Article 8(2) of Indo-French DTAA as was the case before the Hon'ble Delhi High Court in case of DIT Vs. KLM Royal Dutch Airlines 392 ITR 218, as Article 8 (2) is identically worded as Article 8 (3) & 8(4) of Indo-Netherland

and Indo-German Treaty respectively. The Ld. AR further submitted that Indo-France DTAA have not gone any amendment or change and thus the same deserves to be treated at par as Article 8(1) of the DTAA.

14. The Ld. DR as regards assumption of jurisdiction under 148 of the Act submitted that admittedly no return was filed by the assessee and thus, prima facie, the Assessing Officer has reason to believe that income has escaped. Thus, it makes no difference whether the income is later assessed as fees for technical services or under Article 7 as business profits. As on merits, the Ld. DR contended that the submissions which were placed before Assessment Year 2006-07 may be taken under these years as well.

15. We have heard both the parties and perused the material available on record. After going through the reasons it can be seen that the Assessing Officer has prima facie reason to believe that there is escapement of income as no return was filed by the assessee which is admitted fact. Thus, initiating proceedings u/s 148 of the Act are just and proper. Thus, Ground No. 3 and 4 in both the appeals are dismissed. On merits, we have already decided the issue of applicability of Article 8 of DTAA in Assessment Year 2006-07. Thus, Ground Nos. 5 to 21 in both the appeals are allowed. Hence, ITA No. 5008 & 5009/Del/2011 for A.Y. 2004-05 & 2005-06 is partly allowed.

16. In result, ITA No. 5008 & 5009/Del/2011 for A.Y. 2004-05 & 2005-06 filed by the assessee are partly allowed and ITA No. 1786 & 2212/Del/2012 for A.Y. 2006-07 filed the assessee is allowed and the appeal filed by the Revenue is dismissed.

Order pronounced on this 22nd Day of May, 2020.

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 22/05/2020
Priti Yadav, Sr. PS/R.N*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
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	22.5.2020
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	