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

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. N.K. CHOUDHRY, JUDICIAL MEMBER

ITA No.8668/Del/2019
Assessment Year: 2016-17

Westin Hotel Management LP, Nangia and Co. LLP A-109, Sector-136, Noida-201304 **PAN No.AAAFW9088N**	**Vs**	**ACIT** **Circle – 3 (1) (2)** **International Taxation** **New Delhi**
(APPELLAN		**(RESPONDENT)**

Appellant	Sh. Amit Arora, CA Sh. Vishal Misra, CA
Respondent	Ms. Sapna Bhatia, CIT DR

Date of hearing:	21/07/2022
Date of Pronouncement:	21/07/2022

ORDER

PER N.K. BILLAIYA, AM:

This appeal by the assessee is preferred against the order of the CIT(A)-43, New Delhi dated 28.08.2019 pertaining to A.Y.2016-17

2. The grievance of the assessee read as under :-

GROUNDS OF APPEAL

Appeal against the order under section 250(6) of the Income Tax Act, 1961 ('the Act') dated August 28, 2019 for Assessment Year 2016-17 passed by the Commissioner of Income Tax (Appeals) - 43, New Delhi (hereinafter referred as 'Ld. CIT(A)'), received by Appellant on September 21, 2019.

The Appellant prefers the present appeal on the below mentioned grounds which are mutually exclusive and without prejudice to one another:

1. The order of the Ld. CIT(A) is contrary to the facts, law and principle of Stare decisis and is, therefore, bad in law.

2. That on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the addition to income amounting to Rs. 39,28,87,342 made by Ld. Assessing Officer (hereinafter referred to as 'Ld. AO'), towards Centralized Services fees received by the Appellant primarily in the nature of Sales & Marketing charges, Reservation charges, Loyalty programs and fees for other centralized services rendered outside India.

3. That on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in treating the fees of Rs. 39,28,87,342 received for rendering various Centralized Services taxable as Fees for Technical Services (hereinafter referred as 'FTS') under Section 9(1)(vii) of the Act or Fee for Included Services ('FIS') under Article 12 of India-USA Double Taxation Avoidance Agreement ("DTAA").

4. That on the facts and the circumstances of the case and in law, the Ld. CIT (A) has erred in not abiding by the Principle of Stare Decisis by not following the decisions of Jurisdictional Hon'ble Delhi Tribunal and Hon'ble Delhi High Court in cases of group entities of the Appellant rendering similar services, namely Sheraton International Inc. vs DDIT [(2007) 106 TTJ 620 (Delhi)], DIT vs Sheraton International Inc. [(2009) 313 ITR 267 (Delhi)], DCIT vs Starwood Hotels & Resorts Worldwide Inc. (ITA No. 202/ Del/ 2016) and CIT-International Taxation vs. Starwood Hotels & Resorts Worldwide Inc. (ITA 713/2019)., wherein it has been held that payments received for similar services are not taxable in India either under Section 9(1)(vii) of the Act or under Article 12 of India-USA DTAA. While doing so, Ld. CIT(A) has erred in distinguishing the above-mentioned decisions of Hon'ble Delhi Tribunal and Hon'ble Delhi High Court based on incorrect reasons.

5. That on the facts and the circumstances of the case and in law, the Ld. CIT (A) has erred in not abiding by the Principle of Stare Decisis by not following the decisions of his predecessor CIT(A) in Appellant's own case for earlier AY 2013-14 and AY 2014-15.

6. That on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in invoking Article 12 (4)(a) of the India-USA DTAA and treating Centralized Services fees received by Appellant 'ancillary & subsidiary' to the License fee, and taxable as FIS under the India-USA DTAA.

7. That on the facts and the circumstances of the case and in law, the Ld. CIT (A) has violated the principles of natural justice while confirming the addition made in Assessment order and applying a completely different reason/ basis [i.e. Paragraph 4(a) of Article 12 of India-USA DTAA, which was not even invoked by Ld. AO while passing the Assessment Order], without granting opportunity to Appellant to present its case regarding non-applicability of such article/ reason.

8. That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding interest amounting to Rs. 11,530,912 be levied under Section 234B of the Act.

9. Additional Ground: That on the facts and circumstances of the case and in law, the Ld. AO has erred in levying interest amounting to Rs. 7,206,820 levied under Section 234A of the Act, despite the Appellant filing the Income Tax return within the due date of filing the Income Tax return.

All of the above Grounds of Appeal are independent of and without prejudice to each other.

The Appellant craves leave to add to or alter, by deletion, substitution or otherwise, any or all of the foregoing grounds of appeal at or before the hearing, and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing.

3. At the very outset, the counsel for the assessee stated that the substantive issues raised in the grounds of appeal has been considered and decided by this Tribunal in favour of the assessee and against the revenue.

4. The DR fairly conceded to this.

5. We have carefully perused the orders of the authorities below and have duly considered the decision of this Tribunal in ITA No.2013/Del/2019 order dated 29.04.2022.

6. Briefly stated that the facts of the case are that the appellant assessee is a firm incorporated under the laws of

United States of America and resident thereof. It is engaged in the business of providing hotel related services in several countries around the world. The assessee is group entity of Starwood.

7. In India the assessee has entered into agreements with various Indian hotels for provision of hotel related services inter-alia worldwide publicity, marketing and advertising services through its system of sales, advertising, promotion, public relations and reservations.

8. During the course of scrutiny assessment proceedings and taking leaf out of the earlier assessment years in respect of the payments received by the assessee for such services the AO observed as under :-

7.9 Therefore the payments received by assessee in respect of such services are covered under the provisions of Article 12 of the double taxation Avoidance Agreement. Further, the matter is already pending before the Hon'ble Supreme Court by way of Special Leave Petitions in case of Sheraton International Inc. In order to keep the issue alive, it is held that revenue received by the assessee for providing centralized services is liable to tax as FTS both under the Act and under the Treaty.

9. The assessment was completed by treating Rs.28875531/- as Royalty and Rs.39,28,87,342/- as FTS/ FIS.

10. The Action of the AO was challenged before the CIT(A) and the CTI(A) was also carried away with the findings given by him in A.Y. 2015-16. The relevant part of the order of the CIT(A) read as under :-

"5.1 <u>Ground No.2 & 3</u>

The facts of the present case are similar to the case of the appellant disposed by me earlier for Assessment Year 2015-16, Appeal No.73/2017-18. The principle issue is the taxability of the consideration of Rs. 39,28,87,342 received by the appellant for rendering services to the client hotels to which the license has been granted and taxable royalty is being received on the same. The considerations in the earlier year were also of the same nature and a' similar addition was decided upon by me. The **Ground no 2 and 3** *in the present appeal are in substance identical to the Ground no 3 of the earlier appeal."*

11. Thereafter the CIT(A) followed the findings given in A.Y.2015-16 as under :-

The same view is followed in the present year as the facts are exactly similar in nature to the earlier AY 2015-16. Therefore being consistent with the above finding on ground no 2 and 3, summarizing, it is seen that the considerations of Rs.34,22,65,341 received are taxable as fee for included services under paragraph 4(a) of the Article 12 of the India US Treaty as these are ancillary and subsidiary to the enjoyment of rights for which consideration has been received as royalty under paragraph 3 of Article 12. The said considerations are also chargeable to tax under section 9 of the Income Tax Act as explained above. The case of the assessee is not covered and distinguishable from the case of the Jurisdictional High Court in Sheraton International since the said case had only considered the taxability under the payments in question received by the assessee company from the Indian hotels/clients as "fees for included services" within the meaning of paragraph 4(a) of Article 12 .

12. This quarrel was considered by this Tribunal in assessee's own case in ITA No.2013/Del/2019 for A.Y.2015-16 vide order dated 29.04.2022. The relevant findings of the coordinate Bench read as under :-

24. Thus, on a reading of the aforesaid observations of the Coordinate Bench, it becomes very much clear that not only the Tribunal has examined the applicability of Article 12(4)(a) of the Treaty qua the payment received but has categorically held that it

cannot be treated as FIS under Article 12(4)(a) of the Treaty. Undisputedly, the aforesaid observations of the Coordinate Bench have been upheld by the Hon'ble Jurisdictional High Court in case of DIT Vs. Sheraton International Inc (supra). In view of the aforesaid, the observations of learned Commissioner (Appeals) that the applicability of Article 12(4)(a) was never examined has to be rejected at the threshold. In fact, we are constrained to observe, learned Commissioner (Appeals), being conscious of the fact that the centralized service fee received by the assessee cannot be treated as FIS under Article 12(4)(b) due to failure of 'make available' condition, has made an unsuccessful attempt to bring it within the ambit of Article 12(4)(a) of the Treaty and in the processes has misrepresented certain facts.

25. Be that as it may, the fact on record reveal that the taxability of centralized services fee as FIS is a recurring issue between the assessee and the Revenue from the past years. It is relevant to observe, while deciding the issue in assessment year 2010-11, the Tribunal in ITA No.202/Del./2016, dated 28.09.2017, has held as under:

> *"5. We have heard the ld. Authorized Representative of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.*

6. Ld. DR for the revenue relied upon the order of the AO. However, the ld. AR for the assessee relied upon the order passed by the ld. CIT (A).

7. For the sake of ready reference, the findings returned by the ld. CIT(A) allowing the appeal is reproduced as under

> "8. I have carefully considered the above submissions, and the contentions of the appellant. I have also perused the assessment order and the orders of the Hon'ble ITAT and the Hon'ble Delhi High Court for the A Vs. 1995-96 to 2000-2001 in the case of Sheraton International Inc (group concern). The issue of taxability of the appellant's income from hotel related services provided to hotels in India, as royalty fees for technical services, stands squarely covered by f the judgment of the ITAT, Delhi in the case of Sheraton International Inc. at ITA Nos. 50 to 55/Del/2006 dated | 04.10.2006, It is also observed that the appeals of the Revenue have been dismissed by the Delhi High Court vide order dated 30.01.2009, therein the Hon'ble High Court held that the Tribunal had rightly concluded that the payments received were in the nature of business income, and not in nature of royal or fees for technical services. It was accepted by the Ld. Assessing Officer that the appellant did not have a permanent establishment in India, and hence the business income could not be brought to tax under Article 7 of the India- USA DTAA, Moreover, no question of taw had arisen for their consideration, as these are findings of fact by the Tribunal. Therefore, respectfully following the orders of the higher judicial authorities, the bringing to tax of the business receipts of the appellant in India, is deleted. Thus, the appellant succeeds in grounds 1 to 4.

8. The issue in controversy has also been set at rest by the Hon'ble Delhi High Court in case cited as Director of Income-tax vs. Sheraton International Inc. - (2009) 313 ITR 267 (Del.) as under:

> "Double taxation relief-Agreement between India and USA-Payment for advertising, publicity and sales promotion services-Tribunal found as a final fact finding authority that main services rendered by assessee, a company incorporated and tax resident in USA, to Indian company, was advertisement, publicity and sales promotion keeping in mind their mutual interests and in that context, the use of trademark, trade name etc, and other enumerated services referred to in the agreement with the assessee were incidental to main service- Tribunal thus rightly concluded that the

payments received were neither in the nature of royalty under s. 9(l)(vi), Expln. 2 not in the nature of fee for technical services under s. 9(1) (vii), Expln. 2, but business income and assessee not having any PE in India such business income was not taxable in India- j There was nothing on record to show that the agreement was a colourable device- Such findings of fact having not been challenged as perverse, no substantial question of law arose out of the order of the Tribunal"

9. So, following the decision rendered by Hon'ble Delhi High Court in case of Director of Income-tax vs. Sheraton International Inc. (supra), we are of the considered view that the revenue received by the assessee for providing centralized services is not in the nature of Fee for Technical Services (FTS) u/s 9(I)(vi) Explanation 2, but it is a business income. Since the assessee is not having any PE in India, its business income earned is not taxable in India.
under:-

10. So, in view of what has been discussed above, we find no illegality or perversity in the impugned order passed by the Id. CIT (A), hence present appeal filed by the Revenue is hereby dismissed."

26. The aforesaid decision was upheld by the Hon'ble Jurisdictional High Court while dismissing Revenue's Appeal. The same view was reiterated by the Tribunal while deciding assessee's appeal in assessment year 2011-12 in ITA No. 203/Del/2016, dated 18.12.2018. It is relevant to observe, the aforesaid decisions of the Coordinate Bench have been upheld by the Hon'ble Jurisdictional High Court while dismissing Revenue's appeals. Identical is the factual position in assessment year 2013-14, wherein, the Tribunal decided the issue in favour of the assessee in ITA No. 5144/Del/2016, dated 18.11.2019 and the

Hon'ble Jurisdictional High Court has upheld the decision of the Tribunal.

27. Thus, keeping in view our detailed reasoning, hereinabove, and the ratio laid down in the binding judicial precedents rendered in assessee's own case as well as in case of group company, viz, Sheraton International Inc., cited before us, we have no hesitation in holding that the fee received by the assessee under the Centralized Services Agreement cannot be treated as FIS either under Article 12(4)(a) or 12(4)(b) of the India–US Tax Treaty. As a natural corollary, it can only be treated as business income of the assessee. Hence, in absence of a PE in India, it will not be taxable.

28. For the sake of completeness, we must observe, in course of hearing, learned Departmental Representative has relied upon some judicial precedents to drive home the point that the payment received towards centralized services fee is in the nature of FIS under Article 12(4)(a) of the Treaty. In this context, we must observe, after carefully examining the decisions of the Coordinate Bench in case of Marriott Hotel (supra), we are of the view that it is clearly distinguishable on facts. On a reading of the decision, it is very much clear that after examining the

agreements entered into with the Indian hotels, the Bench has recorded a finding of fact that the agreements are interrelated/interlinked in essence that they refer to each other. Further, the Bench has observed that for all practical purposes, the clients (Indian hotels) have construed all the agreements as a single agreement for the purpose to promote brand. Thus, in this factual context, the Bench has concluded that the assessee has split up the royalty received into different segments. However, in the appeals before us, there are no such findings by the departmental authorities which can demonstrate that for all practical purposes the License Fee Agreement and Centralized Services Agreement are to be construed as one agreement and has been so understood by the Indian clients. The case of JC Bamford Excavators Ltd. (supra) is also factually distinguishable. Therefore, in our considered opinion, the decisions cited by learned Departmental Representative would be of no help to advance the case of the Revenue.

29. In view of the aforesaid, we direct the Assessing Officer to delete the addition.

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ITA No. 2012/Del/2019 for AY : 2015-16
ITA No. 2013/Del/2019 for AY : 2015-16
ITA No.2015/Del/2019 for AY : 2015-16

30. The factual position in these appeals are, more or less, identical to ITA No. 2011/Del/2019 decided in the earlier part of the order. Hence, our decision therein would apply mutatis mutandis to all these appeals. Accordingly, additions are deleted.

13. On finding parity of facts, respectfully following the decision of the coordinate Bench (supra) we direct the AO to delete the impugned additions. The appeal of the assessee is accordingly allowed.

14. Decision announced in the open court on 21.07.2022.

Sd/-
(N.K. CHOUDHRY)
JUDICIAL MEMBER

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

NEHA, Sr. Private Secretary
Date:- .07.2022
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	21.07.2022
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	