

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI**

**BEFORE N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 210/Del/2016
Asstt. Year: 2013-14

ITO (Intt. Taxation) Ward 1 (1)(1) New Delhi.	Vs.	Asian Hotels North Ltd. Bhikaji Cama Place, MG/Ring Road, Delhi PAN AAACA0125H
(Appellant)		(Respondent)

Department by:	Shri N.C. Swain, CIT-DR
Assessee by :	Shri M.P. Rastogi, Advocate
Date of Hearing	16/02/2022
Date of pronouncement	15/03/2022

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the Revenue is against the order passed by the Ld. Commissioner of Income Tax (Appeals)-42, New Delhi ("**CIT(A)**") dated 29.10.2015 under section 195(2) of the Income Tax Act, 1961 ("**Act**") pertaining to assessment year ("**AY**") 2013-14.

2. The Revenue has raised the following grounds of appeal:-

"1. Whether CIT(A) was not justified in holding that the payments made by AHL, India to HCSL, Hongkong as per the Strategic Oversight Service

Agreement are covered under the definition of Royalty as per Explanation 2 of Section 9(1)(vi) and thus chargeable to tax u/s 115A of the Income Tax Act 1961 ?”

3. Briefly stated, the assessee filed application under section 195(2) of the Act before the Assessing Officer (“**AO**”) in respect of payments proposed to be made to Hyatt Chain Services Ltd., Hongkong (“**HCSL**”) for provision of centralised services i.e. advertisement, sales promotion and computerised reservation to the assessee amongst others. The assessee is running a hotel under the name and style of Hyatt Regency as a franchise of Hyatt International Asia Pacific Limited known as Hyatt. There is a company, named Hyatt International South West Asia Limited (“**HISWAL**”) which is in the field of providing marketing, management and operation of hotels work under the brand of Hyatt. The assessee entered into a Strategic Oversight Agreement (“**SOA**”) with HISWAL dated 4.9.2008 in respect of carrying out hotel and management services with the assessee. For such services, various employees of HISWAL visits India from time to time. As per SOA there are various other services which are to be provided by other affiliates of Hyatt. One such affiliate of Hyatt is HCSL. HCSL provides centralised services outside India to one worldwide Hyatt Group of Hotels, who work under the supervision and control of Hyatt. HCSL conducts sales and marketing on behalf of all hotels affiliated to the Hyatt chain. The said chain marketing services as stated in the application filed by the assessee include business and sales promotion, advertising, publicity and public relations,

reservation system across the globe, conduct marketing surveys and studies to standardize and improve the facilities in the hotels of the affiliates across the world, all other such activities aimed at protecting and promoting the mutual interest of the affiliates as well as to benefit the guests with better services and facilities. The cost of such expenses incurred by HCSL is allocated amongst the participating Hyatt Hotels worldwide on cost basis without having any element of profit. Hyatt franchisees across the globe contribute to HCSL on an agreed basis and HCSL defrays the advertising as well as its administrative expenses. Short fall in a year, if any is made up by the franchisees on a prorated basis. In the rare event of a surplus in a year, if any, is given benefit by lower contribution by the franchisees on prorated basis. The surplus in no event is distributed as a dividend or share of profit to any person. This arrangement of HCSL with various Hyatt group companies (including the assessee) is in accordance with SOA of various Hyatt group companies signed with HCSL as a part of its share for sales and marketing services performed by HCSL outside India.

4. In the application under section 195 the assessee stated that it proposes to remit the HCSL, its contribution @ USD 425 per annum per guestroom and @ 1% of the room revenue excluding the food beverage and other service bills in terms of SOA. During the proceedings before the Ld. AO, the assessee submitted that no tax is required to be withheld on payments to be made to HCSL as the remittance is towards the prorated share of sales and marketing services which were performed by HCSL

outside India and hence no income accrues or arises or received in India. The assessee also submitted that there is no profit element to be earned by HCSL which is conducting the chain marketing services for the mutual benefit of all the affiliates. The payments to be made are only in the nature of reimbursement of expenses incurred by HCSL outside India. HCSL is a non-profit entity which is corroborated by its auditors report which is on record. Further the assessee submitted that it was separately paying marketing fee @ 3% of room revenue and @7% of the operating profit to Hyatt International which represents their earnings out of the sales and marketing agreement on which the assessee is duly withholding taxes. Up to the preceding year, the Ld. AO allowed the remittance by way of reimbursement of proportionate cost to HCSL without any withholding tax.

4.1 The contentions raised by the assessee were rejected by the Ld. AO. The Ld. AO heavily relied upon the findings of the Hon'ble DRP in the assessment of HISWAL for the assessment year 2009-10. He concluded that the proposed payments to HCSL is in the nature of royalty / Fees for Technical Service ("**FTS**") taxable under section 9(1)(vi)/(vii) of the Act and directed that tax is required to be withheld at the applicable rate under section 195 of the Act.

5. On appeal, the Ld. CIT(A) in para 4.2 and 4.3 of his order recorded the findings of the Ld. AO during the assessment proceedings which is reproduced below :-

“4.2 During the assessment proceedings, the Ld. AO observed that M/s HISWAL, Dubai was providing certain strategic plans, guidelines, processes and policies relating to the development and operation of the Hotel in terms of agreement known as Strategic Oversight agreement (hereinafter "SOSA"). The AO referred to the assessment order u/s 143(3) r.w.s. 144C in the case of HISWAL for Asst. Year 2009-10 dated 21.11.2012, in which it was held that the payment in respect of activities of HISWAL and its affiliates as a whole, under SOSA constitute Royalty or FTS. It was also mentioned by the AO that in the said order of DRP, it was held that the services being rendered under SOSA by HISWAL and other affiliates constitute an integrated bouquet of services in the nature of technical services, based on which, the AO asked the appellant to explain as to why TDS may not be deducted by it on the payment made to HCSL by holding it as Royalty/FTS. In response, the appellant had made the following submissions:

- "a) M/s HISWAL and M/s Hyatt Chain Services Ltd (HCSL) are two separate and distinct entities.*
- b) Both provide different kinds of services to the applicant and the payments for these services are made individually to them.*
- c) In the case of M/s HISWAL, the AO has held that it has a P.E. in India and hence its income to the extent attributable to P.E. India is taxable in India.*
- d) The services provided by M/s HCSL do not come within the definitions of either Technical service Fee or Royalty u/s 9(l)(vi)/(vii) of the Act.*

e) *M/s HCSL operates on no-profit-no-loss basis and hence no income arises to it, much less any income in India. Besides, the payment is analogous to payment made by an Indian exporter to its agent outside. Since the foreign agent operates outside India, no part of its income arises in India."*

4.3 *The AO examined the above contentions but did not accept the same. The AO relied upon the decision of DRP in the case of HISWAL for AY 2009-10 and did not agree with the contention that the HCSL was a separate legal entity, as in his view in terms of the DRP order, payment made to HCSL and other affiliates essentially constitutes royalty in lieu of providing composite bouquet of services mentioned in the SOSA by Hyatt Corporation and other affiliates. The AO refused to agree that such payment was in the nature of 'reimbursement' by observing that there was no one-to-one relationship between expenditure incurred by HCSL and consideration paid by the appellant. The AO observed that out of the total expenses of HCSL amounting to USD 3,31,74,512/, it has recovered an amount of USD 464,475 from the appellant after making adjustments in the form of contributions. However, in his view, the same does not denote the character of reimbursement'.*

Thirdly, the AO rejected the agreement of the appellant that the recipient was carrying out services outside India, by holding that there was 'business connection' in India and the source of income also existed in India.

Fourthly, with regard the submissions of the appellant that HCSL was a no profit-no loss entity, the AO held that the status of the recipient does not determine the nature of services rendered by it, and in this regard, reliance

was placed on the decision in the case of Danfoss Industries P. Ltd. in re (268 ITR 1) and Timken India (273 ITR 57).

The AO lastly, rejected the contention of the appellant on the ground that that Certificates u/s 195(2) have been issued by the AO in the earlier years allowing the appellant to remit such payments to HCSL without deducting any tax by observing that doctrine of res judicata or estoppels by record does not apply to tax proceedings. In view of this, heavily relying upon the decision of DRP in the case of M/s HISWAL in A.Y. 2009-10, the Ld. AO held that the payment to be remitted by appellant to HCSL, HongKong, was chargeable to tax in India as Royalty/FTS. Since the appellant has not given the PAN No of the remittee, the AO held that the appellant had to withhold the tax @ 20% plus surcharge (2%) and education cess (3%), in view of the provisions of section 206AA of the Act.”

6. Ld. CIT(A) after duly considering the findings of the Ld. AO, detailed submissions made by the assessee before him and relevant clauses of SOA held that tax is not required to be withheld on payments to HSCL by recording the following findings:-

“6.2.2 On careful consideration of the facts of the case it is observed that M/s Hyatt Chain Pvt. Ltd. (HCSL) Hongkong, was providing various Chain Services outside India to various hotels operated by M/s Hyatt International South West Asia Limited (HISWAL), across the globe which included convention, business and sales promotion services, publicity, public relation including

institutional advertising programme. These services are collectively called as "Chain Marketing Services". As per Section 2 of SOSA signed between the appellant and "HISWAL", no profit was to be received for rendition Of Chain Marketing Services and the HCSL was to be reimbursed on proportionate basis in respect of such Chain Marketing Services in respect of all costs incurred by HCSL. The agreed formula provided for a fixed recovery per room and topped up by a fixed percentage of the room revenue. Same formula was to be applicable to all Hyatt Hotels Group Companies, which were provided Chain Marketing Services of HCSL depending upon the overall quantum of recovery in respect of Chain allocation, however, the overall and the proportionate recovery from various Hyatt Hotels can be increased or decreased. The Section 2 of the SOSA clearly shows that at no stage, the overall and the proportionate recovery from various Hotels and respect of Chain Marketing Services will exceed the expenses incurred in this regard by HCSL or any other affiliates and it will not result in profit to HCSL. The relevant Section 2 of SOSA reads as under:

"Section 2. Chain Marketing Services, Reservation Services and Gold Passport.

Strategic Services provider shall, in the operation of the Hotel and for the benefit of its guest, provides or cause its affiliates, Hyatt Chain Services Limited ("HCSL") and International Reservations Limited ("IRL") or other affiliates of Strategic Services Provider, to provide the following services outside of India, to the extent appropriate and furnished to other hotels operated by Strategic Services provider and its affiliates. HCSL shall provide

convention, business and sales promotion services (including without limitation, the maintenance and staffing of H.L.'s home office sales force and regional sales offices in various parts of the world), publicity, public relations, and all other group benefits, services and facilities including, without limitation, institutional advertising programs (which exclude advertising programs in which only selected H.I. hotels participate in by mutual agreement, the cost of which programs are allocated amongst the participating H.I. hotels) (collectively, "Chain Marketing Services"). IRL shall provide reservations services.

Neither Strategic Services provider, HCSL nor IRL, nor any other affiliate of Strategic Services provider shall receive any profit for the rendition of Chain Marketing or reservations services. HCSL shall, however, be entitled to be reimbursed for the Hotel's share ("Chain Allocation") of all costs incurred by HCSL Strategic Services Provider or their affiliates, including without limitation, salaries of officers or employees, in the rendition of said services, and IRL shall be reimbursed for reservations costs. The charges for Chain Marketing Services and for reservation services shall be made on the same basis as to the other hotels operated by H.I., Strategic Services Provider and their affiliates. The present formula (in 2008 Dollars) for Chain Allocation is based on US\$394 per Hotel guest room, per annum, plus one percent (1%) of the Room Revenue of the Hotel per annum, during the operating Term and during any partial operations conducted prior to the Formal Opening of Hotel. During the pre-opening period, the present formula (in 2008 Dollars) for chain

allocation is based on US\$394 per Hotel guestroom, per annum, and shall be based gross reservation plus US\$0.70 (in 2008 Dollars) per gross reservation processed through Strategic Services Provider's proprietary software database called SPIRIT/Reserve. The Chain allocation formula and the reservations charge are subject to change, from time to time, in further, but all hotels managed by H.I and its subsidiaries are charged on the same basis. If chain allocation or the reservations charge to all H.I hotels is reduced, the chain allocation and/or reservation charge to the Hotel shall be reduced, and if chain allocation and/or the reservations charge to all H.I hotels is increased, chain allocation and/or the reservations charge to the Hotel be increased. Strategic services provider shall cause its affiliates, HCSL and IRL, to provide Owner with a copy of the audited annual expenditure statements for chain Marketing services and reservation services."

6.2.3 The Ld. AO in the impugned order in Para 8(D) also observed that such Chain Marketing Services are not being provided individually to the appellant company and there is no one-to-one relationship between the expenditure incurred by HCSL in providing the services and consideration received by it from the appellant and other such hotels.

Secondly, it is also undisputed that such services were not rendered in India and the Ld. AO has made no finding in this regard. The AO, however, was of the view that such services show "business connection" in India and that source of income also lies in India. Further, he was of the view that the advertising campaign in foreign media and marketing campaigns may have

readership and viewership in India also. He has also rejected the arguments of the appellant the recipient is a no-profit no loss entity and that the remittance to it is in the nature of only reimbursement.

6.3 On careful consideration of the facts of the case, I find that there is no evidence on record placed by the AO to suggest that the advertising campaign for which HCSL was compensated by various Hyatt Group of Companies specifically provided for advertising services for the appellant company only. The said advertising campaign can be held to build the brand "Hyatt" for which services can be rendered to M/s Hyatt International Inc. However, there is no evidence to prove that such services were specifically rendered for promoting the business of the appellant. As per SOSA, various Hyatt Group of companies located across the globe, were required to make proportionate payment to HCSL in order to recover the cost of such marketing campaign. However, in the own admission of AO, there is no one- to-one relationship between the services rendered by HCSL and the payment made by the appellant, which is only based on a formula globally applicable for all Hyatt Group of Companies depending on the Number of rooms and room revenue and limited to the recovery of actual cost of providing marketing services for the entire group. Under the circumstances, it cannot be held that the appellant was provided any services in respect of which such recovery of cost can be held as FTS. Under the circumstances, I find no merit in as such payment treating FTS. Accordingly, the Ground No. 1 cannot be sustained.

6.4 The Ld. AO also emphasised on Section 1 of SOSA, by which it was held that M/s HISWAL and other affiliates had provided a bouquet of services to the appellant, based on which he treated such income as royalty income. I find that for this purpose the Ld. AO has heavily relied upon the order of DRP in the case of M/s HISWAL for A.Y.2009-10, in which there was only mention about nature of service provided by "HISWAL" and no finding was given/for the services rendered by HCSL, which was in the nature of marketing services. In view of this, the decision of DRP in the case of HISWAL had no application in the case of appellant. It is also undisputed that such services have been rendered outside India. It is evident that by providing such marketing services to foster 'Hyatt' brand, the HCSL has neither transferred any rights nor imparted any information or allowed use of any patent, etc. to the appellant. Under the circumstances, such payment cannot be treated as Royalty under the domestic law. In view of these Grounds No. 3 and 4 are also allowed.

6.5 Further, there is no finding given by the Ld.AO in the impugned order, by which it can be held that M/s HCSL had a P.E in India. This is in contrast to the DRP's order in the case of HISWAL, in which it was observed that in respect of that company, executives travelled to India for the duration of 9 months to 12 months. On the other hand, there is no similar finding on record made by the Ld.AO in respect of HCSL. The appellant had categorically pleaded that no employee or representative of HCSL had ever travelled to India for rendering services to the appellant. Under the circumstances, there is

no ground to hold a fixed place P.E in India of M/s HCSL. In view of the above, the reliance of the Ld.AO on the DRP's order of HISWAL for A.Y. 2009-10 has no precedence value. In view of this, the Ground No. 5 is dismissed.”

7. Aggrieved, the Revenue is before us. The limited issue to be decided is whether the payments made to HCSL for the provision of the centralised services relating to marketing, sales promotion and centralized reservation by HCSL to assessee outside India as per the terms of SOA fall within the purview of definition of royalty as per Explanation 2 of section 9(1)(vi) and thus require the assessee to withhold applicable taxes on remittances made to HCSL in respect of such services.

8. The Ld. DR heavily relied upon the findings of the Ld. AO and the DRP's finding in the case of assessment of HISWAL for assessment year 2009-10 under section 143(3) of the Act.

9. The Ld. AR submitted that the assessee in earlier years was permitted to make remittance to HCSL without any TDS thereon. He submitted that the services were provided by HCSL outside India by HCSL which is a separate independent entity providing such services to various hotels operated by Hyatt across the globe. HCSL is a no profit entity. The DRP's order in case of HISWAL for assessment year 2009-10 has no application in assessee's case which was based on the finding that HISWAL is having a PE in India. Further, the said order only talks about the nature of services

provided by HISWAL and does not mention anything about the services rendered by HSCL which was in the nature of marketing services. The payment is analogous to payment made by an Indian exporter to its agent outside. Since the foreign agent operates outside India, no part of its income arises in India. He submitted that the issue under consideration is squarely covered by the Judgements of the Hon'ble Jurisdictional Delhi High Court in DIT vs. Sheraton International Inc. (313 ITR 267) and Hon'ble Karnataka High Court in the case of ITC Hotels in ITA Nos. 477 and 478 of 2009 dated 15.06.2015. As an alternate argument, the Ld. AR also submitted the payments made to HCSL are in the nature of reimbursement of the proportionate expenses incurred by HSCL on cost to cost basis and there was no element of income at all.

10. We have carefully considered the submissions of the Ld. Representatives of the parties and perused the material on record. It is an undisputed fact that HCSL is a separate independent no profit entity and providing services outside India to various hotels operated by Hyatt across the globe. Costs of such chain marketing services are being reimbursed on proportionate basis by the participant hotels one of which is the assessee. The Ld. CIT(A) categorically recorded the finding that no evidence was brought on record by the Ld. AO to suggest that the advertising campaign for which HCSL was compensated by various Hyatt group of hotels specifically provided for advertising services for the assessee company only. Further, there is nothing on record of the Ld. AO to suggest that the HCSL

had a PE/ business connection in India. The main thrust of the Ld. AO is on the findings in the assessment of HISWAL for assessment year 2009-10 wherein HISWAL was held to be having a PE in India. Therefore, as rightly held by the Ld. CIT(A) the case of HISWAL has no application in the case of the assessee. HISWAL and the assessee are separate legal entities and assessed accordingly. The findings in one case cannot blatantly be applied to an altogether different case. HISWAL's assessment was concluded on the basis of HISWAL having a PE in India. In the instant case, there is nothing on record to suggest that HCSL had a PE/ business connection in India and this has not been controverted before us.

11. The issue for consideration before us is whether the chain marketing services provided by HCSL to assessee falls within the scope of Explanation 2 to section 9(1)(vi) of the Act. The definition of the term "royalty" as provided in Explanation 2 to section 9(1)(vi) of the Act is as follows –

"Royalty means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "capital gains") for –

- (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;

- (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;
- (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;
- (v) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;
- (vi) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or (vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).”

11.1 As per SOA the remittance to HCSL is made by the assessee in relation to centralised services provided by HCSL outside India for advisement, sales promotion and computer reservation. In our view, payments to HCSL are not made for consideration for any of the items (i) to (vi) enumerated in Explanation 2 to section 9(1)(vi).

11.2 There are numerous decisions wherein the issue relating to the nature of provision of centralised marketing services by way of advertising and computer reservation etc. rendered by one of the group of company particularly in the field of hospitality industry outside India has been

considered. In the case of Director of Income Tax vs. Sheraton International Inc. (2009) 313 ITR 267 wherein such type of service was under consideration, the Hon'ble Delhi High Court held that such services are neither royalty nor FTS as per the provisions of section 9 of the Act and accordingly not liable to tax in India. The relevant extract of the judgment is reproduced below:-

“31. 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, a, 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 grin'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 five 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 trade mark 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 I3.TAA (see paragraph 114).

32. 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 trade mark, 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 article 7 of the DTAA "business income" received by the assessee cannot be brought to tax in India..."

11.3 The Hon'ble Karnataka High Court reiterated the above view in CIT/ITO (TDS) vs. ITC Hotels Ltd., ITA Nos. 477 and 478 of 2009 dated 15.06.2015 wherein the Hon'ble High Court following the judgement of the Delhi High Court in Sheraton International Inc. (supra) held as under-

“...In the present case, the question that would arise is whether payment made by the respondent assessee to Sheraton would amount to ‘business income’ or ‘royalty’ or ‘fee for technical services’ and said issue has been settled by the Delhi High Court in the case of Director of Income Tax vs. Sheraton International Inc – (2009) 313 ITR 267 and it has been held that such income would be ‘business income’ not liable for payment of tax under the Double Taxation Avoidance Agreement (DTAA)...”

“The undisputed position is that Delhi High Court in the case of Sheraton International Inc (supra) has clearly held that the income received by Sheraton would not be liable to tax therefore, question of deducting tax at source by the respondent assessee while making payment to Sheraton would not arise. I though Sri Rupesh Jain, learned counsel for the respondent/assessee has stated that the decision in the case of Synopsis International (supra) is distinguishable on facts but, we need not go into the said question as we are clear that with regard to payment of tax by Sheraton or deduction of tax at source by the respondent/assessee would be governed by the decision of the Delhi High Court in the case of Sheraton International (supra). Even otherwise,

as we have already observed herein above, the Revenue itself had given No Objection Certificates consistently for several years and allowed the respondent assessee to make payment to Sheraton without deducting tax at source and it was only after the decision of the Assessing Officer at Delhi in the case of Sheraton holding that payment made to it would be liable for payment of income tax in India, the proceedings in question had been initiated against the respondent assessee herein. However, once the said order of the Assessing Officer itself has been set aside by the Delhi High Court, the very foundation of Initiating proceedings against the respondent assessee disappears and once the foundation goes, the structure cannot remain, i.e., proceedings against the respondent assessee cannot go on.”

11.4 Respectfully following the decisions (supra), we hold that the payments made to the HSCL by the assessee are not in the nature of royalty under the provisions of section 9(1)(vi) of the Act and thus not chargeable to tax and not requiring the assessee to withhold any tax on such payments.

12. It is a settled position of law that under section 195 of the Act, tax is not required to be withheld on remittance made by the assessee in respect of the income of the payee which is not chargeable to tax under the provisions of the Act. In support, reliance is placed on the judgements of the Hon'ble Supreme Court in Transmission Corporation of A.P. Ltd. & Anr. vs. CIT (1999) 239 ITR 587 (SC) and GE India Technology Cen. (P) Ltd. vs. CIT Civil Appeal Nos. 7541-7542 of 2010.

13. The Ld. AR also raised an alternate argument that the payment for chain marketing services has been made to HSCL as reimbursement of the proportionate expenses incurred by HSCL on cost to cost basis and there was no element of income at all. Hence, the payments made to HSCL cannot be said to be in the nature of income deemed to accrue or arise to India in the form of royalty or FTS. We find force in the argument of the Ld. AR. The Hon'ble Delhi High Court in CIT vs. Expeditors International (India) (P.) Ltd. [2012] 209 Taxman 18 (Delhi) held that the assessee was not liable to withhold tax in respect of the reimbursement of global management expenses, communication uplink charges and other expenses made to its parent company located outside India. The relevant para of the said judgment is reproduced below:-

“5. The aforesaid contention of the appellant was refuted by Ms. Kapila, learned counsel appearing for the assessee submitting that core issue was as to whether nature of expenses is such that it attracts the provisions of TDS. Her submission was that the payment raised was towards reimbursement of the expenses incurred by the parent company, namely, global management expenses and other expenses. When such payment was not chargeable to tax at all, the collecting machinery provision, whether Section 194J or Section 195, would not get triggered. According to her, there must be component of income chargeable to tax and only then the question of deduction of tax at source would arise in as much as tax at source is to be deducted on income and not on expenses. Global management expenses were reimbursement of

cost and as per the decision in the case of Van Oord ACZ India (P) Ltd. v. CIT [2010] 323 ITR 130/189 Taxman 232 (Delhi) tax was not deductible.”

14. Considering the issue involved from this perspective also, in our view, no income can be said to accrue or arise to HCSL in India making the assessee liable to withhold tax under section 195 of the Act. We accordingly uphold the order of the Ld. CIT(A) and reject the appeal of the Revenue.

15. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 15th March, 2022.

Sd/-

sd/-

**(N.K. BILLAIYA)
ACCOUNTANT MEMBER**

**(ASTHA CHANDRA)
JUDICIAL MEMEBR**

Dated: 15/03/2022

Veena

Copy forwarded to-

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi