IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI

Before Sh. Amit Shukla, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 5141/Del/2016 : Asstt. Year : 2012-13

Deputy Commissioner of Income Tax, Intl. Taxation, Circle-3(1)(2), New Delhi-110002	Vs	Sheraton International LLC, C/o M/s Nangia & Co. Suite 4A, Plaza, M6, Jasola, New Delhi-110025
(APPELLANT)		**(RESPONDENT)**
PAN No. AAGCS6140J		

Assessee by : Sh. Amit Arora, CA &
Sh. Vishal Mishra, CA
Revenue by : Sh. S. S. Rana, CIT DR

Date of Hearing: 29.08.2019		**Date of Pronouncement: 17.10.2019**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the revenue against the order of the ld. CIT(A)-43, New Delhi dated 26.07.2016.

2. The ground raised by the revenue is as under:

"(i) Whether on the facts and in the circumstances of the case, the ld. CIT (A) has erred in holding that the Centralized services fee received by the appellant for rendering various services such as Sales and Marketing, Loyalty Programs, Reservation Service, Technological Service, Operational Services and Training Program etc. to customers in India, were not taxable as "Fees for Technical Services" (FTS) in terms of Section 9 of the Income Tax Act, 1961 as well as Article 12 of the India-US Double Taxation Avoidance Agreement (DTAA)."

3. Before the ld. CIT (A), the assessee has raised the following relevant grounds which bestows the brief of contentious issue between the assessee and the revenue:

> *"That the ld. AO has erred on facts and in law in holding that the payments received by the Appellant for rendering various marketing and advertisement services to customers in India, were taxable as "Fees for Technical Services" ("FTS"), in terms of Article 12 of the India-US Double Taxation Avoidance Agreement ("DTAA") without appreciating that the same does not qualify as such in terms of Article 12 of the DTAA.*
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> *That the ld. AO has erred in law and on facts in mechanically following the assessment order for AY 1998-99 and disregarding the fact that the same has been overruled by the decision of the Hon'ble Delhi High Court vide order dated January 30, 2009 in Appellant's own case for A.Y. 1995-96 to 2000-01.*
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> *That the Ld. AO has erred in law in not following the decision of the Hon'ble Delhi High Court merely on the ground that the same has not been accepted by the Department and an appeal against the said decision has been filed before the Hon'ble Supreme Court."*

4. Facts of the case in brief are that the assessee is a company incorporated under the laws of United States of America (USA) and resident thereof and engaged in the business of providing hotel related services in several countries around the world. In India, the assessee has entered into agreements with various Indian hotels for provisions of hotel related services inter-alia worldwide bublicity, marketing and advertising services through its system of sales, advertising, promotion, public relations and reservations. Under the agreement, the assessee is to provide the following services, besides the use of brand name:

a) Sales and Marketing

b) Loyalty Programs
c) Reservation Service
d) Technological Service
e) Operational Services
f) Training Programs

5. During the year, the assessee has received amounts on account of license fees, sales & marketing, reservation charge, reservation booking fee, out of which only the license fees were offered to tax claiming the other incomes as exempt as per DTAA. The Assessing Officer treated these amounts as FTS and taxable under Section 9(1)(vii) read with Explanation 2 of the Income Tax Act, 1961.

6. The said issue of taxability of these services as FTS u/s 9(1)(vii) was already decided by the Co-ordinate Bench of the ITAT for the assessment year 1995-96 in assessee's own case vide order dated 04.10.2006. Further, the order of the Tribunal has been affirmed by the Hon'ble High Court of Delhi (313 ITR 267). The Assessing Officer clearly mentioned at para 5 of the assessment order that the addition is being made on the grounds that the department has not accepted the judgment of the Hon'ble Delhi High Court and filed SLP before the Hon'ble Supreme Court. We hold that as on today, the issue has been covered by the judgment of Hon'ble Jurisdictional High Court, hence, no addition on this ground is called for.

7. For the sake of brevity and ready reference the relevant portion of the judgment of the Hon'ble High Court is reproduced as under:

(i) *the main purpose of the agreement entered into between the assessee and its clients-hotels was to promote business keeping in mind their mutual interests, through worldwide publicity, marketing and advertisement. All other services rendered by the assessee as encapsulated in various articles of the agreement were incidental and/or ancillary to its main object. The permission to use the trademark, brand name, as well as, the stylized 'S' given by the assessee to its clients-hotels was examined by the Tribunal. It returned a finding that there was nothing on record for it to come to conclusion that the real transaction was other than what was stated in the agreement, that is, the use of the trademark etc. was not free of cost but was camouflaged in the composite payment made for various services;*

(ii) the assessee, ITC Ltd. had its own brand by the name of 'Welcomegroup' which, as noted in the impugned judgment, was used alongside the assessee's brand name 'Sheraton'. Furthermore, ITC Hotels Ltd., like the assessee also had its own network by the name of 'Welcomenet' which was used for reservations within the country;

(iii) the entire transaction entered into between the assessee and its clients-hotels was an 'integrated business arrangement' under which the main purpose was to carry out advertisement, publicity and sales promotion for mutual benefit, in this context all other services i.e., use of trademark, trade name, computer reservations were incidental to the main purpose as stated above;

(iv) it found as a matter of fact that the payments received by the assessee were neither in the nature of royalty under section 9(1)(vi) read with Explanation 2 or article 12(3) of the DTAA nor fee for technical services or fee for included services under section 9(1)(vii) read with Explanation 2 or article 12(4) of the DTAA. See observations in paragraph 85 of the impugned judgment. The relevant portion of the finding is extracted below:—

> *"As such, considering all the facts of the case, the relevant provisions of the Income-tax Act, 1961 as well as that of DTAA between India and USA and keeping in view the legal position emanating from various judicial pronouncements discussed above, we are of the opinion that the amount received by the assessee from the Indian hotels/clients for the services rendered under the relevant agreements was not in the nature of 'royalties' within the meaning given in section 9(1)(vi) read with Explanation 2 thereto of the Income-tax Act, 1961 or as given in article 12(3) of Indo-American DTAA. The same was also not 'fees for technical services' or 'fees for included services' as defined in section 9(1)(vii) read with Explanation 2 thereto of the Income-tax Act, 1961 or article 12(4) of the Indo-American DTAA respectively. Having regard*

to the integrated business arrangement between the assessee-company and the Indian hotels/clients as evident from the relevant agreements as well as the nature of assessee's own business, the said amount clearly represented its 'business profit' which was not liable to tax in terms of article 7 of the Indo-American DTAA. We, therefore, allow the relevant grounds raised in the assessee's appeals on this issue and dismiss the additional grounds raised by the revenue in its appeals."

(v) it found that article 12(4)(b) had no applicability and for this purpose it relied upon the Memorandum of Understanding dated 15-5-1989 and the examples set out therein. After perusing the examples given therein, it came to the conclusion that it had no applicability to the hotel industry. It held that article 12(4)(b) applied to those services which related to areas where technology was made available, whereas what the assessee in the present case was extending was services to the hotel industry in relation to advertisement, publicity and sales promotion, which were, not in the nature of technical or consultancy service involving 'making of any technology available'. The finding to this effect is given in paragraph 83 of the impugned judgment. The relevant extract is given hereinbelow:—

"It is also further clarified in the Memorandum of Understanding that technical and consultancy services as envisaged under paragraph 4(b) of article 12 could make technology available in a variety of settings, activities and industries and some of the areas to which such services may relate are also enumerated in the MoU which do not include the hotel industry. One of such areas as indicated is the MoU is 'communication through satellite or otherwise' and relying on the same, learned Special Counsel for the revenue has contended that the interface between the reservation system of the assessee-company and that of the Indian hotels/clients was covered in this category. We, however, find it difficult to agree with this contention of the learned Special Counsel for the revenue. First of all, it is the area which has been specified in the MoU for ascertaining the services relating thereto being of technical and consultancy nature making technology available whereas the services rendered by the assessee in the present case are in the field of hotel industries and such services are in relation to advertisement, publicity and sales promotion which are not in the nature of technical and consultancy services involving making of technology available. Secondly, the interface between the computerized reservation system of the assessee and the computerized reservation system of the Indian hotels/clients was provided to facilitate the reservation of hotel rooms by the customers worldwide as an integral part of the integrated business arrangement between the assessee and the Indian hotels/clients. This interface thus was not separable from and independent of the main integrated job

undertaken by the assessee-company of rendering services in relation to marketing, publicity and sales promotion and the same, in any case, was not in the nature of technical and consultancy services making any technology available to the Indian hotels/clients in the field/area of communication through satellite or otherwise. Moreover, as pointed out by the learned counsel for the assessee before us, no communication through satellite was involved in the interface between the computerized reservation system of the assessee and that of the Indian hotels/clients.

What is transferred to the Indian company through the service contract is commercial information and the mere fact that technical skills were required by the performer of the service in order to perform the commercial information services does not make the service a technical service within the meaning of paragraph 4(b) of article 12. Since the facts of the present case are almost similar to the facts of this case given in Example 7 of the Memorandum of Understanding, it leaves no doubt that the payment in question received by the assessee-company from the Indian hotels/clients or any part thereof could not be treated as 'fees for included services' within the meaning of paragraph 4(b) of article 12."

12.2 As regards the agreement being a colourable device the Tribunal noted that nothing was brought on record by the revenue Authorities to show that the intention of the said arrangement or even the action of the parties, as reflected in the agreement, was at variance with the terms of the agreement. It noted that since both the assessee and its clients were operating at arm's length, no collusion could be attributed to the parties to the agreement since, no evidence whatsoever to support or substantiate the said allegation was placed before them. It also noted the fact that not only all statutory requirements have been fulfilled and compliances had been obtained by the assessee from time to time, but that even the Income-tax Authorities had given a 'no objection' under section 195(2) of the Act (see observations in paragraph 90 of the impugned judgment). As regards the payments received on account of SCI and FFP the Tribunal noted that since the job undertaken by the assessee-company was in the nature of 'integrated business' arrangement, whereby services were rendered to its clients-hotels in relation to advertisements, publicity and sales promotion of hotel business worldwide to further their mutual interest all services including the use of trademark and other services enumerated in the article including the programmes, in issue, such as SCI and FFP were incidental to the said business arrangement between the assessee and its clients-hotels. It concluded by holding that these programmes were not independent or separate from the main job undertaken by the assessee and since, the entire amount towards the service had been held by the Tribunal as business income, the contributions received by the assessee

towards the said programmes i.e., SCI and FFP were also in the nature of business income. It thus rejected the contention of the revenue that these contributions were in the nature of included services under article 12(4)(a) of the DTAA (see paragraph 114).

13. In view of the aforesaid findings of the Tribunal that the main service rendered by the assessee to its clients-hotels was advertisement, publicity and sales promotion keeping in mind their mutual interest and, in that context, the use of trademark, trade name or the stylized 'S' or other enumerated services referred to in the agreement with the assessee were incidental to the said main service, it rightly concluded, in our view, that the payments received were neither in the nature of royalty under section 9(1)(vi) read with Explanation 2 or in the nature of fee for technical services under section 9(1)(vii) read with Explanation 2 or taxable under article 12 of the DTAA. The payments received were thus, rightly held by the Tribunal, to be in the nature of business income. And since the assessee admittedly does not have a permanent establishment under the article 7 of the DTAA 'business income' received by the assessee cannot be brought to tax in India. The findings of the Tribunal on this account cannot be faulted. The Tribunal pointedly observed that there was no evidence brought on record by the revenue to enable them to hold that the agreement was a colourable device, in particular, that the payments received were for use of trade mark, brand name and stylized mark 'S'.

We agree with reasoning adopted by the Tribunal. Moreover, these are findings of fact which could be gone into only if a question was proposed impugning the findings of the Tribunal as perverse. We find that no such question has been proposed in the appeal. The observations of the Supreme Court in the case of K. Ravindranathan Nair v. CIT [2001] 247 ITR 178/114 Taxman 53 being relevant are extracted below:—

> *"The High Court overlooked the cardinal principle that it is the Tribunal which is the final fact-finding authority. A decision on fact of the Tribunal can be gone into by the High Court only if a question has been referred to it which says that the finding of the Tribunal on facts is perverse, in the sense that it is such as could not reasonably have been arrived at on the material placed before the Tribunal. In this case, there was no such question before the High Court. Unless and until a finding of fact reached by the Tribunal is canvassed before the High Court in the manner set out above, the High Court is obliged to proceed upon the findings of fact reached by the Tribunal and to give an answer in law to the question of law that is before it.*
>
> *The only jurisdiction of the High Court in a reference application is to answer the questions of law that are placed*

before it. It is only when a finding of the Tribunal on fact is challenged as being perverse, in the sense set out above, that a question of law can be said to arise." (p. 181)

14. In these circumstances we are of the view that no fault can be found with the impugned judgment. No question of law, much less a substantial question of law, has arisen for our consideration. In the result the appeals are dismissed."

8. Since, the issue stands settled by the judgment of the Hon'ble High Court, we hereby decline to interfere in the order of the ld. CIT (A).

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

Order Pronounced in the Open Court on 17/10/2019

Sd/-

(Amit Shukla)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 17/10/2019
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR