

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI
BEFORE SHRI RAJESH KUMAR (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.5200 /MUM/2017
ITA No.4628/MUM/2018**

(Assessment Years: 2014 -15 & 2015-16)

Partners Medical International,
Inc, [Earlier known as Partners Harvard
Medical International, Inc.]
C/o Pricewater House Coopers
(P), PWC House, Plot No. 18/A,
Guru Nanak Road,
Bandra (West),
Mumbai - 400050

Vs. The Deputy Commissioner of
Income Tax (Intl. Taxation) -
3(3)(2), Room No. 1603,
16th Floor, Air India Building,
Nariman Point,
Mumbai - 400021

PAN No. AABCH2171F

(Assessee)

(Revenue)

Assessee by : Shri Dhanesh Bafna &
Shri Arpit Agarwal, A.Rs

Revenue by : Shri S.S. Iyengar, Sr. D.R

Date of Hearing : 14/07/2021
Date of pronouncement : 27/07/2021

ORDER

PER RAVISH SOOD, J.M :

The captioned appeals filed by the assessee are directed against the respective orders passed by the A.O u/s 143(3) r.w.s 144C(13) of the Income Tax Act, 1961 (for short 'Act'), dated 13.06.2017 and 04.06.2018 for A.Y. 2014-15 and 2015-16. As a common issue is involved in the aforementioned appeals, therefore, the same are being taken up and disposed off by way of a

consolidated order. We shall first take up the appeal for A.Y. 2014-15. The assessee has assailed the impugned order on the following grounds before us:

“1 **General**

1.1 On the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel - 2, Mumbai ('the Hon'ble DRP') erred in not following the decision of the Hon'ble Income-tax Appellate Tribunal, Mumbai in the Appellant's own case for earlier years and thereby (confirming the action of the learned Dy. Commissioner of Income-tax 3(3)(2), Mumbai(the A.O).

1.2 The Appellant therefore prays that the action of the Hon'ble DRP be held as bad in law and is liable to be quashed.

2. **Addition on Account of Royalty**

2.1 On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in confirming the action of the AO in bringing to tax 90% of the receipts amounting to Rs.1,14,39,414 as "Royalties" under the provisions of Article 12(3) of the Double Taxation Avoidance Agreement between India and USA ('DTAA') and thus, liable to tax in India.

2.2 The Appellant therefore prays that the payment received by the Appellant be held as not in the nature of Royalties' under Article 12(3) of the DTAA.

3. **Addition on account of Fees for Included Services**

3.1 On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in confirming the action of the AO in bringing to tax 10% of the receipts amounting to Rs.12,71,046 as 'Fees for Included Services' under Article 12(4)(b) of the DTAA and thus liable to tax in India.

3.2 The Appellant therefore prays that the payment received by the Appellant be held as not in the nature of 'Fees for Included Services' under Article 12(4)(b) of the DTAA r.w the Memorandum of Understanding to the DTAA.

4. **Business profit not taxable in absence of a Permanent Establishment**

4.1 On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in not holding that the payments received by the Appellant are in the nature of 'Harness Profits', and not liable to tax in India in absence of permanent establishment under Article 7 of the DTAA,

4.2 The Appellant therefore prays that the payments received by the Appellant be held as not liable to tax in India in absence of permanent establishment under Article 7 of DTAA.

5. **Invoking Rule 10 of the Income-tax Rules, 1962**

5.1 On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in confirming the action of the AO in invoking the provisions of Rule 10 of the Income tax Rules, 1962 ("the Rules") for attributing 90% of the total receipts as Royalties and the balance 10% as FIS.

5.2 The appellant prays that the AO be directed not to invoke the provisions of Rule 10 of the Rules.

6. **Total receipts considered as Rs.1,27,10,460 instead of Rs.64,33,540**

6.1 On the facts and circumstances of the case, and in law, without prejudice to ground nos. 1 to 5, the Hon'ble DRP erred in considering total taxable receipt of PMI as Rs.1,27,10,460 as appearing in Form 26AS Instead of Rs. 64,33,540 which was actually received.

6.2 On the facts and circumstances of the case, the Hon'ble DRP erred in holding that the credit entry to the account of the Appellant in the books of account of the Indian payer amounted to taxable receipt for the Appellant.

6.3 The Appellant prays that the AO be directed to consider total receipts as Rs.64,33,540 instead of Rs.1,27,10,460.

The Appellant craves leave to add, after, amend, modify, delete, substitute or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.”

2. Briefly stated, the assessee is an entity incorporated in United States of America (USA) under Sec. 501©(3) of the US Internal Revenue Code and is stated to be a non-profit educational entity. The activities of the assessee company include assisting other medical institutes and healthcare system throughout the world by sharing medical and technological information with healthcare professionals. During the year under consideration, the assessee company had rendered its services to Wockhardt Hospital Limited in India. The assessee company had e-filed its return of income for A.Y. 2014-15 on 18.09.2014 declaring a total income of Rs.nil. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. During the course of the assessment proceedings, it was gathered by the A.O that the assessee had received fees aggregating to U.S \$ 108,400 as per the “Master Services Agreement”, dated 31.01.2011, which on being converted into Indian rupees worked out to an amount of Rs.64,33,540/-, as under:

Nature of payment	Date of SBI TT Buying Rate	Amount (In USD)	SBI TT (Buying Rates ⁰)	Amount (in Rs.)
Fees from Wockhardt Hospitals Ltd. (WHL) Under Master Services Agreement	31 march, 2014	108,400	59.35	64,33,540
Total				64,33,540

However, as per the details gathered by the A.O from ‘Form 26AS’, it was noticed by him that the assessee had received an amount of Rs.1,27,10,460/- under the terms and conditions of the Master Services Agreement, dated 31.01.2011 that was entered with Wockhardt Hospital Ltd., on which TDS of Rs.22,43,036/ was deducted. On being queried, the assessee declined of there being any such transactions reported in its AIR/CIB/26AS. Backed by the

aforesaid facts, the A.O was of the view that as per the unreconciled difference in the gross receipts furnished by the assessee vis-a-vis AIR information, it could safely be gathered that the assessee had failed to account for the aforesaid receipts of Rs.1,27,10,460/- in its return of income for the year under consideration. Accordingly, backed by his aforesaid conviction the A.O called upon the assessee to explain as to why the amount of Rs.1,27,10,460/- (supra) may not be brought to tax in its hands as “royalty income” and “Fees for included services”(for short “FIS”). In reply, the assessee rebutted the aforesaid observation of the A.O. However, the A.O was not persuaded to accept the explanation of the assessee that the amount in question could not be assessed as royalty income and/or FIS in its hands. It was observed by him that the assessee had business relation with Worckhardt Hospital Limited. Referring to the terms and conditions of the Master Services Agreement, dated 31.01.2011 that was entered into between the assessee with Worckhardt Hospitals Limited, it was observed by the A.O that the job profile of the assessee company revealed that the services rendered by it were highly technical and professional in nature with exclusive knowledge of its own. Also, it was observed by the A.O that though the assessee had claimed that it had carried out its activities on charitable basis, however, the fact as it so remained was that it was earning income/revenue from well known corporate healthcare entities. It was observed by the A.O that though the Tribunal had decided the case of the assessee for A.Y. 2000-01 to A.Y. 2009-10 in its favour, however, the revenue had not accepted the said order and had carried the matter in appeal before the Hon’ble High Court of Bombay under Sec. 260A of the Act, which as on date was pending adjudication. Accordingly, in the backdrop of his aforesaid deliberations the A.O rejected the claim of the assessee and in exercise of Rule 10 of the Income Tax Rules, 1962 held 90% of the assessee’s receipts as royalty and the remaining 10% as FIS. On the basis of his aforesaid observations the A.O vide

his draft assessment order u/s 143(3) r.w.s 144C(1), dated 28.12.2016 proposed to assess the income of the assessee at Rs.1,27,10,460/-.

4. Aggrieved, the assessee filed objections before the Dispute Resolution Panel-2, Mumbai, (DRP). It was inter alia observed by the DRP that the case of the assessee for A.Y 2000-01 to A.Y. 2006-07 that was decided by the Tribunal in its favour, the assessee had entered into an agreement with Wockhardt Hospital Limited titled as "Memorandum of Agreement for Education and Training Services", dated 14.12.2000, while for during the year under consideration i.e A.Y. 2014-15 it had received fees for providing various consulting services under the "Masters Services Agreement", dated 31.01.2011. Backed by his aforesaid observation, the DRP set out in its order at length the difference in the terms and conditions provided in the aforesaid respective agreements. It was observed by the DRP that the terms and conditions of the 'Masters Services Agreement', dated 31.01.2011 as compared to 'Memorandum of Agreement for Education and Training Services', dated 14.12.2000 were materially differently placed. The DRP was of the view that in light of the aforesaid distinction between the aforementioned 'agreements', the observations of the Tribunal while disposing off the appeals in the case of the assessee for A.Y. 2000-01 to A.Y. 2004-05 and A.Y. 2006-07 to A.Y. 2009-10 could not be applied to the year under consideration i.e A.Y. 2014-15. Apropos the reliance placed by the assessee on the aforesaid order passed by the Tribunal in its case for A.Y. 2000-01 to A.Y. 2004-05 and A.Y. 2006-07 to A.Y. 2009-10, the DRP was of the view that the same being distinguishable on facts was thus misplaced and would not assist its case. Accordingly, the DRP was of the view that the payment aggregating to US \$ 108,400 (equivalent to INR 1,27,10,460) received by the assessee from Wockhardt Hospital Limited as fees for providing various consulting services as per the terms and conditions of Master Services Agreement, dated 31.01.2011

constituted income in the hands of the assessee that was taxable under Article 12(4) of the India-USA Tax Treaty.

5. After receiving the order passed by the DRP u/s 144C(5), dated 29.03.2011, the A.O vide his order passed u/s 143(3) r.w.s 144C(13), dated 13.06.2017 held that the amount received by the assessee from Wockhardt Hospital Limited was taxable in India, viz. 90% of Rs.1,27,10,460/- as royalty income; and 10% of Rs.1,27,10,460/- as FIS.

6. The assessee being aggrieved with the order passed by the A.O u/s 143(3) r.w.s 144C(13), dated 13.06.2017 has carried the matter in appeal before us. It was submitted by the Id. A.R that the issue involved in the present appeal was squarely covered by the order passed by the Tribunal in the assessee's own case for the preceding years, viz. ITA No. 412/Mum/2016, dated 02.05.2018 for A.Y. 2012-13 and ITA No. 576/Mum/2017, dated 30.11.2018 for A.Y. 2013-14. In order to buttress his aforesaid claim, the Id. A.R took us through the observations recorded by the Tribunal in its aforesaid orders for A.Y. 2012-13 and A.Y. 2013-14, wherein by referring to the "Master Services Agreement" , dated 31.01.2011, the Tribunal had concluded that the consideration received by the assessee from Wockhardt Hospital Limited could neither be held as royalty nor FIS, but was in the nature of business profits which in the absence of the assessee's PE in India could not be brought to tax in India.

7. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was averred by the Id. D.R that the reliance placed by the assessee on the orders passed by the Tribunal in its own case for A.Y 2000-01 to A.Y 2004-06 and A.Y. 2006-07 to A.Y.2009-10 were distinguishable on facts, for the reason, that unlike the year under consideration i.e A.Y. 2014-15 in the aforementioned years the terms and regulations inter se the assessee and Wockhardt Hospital Limited were regulated by the

“Memorandum of Agreement for Education and Training Services”, dated 14.12.2000, while for in the year under consideration the same was regulated by the Master Services Agreement”, dated 31.01.2011, and both of them as discussed at length by the DRP were materially differently placed. However, the Id. D.R could not rebut the claim of the assessee that the issue involved in the present appeal was squarely covered by the orders passed by the Tribunal in its own case for the preceding years, viz. ITA No. 412/Mum/2016, dated 02.05.2018 for A.Y. 2012-13 and ITA No. 576/Mum/2017, dated 30.11.2018 for A.Y. 2013-14

8. We have heard the Id. Authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been relied upon by them to drive home their respective contentions. As observed by us hereinabove, the controversy involved in the present appeal hinges around the aspect as to whether or not the amount received by the assessee from Wockhardt Hospital Limited could be held to be in the nature of royalty and/or FIS. Admittedly, the terms and conditions inter se the assessee and Wockhardt Hospital Limited were during the year under consideration regulated by the Master Services Agreement, dated 31.01.2011. As stated by the Id. A.R, and rightly so, in the preceding years i.e A.Y. 2012-13 and A.Y. 2013-14 too the arrangement between the assessee and Wockhardt Hospital Limited was regulated by the terms and conditions of the Master Services Agreement, dated 31.01.2011. In the backdrop of the aforesaid facts, we are of the considered view that the issue as to whether or not the amount received by the assessee from Wockhardt Hospital Limited could be brought to tax in its hands as royalty and/or FIS had been decided by the Tribunal while disposing off the aforementioned appeals, vide its order passed in ITA No. 412/Mum/2016 in A.Y. 2012-13 dated 02.05.2018 and ITA No. 576/Mum/2017 in A.Y. 2013-14, dated 30.11.2018. In the aforementioned cases,

the Tribunal had therein held that the consideration received by the assessee pursuant to the Master Services Agreement”, dated 31.01.2011 was neither in the nature of royalty nor FTS, but was in the nature of business profits, which in the absence of the assessee’s PE in India could not be brought to tax in India. For the sake of clarity the observations of the Tribunal in the assessee’s appeal for A.Y. 2013-14 in ITA No. 576/Mum/2017, dated 30.11.2018 are culled out as under:

6. We find that the Tribunal right from the Assessment Year 2002-03 to 2012-13 held that these payments received by the assessee from Wockhardt Hospitals Ltd can neither be said to be royalty nor FTS. It was also held that entire payment received by the assessee from Wockhardt Hospitals Ltd is in the nature of business profits and since the assessee does not have a PE in India the same should not be brought to tax in India. In the latest order of the Tribunal for the Assessment Year 2012-13 in ITA.No. 412/Mum/2016 dated 02.05.2018 it has been held as under:

“Challenging the directions, dated 23/11/2015, of the Dispute Resolution Panel(DRP)-2, Mumbai the Assessing Officer(AO)has filed the present appeal. Assessee- is a non-profit educational entity set up in the United States of America(USA).It filed its return of income on 27/11/2012, declaring total income at Rs.Nil. The case was selected for scrutiny and notice was issued on 06/08/2013 u/s.143(2) of the Act. Subsequently notice u/s. 142(1) was issued on 19/02/2014 and 24/12/2014. The assessment was completed on 28/01/2016, determining its income at Rs.3.94 crores, u/s. 143(3) r.w.s. 144C(13) of the Act.

2. During the assessment proceedings, the AO found that during the year under consideration, the assessee had received fees of USD 886,000 for providing various consulting services under agreements with various Indian entities, the break-up of which is as follows:

Sr. No.	Indian Entity to whom services rendered	Details of Agreement	Net fees received in \$
1.	Wockhardt Hospitals Ltd. (WHL)	Master Services Agreement 31.01.2011	1,71,000
2.	Four Seasons Foundation (FSF)	Master Services Agreement with FSF dated November, 23, 2010 (Master Services agreement) FST)	3,75,000
3	AERMID Healthcare (India) Pvt. Ltd. (AERMID)	Short Term Services Agreement dated April 27,2011 with AERMID	3,40,000
		Total	8,86,000

The AO has proposed to treat 90% of the total receipts i.e. fees for services rendered, as taxable as Royalties as per Article 12(3) of DTAA and 10% of the total receipts as Fees for Included Services under the Article 12(4)(b) of the DTAA.He computed the total income of the assessee as under :-

Nature of Income	Amount (Rs.)
Income from Royalties (90% of total receipts)	3,55,15,332
Income from Fees For included Services (FIS) (10% of total receipts)	39,46,148
Total Income	3,94,61,480

3. It was brought to our notice that the identical issue-i.e.taxing 90% of the total receipts as Royalties as per Article 12(3) of DTAA and taxing the remaining 10% of the receipts as Fees for Included Services under the Article 12(4)(b) of the DTAA-was deliberated upon by the Tribunal,while deciding the appeals/cross objections for the earlier assessment years.We find that while deciding the appeal for the AY.2002-03,(ITA No.1558/Mum/07 dated 18/11/2011,the Tribunal has observed as under:

"17. We have considered the rival submissions. We are of the view that the consideration received by the assessee can neither be said to be royalty not FIS. The payment in question was purely for the purpose of advising, recommending and assisting in relation to healthcare projects. It was also for conducting education and training programmes. It was also for the purpose of review and giving feed back of various aspects and new cardiac hospital to be set up, recommendation on planned patient care delivery system. In page 15A to 15D of the CIT(A)'s order a summary of the activities undertaken by the assessee for WHL. have been given. A perusal of the same shows that the consideration received by the assessee cannot be said to be royalty as they were not a payment for use of order, the right to use any copy right, trademark or industrial, commercial or scientific experience. Similarly the assessee did not make available any technical knowledge, experience, skill knowhow or process. The decision of the Delhi Bench of the ITAT in the case of Sheraton International Inc. (supra) supports the plea of the assessee that where the agreement between the parties provides that there was no economic consideration for right to use the name it cannot be said that any payment can be called royalty. So also the consideration paid in a lumpsum cannot be split as a part being in the nature of royalty and any part being in the nature of FIS as laid down in the case of Motorola Inc. (supra). The payment cannot be said to be FIS for the reason that nothing is made available by the Assessee to WHL and in this regard, the observations while deciding payments received by the Assessee from MAX would be equally applicable to the payments received from WHL also. We are of the view that the entire payment received by the assessee from WHL is in the nature of business profits and since the assessee does not have a PE in India the same cannot be brought to tax in India. Consequently, Ground No.2 & 3 of the Cross Objection of the assessee are allowed.

3.1. In the appeal for the A.Y. 2003-04 (Para 28, Page 41-42 of the paper book),the Tribunal has held as follows:

"28. ITA No. 1559/M/07 is an appeal by the revenue against the order dated 26/10/2006 of CIT(A) 33, Mumbai relating to A. Y2003-04 and C.O No, 146/M/07 is a cross objection by the assessee against the very same order of the CIT(A). The ground raised by the revenue in its appeal and Ground No. 1 to 3 raised by the assessee in its Cross Objection are identical to the Grounds 1 & 2 raised by the revenue in its appeal ITA 1558/M/07 and Ground No. 1 to 3 in the Cross Objection No. 145/M/07 raised by the assessee in this Cross Objection forA.Y2002-03. For the reasons given while deciding identical grounds in A. Y 2002-03, we dismiss the grounds raised by the revenue and allow Ground No.1 to 3 raised by the assessee in its Cross Objection. 'Both the parties agreed that the facts and circumstances prevailing in both the A.Ys are identical. Ground No.4 raised by the assessee in Cross Objection No. 146/A4/07 relating to charging of interest is academic and does not require any adjudication."

3.2. In the appeals of the AY.s 2006-07 to AY 2009-10, the Tribunal had held as under:

"9. We notice that the co-ordinate bench of Tribunal has passed the order dated 22-02-2013 in the assessee's own case relating to AY 2004-05 in ITA No.791/Mum/2008 and JTA No. 1020/Mum/2008, wherein it has followed the orders passed by the co-ordinate benches from AY 2000-01 onwards. In assessment year 2004-05, the assessee had received fees from M/s Max India Ltd. for identical services rendered by the assessee for advisory services rendered. Identical view was taken in the case of receipts from Wokhardt Hospitals. The Tribunal in paragraph 13 and 14 of its order has held as under:-
"13. Consistent with the aforesaid view taken by the Tribunal in Assessee's own case, we hold that the payments received from Max does not constitute FIS (Fee for Included Services) within the meaning of Article 12(4), as nothing is made available by the Assessee to Max and also the Assessee does not have any P.E in India. Therefore the income so arising to the Assessee in India cannot be taxed under Article 7 as 'Business Profits". 14. In case of WHL, (Wokhard Hospitals iJd) also, we hold that it is neither taxable as FIS nor as royalty and also the Assessee does not have any P.E in India and, therefore, the payment received by it cannot be taxed in India. Accordingly, consistent with the view taken in earlier years in assessee's own case, we allow grounds no. 1 and 2, raised by the assessee." The above said decision of the Tribunal shall be applicable to the fees received by the assessee in the current year under Consulting Agreement (Wokhard Hospitals and Carol Info Services Ltd) and under Award Agreement of Vokhard Hospitals),"

3.3. We further find that the department is in appeal before the Hon'ble Bombay High Court for AY.s 2000-01 to AY 2004-05 ,that the Department had not filed appeal yet for AY 2006- 07 to AY 2009-10 where decision was received in July,2015,that the DRP had adjudicated the issues in favour of the assessee following the orders of the Tribunal.

3.4. In our opinion, there is no need to interfere with the Directions of the DRP, as it had followed the orders of the Tribunal for the earlier AY.s.which are yet to reversed by the Hon'ble Bombay High Court. Following the orders of earlier AY.s.of the Tribunal, we decide the effective ground of appeal against the AO.

As a result, appeal filed by the AO stands dismissed."

7. Respectfully following the said order of the Tribunal, we hold that the consideration received by the assessee pursuant to Master Service Agreement is neither royalty nor FTS but the same are in the nature of 6 ITA NO.576/MUM/2017 (A.Y: 2013-14) M/s. Partners Medical International, Inc., business profits and since the assessee do not have a PE in India, the same cannot be brought to tax in India.

8. In the result, appeal of the assessee is allowed."

As the facts and the issue involved in the present appeal i.e as to whether or not the amount received by the assessee from Wockhardt Hospital Limited could be brought to tax in its hands as royalty and/or FIS remains the same as were there before the Tribunal in its appeals for the aforementioned preceding years i.e A.Y. 2012-13 and A.Y. 2013-14, therefore, finding no reason to take a different view, we respectfully follow the same. Accordingly, on the same terms, we herein conclude that the amount of Rs.1,27,10,460/- received by the assessee from Wockhardt Hospital Limited could not be held as royalty and/or FIS in its hands.

The **Grounds of appeal No. 1 to 5** are allowed in terms of our aforesaid observations.

9. As we have held that the amount received by the assessee from Wockhardt Hospital Limited is neither in the nature of royalty nor FIS, therefore, the claim of the assessee qua the adoption of the wrong amount by the A.O/DRP having been rendered as academic in nature is accordingly dismissed. The **Ground of appeal No. 6** is dismissed.

10. The appeal of the assessee is allowed in terms of our aforesaid observations.

ITA No. 4628/Mum/2018
A.Y. 2015-16

11. We shall now take up the appeal of the assessee for A.Y. 2015-16. The assessee has assailed the impugned order on the following grounds before us:

1. General

- 1.1 On the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel - 2, Mumbai (the Hon'ble DRP) erred in not following the decision of the Hon'ble Income-tax Appellate Tribunal, Mumbai in the Appellant's own case for earlier years and thereby confirming the action of the learned Deputy Commissioner of Income-tax 3(3)(2), Mumbai ('the Learned AO'),
- 1.2 The Appellant therefore prays that the impugned assessment order passed by the Learned AO in pursuance to such DRP directions be held as bad in law and is liable to be quashed.

2. Addition on Account of Royalty

- 2.1 On the facts and in the circumstances of the case and in law, the Learned AO filed, while passing the impugned assessment order pursuant to the DRP directions, in bringing to tax 90% of the receipts amounting to INR 2,92,60,134 as "Royalties" under the provisions of Article of the Double Taxation Avoidance Agreement between India and USA ('DTAA') and thus, to tax in India.
- 2.2 The Appellant therefore prays that the payment received by the Appellant be held as not in the nature of 'Royalties' under Article 12(3) of the DTAA.

3. Addition on account of Fees for Included Services

- 3.1 On the facts and in the circumstances of the case and in law, the learned AO erred, while passing the impugned assessment order pursuant to the DRP directions, in bringing to tax 10% of the receipts amounting to INR. 32,51,126 as 'Fees for Included Service' under Article 12(4)(b) of the DTAA and thus liable to tax in India.

3.2 The Appellant therefore prays that the payment received by the Appellant be held as not in the nature of 'Fees for Included Services under Article 12(4)(b) of the DTAA read with the Memorandum of Understanding to the DTAA.

4. Business profits not taxable in absence of a Permanent Establishment

4.1 On the facts and in the circumstances of the case and in law, the Learned AO erred, while passing the impugned assessment order pursuant to the DRP directions, in not holding that the payments received by the Appellant are in the nature of 'Business Profits', and not liable to tax in India under Article 7 of the DTAA in absence of permanent establishment under Article 5 of the DTAA.

4.2 The Appellant therefore prays that the payments received by the Appellant be held as not liable to tax in India under Article 7 of DTAA.

5. Invoking Rule m of the Income-tax Rules, 1962

5.1 On the facts and in the circumstances of the case and in law, the Learned AO erred, while passing the impugned assessment order pursuant to the DRP directions, in invoking the provisions of Rule 10 of the Income-tax Rules, 1962 ("the Rules") for attributing 90% of the total receipts as Royalties and the balance 10% as FIS.

5.2 The Appellant prays that the Learned AO be directed not to invoke the provisions of Rule 10 of the Rules.

6. Short credit of Tax Deducted at Source ('TDS')

6.1 On the facts and circumstances of the case, and in law, the Learned AO erred in not granting TDS credit to the extent of INR 4,50,580.

6.2 The Appellant prays that the Learned AO be directed to grant full TDS credit of INR 83,17,646 as claimed by the Appellant in the return of income.

7. Incorrect levy of interest under section 234B and 234D of the Act

7.1 On the facts and circumstances of the case, and in law, the Learned AO erred in levying interest of INR 7,76,334 and INR 1,85,682 under section 234B and under section 234D of the Act.

7.2 The Appellant prays that the Learned AO be directed to delete the interest levied under section 234B and under section 234D of the Act.

8. Incorrect recovery of interest under section 244A of the Act

8.1 On the facts and circumstances of the case, and in law, the Learned AO erred in recovering interest of INR 4,55,952 under section 244A of the Act.

8.2 The Appellant prays that the Learned AO be directed to delete the recovery of interest under section 244A of the Act.

9. Incorrect Levy of Penalty under section 271(1)(c) of the Act

9.1 On the facts and circumstances of the case, and in law, the Learned AO erred in proposing to levy penalty under section 271(1)(c) of the Act.

9.2 The Appellant prays that the Learned AO be directed to not to levy penalty under section 271(1)(c) of the Act.

The Appellant craves leave to add, alter, amend, modify, delete, substitute or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

12. Briefly stated, the assessee had filed its return of income for A.Y. 2015-16 on 09.09.2015, declaring a total income of Rs.3,32,06,770/-. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act. On the basis of the draft assessment order passed u/s 143(3) r.w.s 144C(1),

dated 24.10.2017, the A.O proposed to assess 90% of the amount received by the assessee from Wockhardt Hospitals Ltd. as royalty and the balance 10% as FIS.

13. Aggrieved, the assessee filed objections before the DRP. However, the DRP not finding favour with the contentions advanced by the assessee upheld the view taken by the A.O.

14. After receiving the order passed by the DRP u/s 144C(5) on 02.05.2018, the A.O vide his order passed u/s 143(3) r.w.s 144C(13), dated 04.06.2018 held that the amount received by the assessee from Wockhardt Hospitals Ltd. was liable to be brought to tax in India, viz. royalty: Rs.2,92,60,134/- (90% of Rs.3,25,11,260/-) and; FIS: Rs. 32,51,120/- (10% of Rs.3,25,11,260/-). Accordingly, the A.O vide his order passed u/s 143(3) r.w.s 144C(13), dated 04.06.2018 assessed the income of the assessee at Rs. 6,57,18,226/-.

15. Aggrieved, the assessee carried the matter in appeal before us. We find that as the facts and the issue involved in the present appeal i.e as to whether or not the amount received by the assessee from Wockhardt Hospitals Ltd. could be held as royalty and/or FIS in its hands, remains the same, as were there before us in its own case for A.Y. 2014-15 in ITA No. 5200/Mum/2017, as had been adjudicated by us hereinabove, therefore, our order therein passed shall apply *mutatis mutandis* for the purpose of disposal of the controversy in hand involved in the assessee's present appeal for A.Y. 2015-16 in ITA No. 4628/Mum/2018. Accordingly, on the same terms, we herein conclude that the amount of Rs.3,25,11,260/- received by the assessee during the year from Wockhardt Hospital Limited cannot be brought to tax in its hands either as royalty and/or FIS, but is in the nature of its business profits. The **Grounds of appeal Nos. 1 to 5** are allowed in terms of our aforesaid observations.

16. The assessee has assailed before us the allowing of short credit of TDS to the extent of Rs.5,50,580/- by the A.O. As the aforesaid grievance of the assessee would require verification of facts, therefore, in all fairness we herein direct the A.O to verify the factual position and in case the claim of the assessee is found to be in order, then, allow the credit for the deficit amount of TDS to the assessee as per extant law. The **Ground of appeal No. 6** is allowed for statistical purposes.

17. The assessee has assailed before us the levy of interest u/s 234B and 234D of the Act. As the levy of interest is mandatory as held by the Hon'ble Supreme Court in the case of CIT Vs. Anjum H.M. Ghaswala (2001) 252 ITR 1 (SC), therefore, we herein direct the A.O to re-determine the interest liability of the assessee while giving effect to our appellate order. The **Ground of appeal No. 7** is allowed for statistical purposes.

18. The assessee has assailed the incorrect recovery of interest u/s 244A of the Act. It is the claim of the assessee that the A.O had erred in recovering interest of Rs.4,55,952/- u/s 244A of the Act. As the adjudication of the aforesaid aspect would require verification of facts, therefore, in all fairness we herein direct the A.O to verify the factual position. In case the claim of the assessee is found to be in order, then, the consequential relief be allowed to the assessee. The **Ground of appeal No. 8** is allowed for statistical purposes.

19. The assessee has assailed before us the initiation of penalty proceedings u/s 271(1)(c) of the Act. As the aforesaid grievance of the assessee is premature, therefore, the same is dismissed. The **Ground of appeal No. 9** is dismissed.

20. The appeal of the assessee is allowed in terms of our aforesaid observations.

21. Resultantly, both the appeals of the assessee i.e ITA No.5200/MUM/2017 & ITA No. 4628/Mum/2018 are allowed in terms of our aforesaid observations.

Order pronounced in the open court on 27.07.2021

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai;

Dated: 27.07.2021

PS: Rohit

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)