IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI I BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
And Amit Shukla (Judicial Member)]

ITA No. 2286/Mum/2021
Assessment year: 2013-14

Deputy Commissioner of Income Tax, (IT)-3(2)(2)
Mumbai **.....Appellant**

Vs.

M/s Marriott International Design & Construction Services.....Respondent
C/o BMR & Associates LLP, BMR House, 36B,
Dr. RK Shirodkar Marg, Parel, Mumbai 400 012
[PAN: AAGCM5401Q]

CO No. 35/Mum/2022
Arising out of ITA No. 2286/Mum/2021
Assessment year: 2013-14

M/s Marriott International Design & Construction Services .....Cross Objector
C/o BMR & Associates LLP, BMR House, 36B,
Dr. RK Shirodkar Marg, Parel, Mumbai 400 012 [PAN: AAGCM5401Q]

Vs.

Deputy Commissioner of Income Tax, (IT)-3(2)(2)
Mumbai **.....Respondent**

Appearances by:
Milind Chavan *for the appellant*
Paras Savla *along with* **Harsh Shah, Pratik Poddar** *for the respondent*

Date of concluding the hearing : 09/06/2022
Date of pronouncing the order : 22/06/2022

O R D E R

Per Pramod Kumar VP

1. This appeal has also the cross objection on directed against the order 23.09.2021 passed by the learned CIT (A) in the matter of assessment under section 143 (3) r.w.s 144C of the Income Tax Act, 1961, for the assessment year 2013-14.

2. We first take up the appeal filed by the Assessing Officer.

3. In the appeal filed by the Assessing Officer the following grievances are raised:-

> *1. The Ld. CIT(A) erred in relying on the judgement of Hon'ble ITAT in the of Viceroy Hotels when services provided by the assessee are more than advisory in nature and comes in purview of fee of included services as per Indo US DTAA. "The appellant prays that the order of the Ld. CIT(A) on the above ground(s) be set aside and that of the Assessing Officer be restored?.*
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> *2. The Ld. CIT(A) erred in ignoring the fact that as per "Technical Service Agreement" assessee company does more than mere a review of the work done by the owner of hotel and is involved in the project from conceptualization to the final stage and makes available knowledge and experience and skill to the owner of the hotel.*

4. To adjudicate on these grievances it is sufficient to take note of the fact that the assessee before us is a company incorporated and fiscally domiciled in United States Of America and that during the relevant previous year it has received a sum of Rs. 10,71,58,100/- towards advisory assistance for design and construction of hotel. The Assessing Officer was of the view that the amount so received by the assessee is taxable in the hands of the assessee as fees of included services under article 12 of the US Tax Treaty and also as fees for technical services u/s. 9 (1) (vii) of the Income Tax Act. For the reasons set out in short while it is not really necessary to go into any further details in respect of nature of the services rendered. Suffice to take note of the fact that when the taxability of an identical payment made by the an Indian company namely Viceroy Hotel Ltd., to the asssessee company came up before a coordinate bench of this Tribunal, in the course of adjudicating upon the tax deduction at source liability u/s 195 of the Act, it was held that these amounts are not taxable under the provisions of the Indo-US tax treaty, while holding so the co-ordinate bench *inter alia* observed as follows:-

> *30.We have also gone through the definition of 'included services in Indo US Treaty so as to find out whether the services rendered by Marriott will fall under the purview of included services as enumerated in article 12(4)(a) and 12(4)(b) of the Treaty :*

Article 12(4) of the Indo US Treaty reads as below:

For the purpose of this article 'fees for included services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services;

(a)		*Are ancillary and subsidiary to the application and enjoyment of the right, property or information for which a payment described in paragraph 3 is received or*
(b)		*Make available technical knowledge, experience, skill, knowhow or processes or consist of the development and transfer of a technical plan or technical design.*

31. Thus Article 12(4) emphasises on rendering any technical or consultancy services which are ancillary and subsidiary to the application or enjoyment of any right, property or information for which a payment is received or make available technical knowledge, experience, skill, know how or processes or consist of development and transfer of technical plan or technical design. The services rendered by Marriott do not fit into either of the categories defined in 12(4)(a) or 12(4)(b) since the services do not involve technical expertise nor does it make available any technical know-how plan, design etc. What is being done by Marriott is basically inspection of the hotel, reviewing the facilities, comparing the same with Marriott's standards and suggesting improvements/change wherever required to meet the Marriott standard. Generally speaking technology will be made available when the person acquiring the service is enabled to apply the technology. The fact that the provision of service may require technical input by the person providing the service does not per se mean the technical knowledge, skill etc., are made available to the person acquiring the service within the meaning of Article 12(4)(a). An example (example 7) given in the Memorandum of Understanding will further elucidate the issue. In this example, an Indian Vegetable Oil Manufacturing firm wished to market its product worldwide for which it hired an American Marketing Consulting Firm to do a Computer Simulation of the World Market and advise the Indian company on the marketing strategy. On the issue whether the fees paid to the US Company will be for included services, it has been stated that the fees would not be for included services. The American Company is not making available to the Indian Company any technical knowledge, experience and skill nor is it transferring a technical plan or design. What is transferred to the Indian company through the service contract is commercial information. The fact that Technical skills were required by the performer of the service in order to perform commercial information service does not make the service a technical service within the meaning of Article 12(4)(b).

32. Further we find that similar issue has also been decided in the case of Raymond Ltd. (supra) wherein the ITAT, Mumbai has dealt in detail the concept of 'make available' and have opined that the technical knowledge, experience, skill etc. must remain with the person utilising the services even after rendering of the services comes to an end. Similar view was also expressed by Hon'ble Mumbai in the case of Boston Consulting Group (P.) Ltd. (supra) wherein the Tribunal observed that :

Unless the services are technical in nature, there cannot be any question of 'technology' being contained therein which the person acquiring the services can be enabled to apply. Therefore, so far as the provisions of India Singapore Tax Treaty as also the

provisions of India US Tax Treaty are concerned, payment for services not containing any technology, are required to be treated as outside the scope of 'fees for technical services".

Rendering technical or consultant services or services make available means that technical or consultant services rendered should be of such nature that 'makes available' to the recipient technical knowledge, know-how and the like. The service should aimed at and result in transmitting the technical knowledge, etc. so that the payer of services could derive an enduring benefit and utilise the knowledge or know-how in future on its own without the aid of the service provider. By making available technical skills or know how, the recipient of service will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider. In other words, to fit into the terminology 'fees for included services', the technical knowledge and skills etc., must remain with the person receiving the services even after the particular contract comes to an end. The services offered may be the product of intense technological effort and a lot of technical knowledge and experience of the service provider would have into it. But that is not enough to fall within the description of 'fees for included services'. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in future without depending on the provider. For example, a prescription and an advise given by the doctor after examining the patient and going through the clinical reports, the service rendered by the doctor cannot said to have made available to the patient, the knowledge and expertise possessed by the doctor. On the other hand, if the same doctor teaches or trains student on the aspect of diagnosis or techniques of surgery, that will amount to making available the technical knowledge and experience of the doctor.

In the case of Carborandum Co. v. CIT [1977] 108 ITR 335 (SC), a foreign company entered into an agreement with an Indian company for rendering technical and know how services to the Indian company. In lieu of those services, the foreign company was to receive from the Indian company an annual fee equal to three per cent of the net sale proceeds of the products manufactured by the Indian company every year. The question was how much of the money received by the foreign company would be taxable under the provisions of the Act. The Indian company employed personnel made available by the foreign company, who worked under the direct control of the Indian company. The Supreme Court held that the services of the foreign company in making the employees available were rendered wholly outside India and that the activities of the foreign personnel lent or deputed by the foreign company did not amount to a business activity carried on by the foreign company in India. It was further held that the fee did not accrue or arise in India nor could it be deemed to have accrued or arisen in India and that to rope in the income of the non resident under the deeming provision of section 42(1) of the 1922 Act it must be shown by the department that some of the operations were carried out in India in respect of which the income is sought to be assessed.

In the case of Addl. CIT v. New Consolidated Gold Fields Ltd. [1983] 143 ITR 599 (Pat.), the assessee company and the foreign company entered into an agreement under which the foreign company was to be technical adviser of the assessee company in the matter of exploration, mining and mineral dressing operations. The foreign company was to be paid a retainer's fee at the rate of $7,000 per annum in London. The Income Tax Officer treated the assessee company as the agent of the foreign company within the meaning of section 163 of the income tax act and treated $7,000 payable by the assessee company to the foreign company as its income accruing in the hands of the assessee

company. On appeal, the Appellate Assistant Commissioner held that even if the assessee company was to be treated as an agent within the meaning of section 163(1), there was no business connection within the meaning of section 9(1) of the Act so the income accruing to the non resident foreign company could not be assessed through as agent. That order was affirmed by the Tribunal. On a reference to the High Court of Patna, it was held that the sum of $7,000 was not the income with the foreign company had received in India or an income which had accrued to the foreign company within the meaning of section 5(2) of the Act and that the sum paid to the foreign company at London for technical advice given from London could not be attributed to the operation carried on in India. It was further held that there was no continuity between the business of the non resident and the activity in the taxable territories in respect of the income and, therefore, there was no business connection between the foreign company and the assessee company and the income could not be deemed to accrue or arise to the foreign company in India within the meaning of section 9(1) as such, the said sum paid to the foreign company at London was not assessable in the hands of the assessee company even as agent of the foreign company.

In the case of C.E.S.E. Ltd. v. Dy. CIT [275 ITR (AT) 15], Hon'ble Calcutta Tribunal have held that, if the services provided was of mere reviewing and opining rather than designing and directing the project, no technical knowledge etc., is made available to the assessee. The decision was rendered in the context of Indo UK treaty, but the same can also be applied to interpretation of the phrase 'make available' appearing in Indo US Treaty. The fact of the present case is almost identical to the ones discussed above. As in the case of CESE Ltd., the present case what was being made available to the assessee company was advisory services and opinion for improvement of the existing facilities. Accordingly, in the light of the of ITAT Mumbai & Calcutta, no technology or technical skill is being transferred to the assessee company.

33. In view of the above, in our opinion, in the present case, what was made available to the assessee company was advisory services and opinion for improvement of the existing facilities. It is also noted by the assessing officer mentioned in his order that the services rendered by Marriott which includes advisory services and reviewing of the design documents prepared by the owner or owner's consultant to verify compliance with Marriott's standards. It is thus clear that Marriott themselves are not preparing and transferring any drawing, designs, technical plan etc. They are simply reviewing, what is being done by the parties engaged for designing upgrading the Hotel. In view of this, the fees paid to Marriott International will not fall within the ambit of fees for included services. As such, a provision of section 195 is not applicable. Accordingly, there is no question of application of provisions of section 201(1) and 201(1)(A) of the IT Act.

5. Learned CIT(A) in the light of the above decision of the co-ordinate bench granted impugned relief to the assessee by holding that the amounts in question are not taxable in the hands of the Assessee. The Assessing Officer, however, is aggrieved and is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. We are of the view that once a coordinate bench of this Tribunal in assessess's own case comes to the conclusion that the amounts in question are not taxable in terms of the provisions of the applicable tax treaty and the findings of the co-ordinate bench still hold good in law, we have no reasons to take any other view of the matter than the view so taken by the coordinate bench. Learned CIT(A) was quite justified in the following a binding judicial precedent and no specific reasons have been pointed out to us either, for the said judicial precedent, which is binding on us as well, must be deviated from. In view of these discussions and bearing in mind entirety of the case we uphold the relief granted by the learned CIT(A) and decline to interfere in the matter. The grievance raised by the Assessing Officer, does not meet our approval.

8. In the result the appeal filed by the Assessing Officer is thus dismissed.

9. Learned counsel for the assessee fairly submitted that in the event of the order of the learned CIT(A) being confirmed on merits, the assessee does not wish to pursue the technical objections raised by him with respect the impugned demand. He therefore, does not press the cross objection filed by the assessee. Accordingly, the cross objection is dismissed for want of prosecution.

10. In the result cross objection is also dismissed.

11. To sum up, while the appeal of the Assessing Officer is dismissed and cross objections filed by the assessee are also dismissed has not pressed. Pronounced in the open court today on the 22nd day of June, 2022

Sd/-	Sd/-
Amit Shukla	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 22nd day of June, 2022

Copies to: *(1) The appellant (2) The respondent*
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai