IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 1526/Mum/2021 (A.Y. 2016-17)

Renaissance Services BV,
C/o Marriott Hotels India Pvt. Ltd.
303A, 304, Fulcrum, B-Wing,
Hiranandani Business Park,
Sahar Road, Andheri (East),
Mumbai-400099
PAN: AAECR4995E ..... Appellant

Vs.

DCIT (International Taxation)-4(1)(1),
17th Floor, Room No. 1712, Air India Building,
Nariman Point, Mumbai-400021 ..... Respondent

ITA No. 1760/Mum/2021 (A.Y. 2016-17)
ITA No. 2360/Mum/2021 (A.Y. 2017-18)

DCIT (International Taxation)-4(1)(1),
17th Floor, Room No. 1712, Air India Building,
Nariman Point, Mumbai-400021 ..... Respondent

Vs.

Renaissance Services BV,
C/o Marriott Hotels India Pvt. Ltd.
303A, 304, Fulcrum, B-Wing,
Hiranandani Business Park,
Sahar Road, Andheri (East),

Mumbai-400099
PAN: AAECR4995E ..... Appellant

Appellant/Assessee by	:	Sh. Paras Savla/Pratik Poddar
Respondent/Revenue by	:	Sh. Soumendu Kumar Dash- Sr. DR
Date of hearing	:	06/09/2022
Date of pronouncement	:	25/11/2022

ORDER

PER GAGAN GOYAL, A.M:

These three appeals in which one by assessee and two by Revenue are directed against the common order Commissioner of Income Tax (Appeals)-58,Mumbai [for short 'CIT(A)'] vide common orders dated 08.07.2021 for AY 206-17 and order dated 17.09.2021 for AY 2017-18 respectively. We shall first take up appeal of assessee as lead case. The assessee has raised the following grounds of appeal:

"Based on the facts and circumstances of the case, the Appellant respectfully submits that the learned Commissioner of Income-tax (Appeals) - 58, Mumbai, has in his order dated July 8, 2021 under section 250 of the Income-tax Act, 1961 ('the Act') erred in disposing the appeal of the Appellant on the following ground:

1. In directing the assessing officer that, while giving effect to the order dated July 8, 2021 passed under section 250 of the Act for AY 2016-17, the taxable income should not go below the returned income of the Appellant.

2: In not appreciating that if once the income received from conducting training programs are held not to be taxable in India then the same should not be considered as taxable while computing the income of the Appellant.

The Appellant craves leave to add, alter, vary, omit, substitute or amend any of the above ground of appeal, at any time before or at, the time of appeal, so as to enable the Honourable Income-tax Appellate Tribunal to decide this appeal according to law.

Tax effect:

The tax effect arising on account of grounds of 1 and 2 is Rs 32,60,627. The Appellant has not provided tax effect for each of these grounds separately, since grounds 1 and 2 are in relation to a single addition of Rs 32,60,627."

2. The Revenue has raised common grounds of appeal except variation of amounts in figures. In ITA No. 1760/Mum/2021 for A.Y. 2016-17, the Revenue has raised the following grounds of appeal:

"1. The Ld' CIT(A) erred in holding that the amount of Rs 3,26,06,229) received by the Assessee on account of conducting core managerial training programs for managerial employees of the Indian hotels under the Training and Computer Systems Agreement (TCSA) were not in the nature of fees for technical services under section 9(1)(vii) of the Income-tax Act, 1961 (the Act) as well as under Article 12(5) of the India-Netherlands tax treaty:

2. The Ld' CIT(A) erred in holding that the amount of Rs 22,04,08,147/-received by the Assessee on account of providing access to the centralized reservation systems property management systems and other systems to the Indian hotels under the TCSA were not in the nature of royalty under section 9(1)(vi) of the Act respectively as well as under Article 12 of the India-Netherlands tax treaty:

3. The Ld' CIT(A) erred In holding that the amount of Rs 1,86,18,792/- received towards human resources related costs incurred by the Assessee the TCSA (such as medical insurance premium, stock compensation and like benefits) were not in the nature of fees for technical services under section 9(1)(vii) of the Act as well as under Article 12(5) of the India-Netherlands tax treaty;"

3. For sake of convenience and better understanding of this subject matter involved in all the 3 appeals we are disposing departmental appeals first and the lead year would be AY 2016-2017, vide ITA NO-1760/Mum/2021.

4. Brief facts of the case are that the assessee filed its return of income on 29-09-2016 declaring total income of Rs 2,35,98,890/- and claiming TDS credit of Rs 2,49,76,623/-. The original return of income for Assessment Year 2016-17 was filed by the Assessee on 29.09.2016 declaring total income of Rs 2,35,98,890/-, and claiming TDS credit of Rs. 2,49,76,623/- The return was selected for scrutiny

under compulsory manual selection. Notice under section 143(2) of the Income-tax Act, 1961 (the Act) was issued on 19.09.2017 and duly served to the Assessee on 19.09.2017 by email. Subsequently, the assessee received notice from CPC. Bangalore dated 19.09.2017 u/s 139(9) of the IT Act stating that "the return is defective as the gross receipts shown in Form 26AS, on which TDS credit has been claimed, are higher than the total of the receipts shown under all heads of income, in the return of income. Thus, while credit for TDS has been claimed, the corresponding receipts are not offered in the respective income schedules, to arrive at the taxable total income. Hence, the return of income is regarded as defective, as provided in Explanation (a) under section 139(9)". The assessee filed reply to the said notice on 07.10.2018 stating that "Assessee is a foreign company and has received payments from Indian hotels for providing training services, access to central reservation system and reimbursements Assessee has offered only the receipts for rendering training services to tax in India as the other receipts are not taxable in India. However, the Indian hotels, on conservative basis, deducted tax on the entire payments to the assessee. Give this. Assessee claimed refund of the excess TDS deducted by the Indian hotels in its ROI" DCIT, CPC passed order dated 09.03.2018 stating that the original return filed by the assessee was invalid. The assessee filed a belated return of income u/s 139(4) of the IT Act on 30.03.2018 to claim higher TDS credit of Rs. 2, 52, 64,792/- claiming that the Indian hotels had revised their TDS returns. The assessee received a notice u/s 139(9) dated 09.04.2018 stating that the return filed is defective as "Part-A. P and L (Profit and Loss) and/or Part A BS (Balance Sheet) has not been filed". The assessee filed response dated 03.05.2018 with CPC stating that is "the company is a foreign company and it does not maintain books of accounts in

India. Hence it is not required to furnish details of balance sheet and profit and loss account in the return of income.

5. Assessee case was selected for compulsory scrutiny u/s 143(2). A notice u/s 143(2) was issued on 19-09-2017. The assessee is a tax resident of the Netherlands. Assessee had entered into the training and computer systems agreement(TCSA) with various Indian hotel for conducting soft skills, leadership and similar training programmes for the managerial employees of the Indian hotels and providing access to the centralised reservation system, property management system and other systems to the hotels operating under various Marriot brands worldwide. In addition to these two services the assessee also received payments classified as reimbursement for human resources related cost and expenses from these hotels.

6. The details of receipts as per assessee submitted vide letter dated 31.05.2018 are tabulated below:

Nature of income	Amount (Rs.) as per assessee	Offered to tax in India
Training programme	2,35,98,890	Offered as Fees for Technical Services in return of income. Claimed as not taxable during assessment proceedings.
Computer Reservation Systems	17,75,43,840	No
Reimbursement related to Human Resources	1,00,80,000	No

During the course of the proceedings, it was seen that there were differences in the client-wise receipts as per assessee's accounts (submitted vide letter dated

09.08.2018) and as per Form 26AS the assessee was asked to explain the differences in client-wise receipts vide notices u/s 142(1) dated 28.08.2018. 27.09.2018 and 13.11.2018, Vide notice u/s 142(1) dated 20.11.2018, the assessee was asked to show cause as to why the higher of the receipts as seen in 26AS for clients vis-à-vis receipts as per assessee's accounts for each type of service (training, computer reservation system, human resources cost and expenses) should not be taken? However, the assessee has not submitted any reply. In view of this, the higher receipts for each client, as per the assessee's books vis-à-vis 26AS has been taken to calculate the total receipts of the assessee. The same have been summarized below:

Type of Receipt	Gross Receipt considered in this Assessment order for determination of taxability (Rs.)
Training programme	3,26,06,269
Computer Reservation Systems	22,04,08,147
Human Resources related costs and expenses	1,86,18,972
Total	27,16,33,208

7. Despite of a favourable decision by ITAT (Mum) in assessee own case for AY 2009-2010 that the TCSA are not taxable as fees for technical services, AO assessed the income of the assessee as per the figures reflected in form no 26AS as mentioned in para-5 above amounting to Rs. 27,16,33,208/-. Being aggrieved with this order of AO assessee filed an appeal before the Ld.CIT (A (Mum).

8. Ld.CIT(A) allowed the appeal of the assessee and held that the amount of Rs. 3,26,06,229/- received by the assessee on account of conducting core managerial training, programme for managerial employees of the Indian Hotels under the TCSA, Rs. 22,04,08,147/- received by the assessee on account of providing access to the centralised reservation systems, property management system and other system to the Indian hotels under the TCSA and Rs1,86,18,792/- received towards human resources related costs incurred by the assessee under the TCSA were not in the nature of fees for technical services u/s 9(1)(vii) as well as under article 12(5) of the India -Netherland tax treaty. Being aggrieved with these findings of the Ld.CIT (A) in favour of assessee, revenue preferred these appeals before us.

9. Before discussing the findings of the Ld.CIT(A), for just and fair adjudication of the matter keeping in view the relevant judicial pronouncements we are reproducing herein below the relevant covenants of the agreement between the assesseeand recipient of services in India i.e. Indian Hotels as under:

a) Recitals to TCSA agreement clause -c “owner desires certain training and computer systems services to be performed for the hotel and RSBV Bombay Viceroy desires to perform such services

ARTICLE I

SERVICES

“1.01 Training Programs

A. Following the Take-Over Date, RSBV shall provide and/or cause any one or more of its Affiliates to provide certain core training programs for the benefit of management-level Hotel Employees ("Core Training Programs") at times and locations reasonably designated by RSBV. Commencing on the Re-Branding Date

and continuing throughout the Term, RSBV shall be paid as a Deduction the Hotel's share of the costs and expenses of developing and providing the Core Training Programs. These costs and expenses as of the Effective Date are allocated among Marriott System hotels by an annual charge (payable in equal instalments each Accounting Period) per management-level Hotel Employee,

B. RSBV may from time to time following the Take-Over Date provide and/or cause one or more of its Affiliates to provide other training programs (including, without limitation, courses, conferences, seminars, and materials) for the benefit of Hotel Employees (Other Training Programs") at times and locations reasonably designated by RSBV. Prior to any Hotel Employees attending any Other Training Programs, RSBV shall be paid as a Deduction the applicable tuition fees.

C. The extent of participation by Hotel Employees in Core Training Programs and/or Other Training Programs shall be as reasonably required by RSBV. Owner shall be responsible for paying as a Deduction all Hotel Employees' travel, room, board, and other expenses and salary and other compensation incurred in connection with Core Training Programs and Other Training Programs.

D. RSBV reserves the right to require that participants in any Core Training Programs or Other Training Programs execute confidentiality agreements prepared by RSBY.

1.02 Reservations System, Property Management System, and Other Systems

A. 1. RSDV shall make available or cause one or more of its Affiliates to nuke available for the benefit of the Hotel the Reservations System, and the Hotel shall be required to use the Reservations System.

2. Owner shall purchase and install at its own cost, and not as a Deduction, all Hardware and Software necessary for use at the Hotel to participate in the Reservations System. Any ongoing costs and expenses incurred at the Hotel in maintaining and using the Reservations System shall be Deductions. Any additional costs and expenses necessary to connect the Hotel to the Reservations System (e.g., local connection or modem payments to an independent third party) shall be Deductions.

B. 1. RSBV shall make available or cause one or more of its Affiliates to make available to the Hotel the Property Management System, and the Hotel shall be required to use the Property Management System.

2. Owner shall purchase and install at its own cost, and not as a Deduction, all Hardware and Software reasonably specified by Operator as necessary to utilize the Property Management System at the Hotel. Any ongoing costs and expenses incurred at the Hotel in maintaining and using the Property Management System shall be Deductions.

C. 1. RSBV may provide or cause one or more of its Affiliates to provide to Marriott System hotels systems other than those described above, which systems are intended to benefit the Hotel and other hotels in the Marriott System ("Other Systems"), and RSBV may require the Hotel to use such Other Systems.

2. For each Other System, Owner shall purchase and install at its own cost, and not as a Deduction, all Hardware and Software reasonably specified by Operator as necessary to utilize Other Systems at the Hotel. Any ongoing costs and expenses incurred at the Hotel in maintaining and using Other Systems shall be Deductions.

1.03 Allocation of Other Costs and Expenses

All costs and expenses incurred by RSBV and its Affiliates in providing the Services described herein shall be allocated to participating Marriott System hotels on a fair and reasonable basis, which basis may be different for different groups of Services and may change from time to time as reasonably determined by RSBV. In addition, when RSBV and its Affiliates provide services similar to the Services provided hereunder to other lodging brands owned or operated by RSBV (such as Marriott or Courtyard by Marriott), the costs and expenses associated with such common services may be allocated among participating Marriott System hotels and other participating hotels, provided that such allocation continues to be made on a fair and reasonable basis.

5.03 Relationship

In the performance of this Agreement, RSBV shall act solely as an independent contractor. Neither this Agreement nor any agreements, instruments, documents, or transactions contemplated hereby shall in any respect be interpreted, deemed or construed as making RSBV a joint venturer with, or partner or agent of, Owner. Owner and RSBV each agree that they will not make any assertion, claim or counterclaim in any action, suit, arbitration or other legal proceedings involving Owner and RSBV that the other party is an agent, partner or joint venturer of or with Owner or RSBV, as the case may be."

10. We have perused the relevant clauses of the agreement. These clauses have already been discussed in detail in his order by the Ld. CIT (A) and ITAT (Mum) also for AY 2009-10 to 2015-16, the summary of findings of ITAT (mum) on all the 3 issues is summarised as under:

AY 2016-17: Dept – ITA No. 1760/Mum/2021
Assessee – ITA No. 1526/Mum/2021
AY 2017-18: Dept – ITA 2360/Mum/2021

Covered by the decision of the Hon'ble Income-Tax Appellate Tribunal ('ITAT') in Assessee's own case.

Particulars	**AY 2009-10 (Pg 1-20)**	**AYs 2011-12 and 2012-13 (Pg 21-46)**	**AYs 2010-11 and 2014-15 (Pg 47-68)**	**AYs 2013-14 and 2015-16 (Pg 69-83)**
Dept's Appeal (AY 2016-17 and AY 2017-18)				
Ground 1 : Receipt on account of training	Cannot be treated as FTS Para 10-12, pg. 11-15	Cannot be treated as FTS Para 10-11, pg. 25-29	Cannot be treated as FTS Para 3.2, , pg. 50-53, Para 3.5 pg. 61	Cannot be treated as FTS Para 4.3-4.6, pg. 72-79
Ground 2 : Receipt on account of providing access to computer systems	Cannot be treated as FTS Para 13-14, pg. 15-18	Cannot be treated as FTS Para 20, 26, pg. 36, 41-43 Cannot be treated as Royalty Para 21-25, pg. 36-41	Cannot be treated as FTS Para 3.3, pg. 54-55 Para 3.5, pg. 61 Cannot be treated as Royalty Para 3.4-3.5, pg 55-61; Para 12.1, pg. 66	Cannot be treated as FTS Para 4.3-4.6, pg. 76-79 Cannot be treated as Royalty Para 4.4-4.6, pg. 77-79
Ground 3: Reimbursements	Reimbursement pertains to the main receipts i.e. training and access to computer systems and it also arises out of the same contact. Hence, the same will per take character of main receipts.			Will per take character of main receipts, thus not taxable para5, pg. 79-80
Assessee's Appeal (AY 2016-17)				
Ground 1 and 2: Taxable income can go below	NA		Taxable income can go below the returned income	Taxable income go below the returned

the returned income of the Assessee		Para 12, pg. 64-66	income Para 7, pg. 80-82

11. Considering the facts of the case and precedents in favour of assessee, we are further reproducing relevant findings ground-wise in the previous decisions rendered by ITAT, Mumbai as under:

Ground No.1:

S.No.	Finding of the ITAT	A.Y.
1	10. We shall now advert to the claim of the assessee that the consideration received for conducting training programs had wrongly been held by the CIT (A) as FTS in its hands. The assessee had assailed the observations of the CIT (A), viz. (i). The training programs conducted by the assessee did "make available" technical knowledge; and (ii). That as the conducting of training programs by the assessee was "ancillary and subsidiary to the royalty agreement, hence the consideration received there from was liable to be assessed as FTS under Article 12(5)(a) of the India-Netherland tax treaty. We find that as per the agreement entered into between the assessee and the Indian Hotels the assessee was to provide certain core-training programs for management level personnel; and (i) other training for other employees of the above referred Indian Hotels. However, during the year under consideration the assessee had only provided certain core-training programs for	2009-10

	management level personnel. We are of the considered view that the claim of the assessee before the lower authorities that as the training services provided to the management level personnel were in the nature of general managerial/leadership training and the same did neither involve 'make available' or transfer of any technology to the personnel, had neither been dislodged before the lower authorities, nor anything has been placed on record before us by the ld. D.R, which could persuade us to hold otherwise. We find ourselves to be in agreement with the view taken by the ITAT, Bangalore in the case of ITO Vs. Veda Clinic Research P. Ltd. (2011) 13 taxmann.com21 (Bang), that in order to successfully invoke the coverage of training fees by make available' clause in the definition of technical services, the onus is on the revenue authorities to demonstrate that the services do involve transfer of technology. We have further perused the case laws relied upon by the Id. A.R to impress upon us to return a finding that the consideration received by the assessee from providing training services being in the nature of managerial/leadership training, thus could not have been assessed as FTS in the hands of the assessee, as under: (i). <u>Lloyds Register Industrial Services (India) P. Ltd. vs ACIT (2010) 36 SOT 293 (Mum):</u> The Tribunal observed that the expenses incurred by	

	the assessee who was engaged in the business of survey of ships, on the training of its employees who would inspect various mechanical and electrical equipments us the ship and ultimately issued a fitness certificate, could not be held as payments made o technical services. The Tribunal while concluding as hereinabove observed that the employees by taking training from the Principal company had acquired only puts to enable them to perform their work with desired state of efficiency. (ii) Ershisance Construction Group India (P) Ltd. vs DCIT (2017) 84 taxmann.com/108 Kol): The Tribunal had observed that payments which were made by a Chinese company in respect of training of Chinese engineers of the assessee in English language would not constitute FTS. (iii) ACIT Vs PCI Ltd. (2011112 taxmann.com 59 (Delhi The High Court observed that payments made by the assessee to a non-resident party for training its personnel or customers to explain to the proposed buyers the salient features of the products imported by the assessee in India and to impart training to the customers to use the equipments cannot be held to be FTS (iv). ITO V. Veeda Clinic Research P. Ltd. (2011) 13 taxmann.com21 (Bang): Where training services to the employees of the assessee company was general in nature, not	

	involving any transfer of technology, the fees for providing such services was not taxable as FTS as per Article 13 of India-UK tax treaty. (v) Wockhardt Ltd. Vs. ACIT (2011) 10 taxmann.com 208 (Mum): The services rendered by the employees of a non-resident company being in the nature of sharing management experiences and business strategies could not be termed as technical services. We have deliberated at length on the aforesaid judicial pronouncements in the backdrop of the facts involved in the case of the assessee before us, and are of the considered view that the consideration received by the assessee for the managerial/leadership training provided to the employees of the Indian Hotels cannot be held as FTS. 11. We have further deliberated on the reliance placed by the CIT(A) on the judgment of the Hon'ble Supreme Court in the case of CBDT Vs. Oberoi Hotels (India) Pvt. Ltd (1998) 231 ITR 148 (SC), wherein it was observed that 'technical services' included 'professional services. Still further, we find that the A.O also had relied on certain judgments/orders, viz. (i). Intertek Testing Services (2008) 307 ITR 418 (AAR). (ii). G.V.K Industries (1997) 228 ITR 564 (AP); (iii). Continental Construction Ltd. Vs. CIT (1992) 195 ITR 81 (SC); (iv). CBDT Vs. Oberoi Hotels (India) Pvt. Ltd	

	(1998) 231 ITR 148 (SC); and (v). Dean, Goa Medical College Vs. Dr. Sudhir Kumar Solanki (2001) 7 SCC 645, to support his view that technical services included 'professional services. We find substantial force in the contention of the ld. AR that in case training services rendered by the assessee to the Indian Hotels were to be construed as professional services, than the same would fall within the sweep of Article 14 of the India-Netherland tax treaty, which exclusively pertained to "Independent Personal Services" and would automatically be excluded from Article 12 dealing with "Fees for technical services". Still further, a perusal of Article 14 reveals that the same could be assessed in the contracting state i.e. India, subject to satisfaction by the assessee of either of the two conditions therein provided, viz. (a), fixed base for performing of the professional activities in the contracting state; or (b), stay for a period or periods exceeding 183 days in the fiscal year. 12. We shall now advert to the observations of the CIT (A) that as the Training and Computer systems agreements (for short TCSA) entered into by the assessee with the Indian Hotels, viz. M/s Viceroy Hotels Ltd., Hyderabad and M/s Chalet Hotels Ltd., Mumbai were an integral part of the licensing/royalty agreement, thus both the agreements were complementary to each other. The CIT (A) was of the view that as the training services rendered by the	

	assessee were "ancillary and subsidiary" to the enjoyment of the rights, property or information pursuant to the royalty agreement, thus the consideration received by the assessee from rendering such services could safely be held as FTS as per Article 12(5) (a) of the India-Netherland tax treaty. We have deliberated at length on Article 12(5)(a) of the tax treaty, which reads as under: "Article 1215) For the purposes of this Article, "fees for technical services" means payment 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) se ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 1 of this Article is receives; or" We find that for invoking Article 12(5)(a) and holding the consideration received by an assessee from certain "ancillary and subsidiary technical or consultancy services rendered for the application or enjoyment of the right, property or information as FTS, presupposes receipt by the assessee of a consideration towards royalty as provided in Article 124) of the tax treaty. We are of the considered view that as the assessee was not the owner of any brand or trademark for which any royalty would have been	

	received by it under Article 12(4) of the India-Netherland tax treaty, hence the services provided to the Indian Hotels were in the ordinary course of its business, and could not be brought within the sweep of "ancillary and subsidiary" services as provided in Article 12(5)(a) of the India-Netherland tax treaty. We thus, are of a strong conviction that the CIT (A) losing sight of the fact that as the assessee was not in receipt of any royalty as per Article 12(4) of the India-Netherland tax treaty, hence had failed to appreciate that the training services rendered by it could not have been held to be "ancillary and subsidiary" services under Article 12(5)(a). We thus, are of the view that the consideration received by the assessee for providing training services to the Indian Hotels could not be held as FTS under Article 12(5)(a) of the India- Netherland tax treaty. We are of the considered view that in terms of our aforesaid observations, as neither the training services rendered by the assessee to the Indian Hotels could be held to be technical services, nor the same could have been characterised as "ancillary and subsidiary" services as per Article 12(5) (a), hence the consideration received by the assessee for rendering the training services could not be held as FTS in its hands. We thus, not being persuaded to subscribe to the view taken by the CIT (A) that the consideration received for providing training services to the Indian Hotels was chargeable as FTS in the hands of the	

	assessee, set aside his order. The Ground of appeal No. 2 is allowed in terms of our aforesaid observations.	
2	4.3. We find that the Id. AR stated that the issues are squarely covered by the orders passed by this tribunal in assessee's own case for Asst Years 2009-10, 2010-11, 2011-12, 2012-13 and 2014-15, wherein this tribunal had considered each of the receipts separately and had held that the same cannot be construed as FTS or Royalty, as the case may be. Per Contra, the Id. DR argued that the receipts from CRS should be treated as Equipment Royalty. We find that this aspect is also covered by the order of this tribunal in assessee's own case for the Asst Years 2010-11 and 2014-15 vide Para 12.1. In pages 20 to 21 of the order wherein it was held that receipts cannot be classified as Equipment Royalty. Hence the entire arguments advanced by the Id. DR are already covered in the orders passed by this tribunal in earlier years. For the sake of convenience, the relevant operative portion of the order passed by this tribunal for Asst Year 2009-10 in ITA No. 7159/Mum/2012 dated 8.6.2018. are reproduced hereunder:- **For Consideration received in relation to conducting Core training, Technical and Managerial services** *10. We shall now advert to the claim of the assessee that the consideration received for conducting training programs had wrongly been held by the CIT (A) as FTS in its hands. The assessee had assailed the observations of the CIT (A), viz. (0. the training programs conducted by the assesses did make*	2013-14 to 2015-16

	available technical knowledge, and (ii) that as the conducting of training programs by the assessee was "ancillary and subsidiary to the royalty agreement, hence the consideration received there from was liable to be assessed as FTS under Article 12(5)(a) of the India-Netherland tax treaty. We find that as per the agreement entered into between the assessee and the Indian Hotels the assessee was to provide (1) certain core-training programs for management level personnel and (ii) other training for other employees of the above referred Indian Hotels However, during the year under consideration the assessee had only provided certain core training programs for management level personnel. We are of the considered view that the claim of the assessee before the lower authorities that as the training services provided to the management level personnel were in the nature of general managerial/leadership training and the same did neither involve make available" or transfer of any technology to the personnel, had neither been dislodged before the lower authorities, nor anything has been placed on record before us by the ld DR which could persuade us to hold otherwise. We find ourselves to be in agreement with the view taken by the ITAT, Bangalore in the case of ITO Vs Veedu Clinic Research Pvt. Ltd (2011) 13 taxmann.com21 (Bang) that in order to successfully invoke the coverage of training fees by make available" clause in the definition of technical services the onus is on the revenue authorities to demonstrate that the services do involve transfer of technology. We have further perused the case laws relied upon by the Ld AR to impress on us to return a finding that the consideration received by the assessee from providing training services being in the native of managerial/leadership training, this could not have been assessed as FIS in the hands of the assessee, as under: *(i). Lloyds Register Industrial Services (India) P. Ltd vs. ACIT (2010) 36 SOT 293 (Mum):* *The Tribunal observed that the expenses incurred by the assessee which was engaged in the business of survey of ships, on the training of its employees who would inspect various mechanical and electrical*	

	equipments in the ship and ultimately issued a fitness certificate, could not be held as payments made for technical services The Tribunal while concluding as hereinabove, observed that the employees by taking training from the Principal company had acquired only inputs to enable them to perform their work with desired state of efficiency: *(ii) Ershisanye Construction Group India (P) Ltd vs. DCIT (2017) 84 taxmann.com 108 (Kol):* *The Tribunal had observed that payments which were made by a Chinese company in respect of training of Chinese engineers of the assessee in English language would not constitute FTS* *(iii) ACIT Vs. PCI Ltd. (2011) 12 taxmann.com 59 (Delhi):* *The High Court observed that payments made by the assessee to a non-resident party for training its personnel or customers to explain to the proposed buyers the salient features of the products imported by the assessee in India and to impart training to the customers to use the equipments cannot be held to be FTS* *(iv). ITO Vs. Veeda Clinic Research P. Ltd. (2011) 13 taxmann.com21 (Bang):* *Where training services to the employees of the assessee company was general in nature, not involving any transfer of technology, the fees for providing such services was not taxable as FTS as per Article 13 of India-UK tax treaty.* *(v). Wockhardt Ltd. Vs. ACIT (2011) 10 taxmann.com 208 (Mum):* *The services rendered by the employees of a non-resident company being in the nature of sharing management experiences and business strategies could not be termed as technical services.* *We have deliberated at length on the aforesaid judicial pronouncements in the backdrop of the facts involved in the case of the assessee before us, and are of the considered view that the consideration received by the assessee for the managerial/leadership training provided to the employees of the Indian Hotels cannot be held as FTS* *11. We have further deliberated on the reliance*	

	placed by the CITA) on the judgment of the Hon'ble Supreme Court in the case of CBDT Vs Oberoi Hotels (India) Pvt. Ltd (1998) 231 ITR 148 (SC), wherein it was observed that technical services included professional services" Still further, we find that the AO also had relied on certain judgments/orders viz. (1) Intertek Testing Services (2008) 307 TTR 418 (AAR), in GVK Industries (1997) 228 ITR 564 (AP); Continental Construction Ltd Vs CIT (1992) 193 ITR SI (SC), (v) CBDT Vs Oberoi Hotels (India) Pvt. Ltd (1998) 231 TTR 148 (SC) and (v).Dean, Goa Medical College Vs Dr. Sudhir Kumar Solanki (2001) SCC 645, to support his view that technical services" included professional services We find substantial force in the contention of the ld. AR that in case training services rendered by the assessee to the Indian Hotels were to be construed as professional services, then the same would fall within the sweep of Article 14 of the India- Netherland tax treaty, which exclusively pertained to Independent Personal Services" and would automatically be excluded from Article 12 dealing with Fees for technical services" Still further, a perusal of Article 14 reveals that the same could be assessed in the contracting state i.e. India, subject to satisfaction by the assessee of either of the two conditions therein provided, viz. (a) fixed base for performing of the professional activities in the contracting state, or (b) stay for a period or periods exceeding 183 days in the fiscal year. *12. We shall now advert to the observations of the CIT(A) that as the Training and Computer systems agreements (for short TCSA") entered into by the assessee with the Indian Hotels, viz. M/s Viceroy Hotels Ltd. Hyderabad and M/s Chalet Hotels Ltd., Mumbai were an integral part of the licensing/royalty agreement, thus both the agreements were complementary to each other The CIT(A) was of the view that as the training services rendered by the assessee were "ancillary and subsidiary" to the enjoyment of the rights, property or information pursuant to the royalty agreement, thus the consideration received by the assessee from rendering such services could safely be held as FTS as per Article*	

	1215)(a) of the India- Netherland tax treaty. We have deliberated at length on Article 12(5)(a) of the tax treaty, which reads as under: *"Article 12(5): For the purposes of this Article, "fees for technical services" means payment 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 or enjoyment of the right, property or information for which a payment described in paragraph 4 of this Article is receives; or"* *We find that for invoking Article 12(5)(a) and holding the consideration received by an assessee from certain "ancillary and subsidiary technical or consultancy services rendered for the application or enjoyment of the right, property or information as FTS, presupposes receipt by the assessee of a consideration towards royalty as provided in Article 12(4) of the tax treaty.* *We are of the considered view that as the assessee was not the owner of any brand or trademark for which any royalty would have been received by it under Article 12(4) of the India-Netherland tax treaty, hence the services provided to the Indian Hotels were in the ordinary course of its business, and could not be brought within the sweep of "ancillary and subsidiary services as provided in Article 12(5)(a) of the India-Netherland tax treaty. We thus, are of a strong conviction that the CIT (A) losing sight of the fact that as the assessee was not in receipt of any royalty as per Article 12(4) of the India-Netherland tax treaty, hence had failed to appreciate that the training services rendered by it could not have been held to be "ancillary and subsidiary" services under Article 12(5)(a). We thus, are of the view that the consideration received by the assessee for providing training services to the Indian Hotels could not be held as FTS under Article 12(5)(a) of the India Netherland tax treaty We are of the considered view that in terms of our aforesaid observations, as neither the training services rendered by the assessee to the Indian Hotels*	

	could be held to be technical services, nor the same could have been characterised as "ancillary and subsidiary services as per Article 12(5)(a) hence the consideration received by the assessee for rendering the training services could not be held as FTS in its hands. We thus, not being persuaded to subscribe to the view taken by the CIT(A) that the consideration received for providing training services to the Indian Hotels was chargeable as FTS in the hands of the assessee, set aside his order. The Ground of appeal No. 2 is allowed in terms of our aforesaid observations. ***For Consideration received in relation to providing access to Computer System*** *13. We shall now advert to the assailing of the order of the CIT(A) by the assessee, on the ground that he had erred in holding that the amounts received by the assessee for providing access to the international CRS, Property Management Systems and Other Systems was ancillary and subsidiary to the enjoyment of the right "Marriott" and hence, taxable as FTS under the India-Netherland tax treaty as well as under the Act. We find that since inception, it has been the claim of the assessee that as the providing of access to CRS, Property Management Systems and Other Systems to the Indian Hotels, were standard facilities/services, thus they could not be characterised as technical services" and the consideration received in lieu thereof he subjected to tax as FTS receipts. We find from a perusal of the agreement entered into between the assessee and the Indian Hotels that the assessee had made available the CRS, Property Management Systems and Other Systems for use by the Indian Hotels in their business. We find that the ld. AR in support of his contention that the consideration received by an assessee for granting license to use its copyrighted software for the licensees own business purpose only, could not be brought to tax as royalty, had relied on the judgment of the Hon'ble High Court of Delhi in the case of DIT Vs. Infrasoft Ltd. (2013) 39 taxmann.com88 (Delhi) and host of other judicial pronouncements. However, as the CIT (A) had*	

	concluded that the consideration received by the assessee from the Indian Hotels for providing access to CRS. Property Management Systems and Other Systems was FTS in the hands of the assessee, hence we refrain from referring to and dealing with the contentions advanced by the ld. A.R in support of his claim that the same could not be held as royalty. We find that the High Court of Delhi in the case of DIT Vs. Sheraton International Inc (2009) 313 ITR 267 (Del) had observed that consideration received by the assessee for providing access to reservation system could not be brought to tax as FTS in the hands of the assessee We further find that the Hon'ble Supreme Court in the case of CIT vs. Kotak Securities Ltd. (2016) 383 ITR 1 (SC) had in the backdrop of the facts involved in the case before it had observed that services made available by Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which transaction charges were paid by members of BSE were for common services that every member of Stock Exchange was necessarily required to avail of to carry out trading in securities in Stock Exchange, thus such services did not amount to technical services provided by Stock Exchange, as the same were not services which were specifically sought for by the user or consumer. The Hon'ble Apex Court following the aforesaid view, had thereafter observed in the case of CIT (T)-1 Vs. AP Moller Maersk AS (2017) 392 ITR 186 (SC), that where the assessee, it foreign shipping company had set up a telecommunication system in order to enable its agents across globe including India to perform their role more effectively, the payment received for providing such facility was not taxable as fee for technical services. We have perused the facts of the case before us and offer deliberating on the same in the backdrop of the aforesaid judicial pronouncements are of the considered view that as the access to CRS, Property Management System and Other Systems provided to the Indian Hotels by the assessee were common facilities provided to the members of the Marriott chain of hotels across the world by the assessee, and were not tailor made services to suit their specific requirements, thus the said facility could not be construed as technical	

	services". *14. We shall now advert to the observations of the CIT(A) that as the consideration received by the assessee on account of providing access to CRS. Property Management Systems and Other Systems facility was ancillary and subsidiary to the enjoyment of the right to use the brand "Marriott, thus the same would be taxable as FTS under Article 12(5)(a) of the India-Netherlands tax treaty. We are of the considered view that as observed by us hereinabove, invoking of Article 12(5) (a) and holding the consideration received by an assessee from certain "ancillary and subsidiary" technical or consultancy services rendered for the application or enjoyment of the right, property or information as FTS, itself presupposes receipt by the assessee of a consideration towards royalty as provided in Article 12(4) of the tax treaty. We are of the considered view that now when the assessee was not the owner of any brand or trademark for which any royalty would have been received by it under Article 12(4) of the India-Netherland tax treaty, hence the services of providing access to CRS. Property Management System and Other Systems to the Indian Hotels were provided by it in the ordinary course of its business and could not be brought within the sweep of "ancillary and subsidiary" services under Article 12(5)(a) of the tax treaty. We thus, are of a strong conviction that the CIT(A) losing sight of the fact that as the assessee had neither granted any right of enjoyment of the brand "Marriott" to the Indian Hotels and thus was not in receipt of any royalty as provided in Article 12(4) of the tax treaty, thus the consideration received by it from the Indian Hotels for providing access to CRS Property Management System and Other Systems, could not have been brought within the sweep of "ancillary and subsidiary services under Article 12(5)(a), We thus, in terms of our aforesaid observations are of the considered view that as providing of access to CRS Property Management Services and Other services could neither be held to be technical services, nor the same in terms of our aforesaid observations could have been characterised*	

	as ancillary and subsidiary services under Article 12(5)(a). Hence the consideration received by the assessee for rendering the said services facility could not be held as FTS in its hands. We thus, set aside the order of the CITCA) holding that the consideration received by the assessee for providing of access to CRS Property Management Services and Other Systems was chargeable as FTS in the hands of the assessee. The Ground of appeal No. 3 is allowed in terms of our aforesaid observations 4.4. We find that this Tribunal for Asst Years 2011-12 and 2012-13 in ITA Nos. 5678/Mum/2016 and ITA No. 764/Mum/2017 respectively vide order dated 9.8.2019 had held that the computer system receipts do not qualify as Royalty. This order was also followed by this tribunal in assessee's own case for the Asst Years 2010-11 and 2014-15 in ITA Nos. 5677/Mum/2016 and ITA No. 1629/Mum/2020 respectively vide order dated 24.2.2022. 4.5. The Id. DR placed reliance on the decision of Pune Tribunal in the case of Vanderlande Industries Private Limited vs. ACIT in ITA no. 48/Pun/2018 dated 9.2.2022 in support of his arguments that receipts from training services and computer reservation systems should be treated as Equipment Royalty. We have gone through the decision of the Pune Tribunal which was placed on record by the Id. DR at the time of hearing. In our considered opinion, it is abundantly clear from the agreement entered into by the assessee that the hotel owners are required to purchase and install at its own cost, the necessary	

	Hardware and Software for accessing the CRS. The main distinguishing feature with Pune Tribunal decision and that of the assessee is that in the case of the assessee, there is no provision of any equipment / infrastructure by the assessee. The assessee herein had merely provided a service by giving a right to access the CRS to the Indian Hotel owners. The servers are not leased to the Indian Hotel owners. Hence rendition of a service by a service provider using the equipment or an apparatus would not constitute Royalty, in contrast to specifically allowing or granting the use or right to use of such equipment or apparatus in the hands of the customer by way of renting or leasing of equipment or allowing the customer to commercially exploit such equipment for the customer's own benefit. Moreover, in our considered opinion, in order for a consideration to be treated for use or right to use of an equipment, both under the provisions of the Act as well as under the Treaty, the same has to be with respect to specifically identified equipment which is not in the assessee's case. At the cost of repetition, in the instant case before us, the assessee is merely providing an access to CRS. Hence we hold that the decision of Pune Tribunal is factually distinguishable with that of assessee and does not advance the case of the revenue. 4.6. It is not in dispute that the facts prevailing in Asst	

	Years 2009-10, 2010-11, 2011-12, 2012-13 and 2014-15 are identical with the facts prevailing in Asst Year 2013-14 as they form part of the same agreement and same nature of activities carried out by the assessee. Hence we hold that the decision rendered by this tribunal in assessee's own case for Asst Years 2009-10 to 2012-13 and 2014-15 shall apply mutatis mutandis to Asst Year 2013-14 also. Accordingly, the Ground Nos. 1 & 2 raised by the revenue is dismissed.	

Ground No.2:

S.No.	Finding of the ITAT	A.Y.
1	13. We shall now advert to the assailing of the order of the CITIAL by the assessor, on the ground that he had erred in bolding that the amounts received by the assessee for providing access to the international CRS. Property Management Systems and Other Systems were ancillary and subsidiary to the enjoyment of the right "Marriott" and hence, taxable as FTS under the India-Netherland tax treaty, as well as under the Act. We find that since inception, it has been the claim of the assessee that as the providing of access to CRS, Property Management Systems and Other Systems to the Indian Hotels, were standard facilities/services, thus they could not be characterised as 'technical services' and the consideration received in lieu thereof be subjected to tax as FTS receipts. We find from a perusal of the agreement entered into	2009-10

	between the assessee and the Indian Hotels that the assessee had made available the CRS, Property Management Systems and Other Systems for use by the Indian Hotels in their business. We find that the ld. A.R in support of his contention that the consideration received by an assessee for granting license to use its copyrighted software for the licensees own business purpose only, could not be brought to tax as royalty, had relied on the judgment of the Hon'ble High Court of Delhi in the case of DIT Vs. Infrasoft Ltd. (2013) 39 taxmann.com88 (Delhi) and host of other judicial pronouncements. However, as the CIT (A) had concluded that the consideration received by the assessee from the Indian Hotels for providing access to CRS, Property Management Systems and Other Systems was FTS in the hands of the assessee, hence we refrain from referring to and dealing with the contentions advanced by the ld. A.R in support of his claim that the same could not be held as royalty. We find that the High Court of Delhi in the case of DIT Vs. Sheraton International Inc. (2009) 313 ITR 267 (Del) had observed that consideration received by the assessee for providing access to reservation system could not be brought to tax as FTS in the hands of the assessee. We further find that the Hon'ble Supreme Court in the case of CIT vs. Kotak Securities Ltd. (2016) 383 ITR 1 (SC) had in the backdrop of the facts involved in the case before it, had observed that services made available by Bombay	

	Stock Exchange (BSE Online Trading (BOLT) System] for which transaction charges were paid by members of BSE were for common services that every member of Stock Exchange was necessarily required to avail of to carry out trading in securities in Stock Exchange, thus such services did not amount to 'technical services' provided by Stock Exchange, as the same were not services which were specifically sought for by the user or consumer. The Hon'ble Apex Court following the aforesaid view, had thereafter observed in the case of CIT (IT)-1 Vs. AP Moller Maersk A S (2017) 392 ITR 186 (SC), that where the assessee, a foreign shipping company had set up a telecommunication system in order to enable its agents across globe including India to perform their role more effectively, the payment received for providing such facility was not taxable as fee for technical services. We have perused the facts of the case before us and after deliberating on the same in the backdrop of the aforesaid judicial pronouncements are of the considered view that as the access to CRS, Property Management System and Other Systems provided to the Indian Hotels by the assessee were common facilities provided to the members of the Marriott chain of hotels across the world by the assessee, and were not tailor made services to suit their specific requirements, thus the said facility could not be construed as technical services'.	

	14. We shall now advert to the observations of the CIT (A) that as the consideration received by the assessee on account of providing access to CRS, Property Management Systems and Other Systems facility was ancillary and subsidiary to the enjoyment of the right to use the brand "Marriott", thus the same would be taxable as FTS under Article 12(5) (a) of the India-Netherlands tax treaty. We are of the considered view that as observed by us hereinabove, invoking of Article 12(5) (a) and holding the consideration received by an assessee from certain "ancillary and subsidiary technical or consultancy services rendered for the application or enjoyment of the right, property or information as FTS, itself presupposes receipt by the assessee of a consideration towards royalty as provided in Article 12(4) of the tax treaty. We are of the considered view that now when the assessee was not the owner of any brand or trademark for which any royalty would have been received by it under Article 12(4) of the India- Netherland tax treaty, hence the services of providing access to CRS, Property Management System and Other Systems to the Indian Hotels were provided by it in the ordinary course of its business and could not be brought within the sweep of "ancillary and subsidiary" services under Article 12(5)(a) of the tax treaty. We thus, are of a strong conviction that the CIT(A) losing sight of the fact that	

	as the assessee had neither granted any right of enjoyment of the brand "Marriott" to the Indian Hotels and thus was not in receipt of any royalty as provided in Article 12(4) of the India-Netherland tax treaty, thus the consideration received by it from the Indian Hotels for providing access to CRS, Property Management System and Other Systems, could not have been brought within the sweep of "ancillary and subsidiary" services under Article 12(5)(a). We thus, in terms of our aforesaid observations are of the considered view that as providing of access to CRS, Property Management Services and Other services could neither be held to be technical services, nor the same in terms of our aforesaid observations could have been characterised as "ancillary and subsidiary" services under Article 12(5) (a), hence the consideration received by the assessee for rendering the said services/facility could not be held as FTS in its hands. We thus, set aside the order of the CIT (A) holding that the consideration received by the assessee for providing of access to CRS, Property Management Services and Other Systems was chargeable as FTS in the hands of the assessee. The Ground of appeal No. 3 is allowed in terms of our aforesaid observations.	
2	4.3. We find that the Id. AR stated that the issues are squarely covered by the orders passed by this tribunal in assessee's own case for Asst Years 2009-10, 2010-11, 2011-12, 2012-13 and 2014-15, wherein this	2013-14 to 2015-16

	tribunal had considered each of the receipts separately and had held that the same cannot be construed as FTS or Royalty, as the case may be. Per Contra, the Id. DR argued that the receipts from CRS should be treated as Equipment Royalty. We find that this aspect is also covered by the order of this tribunal in assessee's own case for the Asst Years 2010-11 and 2014-15 vide Para 12.1. In pages 20 to 21 of the order wherein it was held that receipts cannot be classified as Equipment Royalty. Hence the entire arguments advanced by the Id. DR are already covered in the orders passed by this tribunal in earlier years. For the sake of convenience, the relevant operative portion of the order passed by this tribunal for Asst Year 2009-10 in ITA No. 7159/Mum/2012 dated 8.6.2018. are reproduced hereunder:- **For Consideration received in relation to conducting Core training, Technical and Managerial services** *10. We shall now advert to the claim of the assessee that the consideration received for conducting training programs had wrongly been held by the CIT (A) as FTS in its hands. The assessee had assailed the observations of the CIT (A), viz. (0. the training programs conducted by the assesses did make available technical knowledge, and (ii) that as the conducting of training programs by the assessee was "ancillary and subsidiary to the royalty agreement, hence the consideration received there from was liable to be assessed as FTS under Article 12(5)(a) of the India-Netherland tax treaty. We find that as per the agreement entered into between the assessee and the Indian Hotels the assessee was to provide (1) certain core-training programs for management level personnel and (ii) other training for other employees of the above referred Indian Hotels However, during*	

	the year under consideration the assessee had only provided certain core training programs for management level personnel. We are of the considered view that the claim of the assessee before the lower authorities that as the training services provided to the management level personnel were in the nature of general managerial/leadership training and the same did neither involve make available" or transfer of any technology to the personnel, had neither been dislodged before the lower authorities, nor anything has been placed on record before us by the ld DR which could persuade us to hold otherwise. We find ourselves to be in agreement with the view taken by the ITAT, Bangalore in the case of ITO Vs Veedu Clinic Research Pvt. Ltd (2011) 13 taxmann.com21 (Bang) that in order to successfully invoke the coverage of training fees by make available" clause in the definition of technical services the onus is on the revenue authorities to demonstrate that the services do involve transfer of technology. We have further perused the case laws relied upon by the Ld AR to impress on us to return a finding that the consideration received by the assessee from providing training services being in the native of managerial/leadership training, this could not have been assessed as FIS in the hands of the assessee, as under: *(i). Lloyds Register Industrial Services (India) P. Ltd vs. ACIT (2010) 36 SOT 293 (Mum):* *The Tribunal observed that the expenses incurred by the assessee which was engaged in the business of survey of ships, on the training of its employees who would inspect various mechanical and electrical equipments in the ship and ultimately issued a fitness certificate, could not be held as payments made for technical services The Tribunal while concluding as hereinabove, observed that the employees by taking training from the Principal company had acquired only inputs to enable them to perform their work with desired state of efficiency:* *(ii) Ershisanye Construction Group India (P) Ltd vs. DCIT (2017) 84 taxmann.com 108 (Kol):* *The Tribunal had observed that payments which were made by a Chinese company in respect of training of*	

	Chinese engineers of the assessee in English language would not constitute FTS *(iii) ACIT Vs. PCI Ltd. (2011) 12 taxmann.com 59 (Delhi):* *The High Court observed that payments made by the assessee to a non-resident party for training its personnel or customers to explain to the proposed buyers the salient features of the products imported by the assessee in India and to impart training to the customers to use the equipments cannot be held to be FTS* *(iv). ITO Vs. Veeda Clinic Research P. Ltd. (2011) 13 taxmann.com21 (Bang):* *Where training services to the employees of the assessee company was general in nature, not involving any transfer of technology, the fees for providing such services was not taxable as FTS as per Article 13 of India-UK tax treaty.* *(v). Wockhardt Ltd. Vs. ACIT (2011) 10 taxmann.com 208 (Mum):* *The services rendered by the employees of a non-resident company being in the nature of sharing management experiences and business strategies could not be termed as technical services.* *We have deliberated at length on the aforesaid judicial pronouncements in the backdrop of the facts involved in the case of the assessee before us, and are of the considered view that the consideration received by the assessee for the managerial/leadership training provided to the employees of the Indian Hotels cannot be held as FTS* *11. We have further deliberated on the reliance placed by the CITA) on the judgment of the Hon'ble Supreme Court in the case of CBDT Vs Oberoi Hotels (India) Pvt. Ltd (1998) 231 ITR 148 (SC), wherein it was observed that technical services included professional services" Still further, we find that the AO also had relied on certain judgments/orders viz. (1) Intertek Testing Services (2008) 307 TTR 418 (AAR), in GVK Industries (1997) 228 ITR 564 (AP); Continental Construction Ltd Vs CIT (1992) 193 ITR SI (SC), (v) CBDT Vs Oberoi Hotels (India) Pvt. Ltd (1998) 231 TTR 148 (SC) and (v).Dean, Goa Medical College Vs Dr.*	

	Sudhir Kumar Solanki (2001) SCC 645, to support his view that technical services" included professional services We find substantial force in the contention of the ld. AR that in case training services rendered by the assessee to the Indian Hotels were to be construed as professional services, then the same would fall within the sweep of Article 14 of the India- Netherland tax treaty, which exclusively pertained to Independent Personal Services" and would automatically be excluded from Article 12 dealing with Fees for technical services" Still further, a perusal of Article 14 reveals that the same could be assessed in the contracting state i.e. India, subject to satisfaction by the assessee of either of the two conditions therein provided, viz. (a) fixed base for performing of the professional activities in the contracting state, or (b) stay for a period or periods exceeding 183 days in the fiscal year. *12. We shall now advert to the observations of the CIT(A) that as the Training and Computer systems agreements (for short TCSA") entered into by the assessee with the Indian Hotels, viz. M/s Viceroy Hotels Ltd. Hyderabad and M/s Chalet Hotels Ltd., Mumbai were an integral part of the licensing/royalty agreement, thus both the agreements were complementary to each other The CIT(A) was of the view that as the training services rendered by the assessee were "ancillary and subsidiary" to the enjoyment of the rights, property or information pursuant to the royalty agreement, thus the consideration received by the assessee from rendering such services could safely be held as FTS as per Article 1215)(a) of the India- Netherland tax treaty. We have deliberated at length on Article 12(5)(a) of the tax treaty, which reads as under:* *"Article 12(5): For the purposes of this Article, "fees for technical services" means payment 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 or enjoyment of the right, property or information for which a payment*	

	described in paragraph 4 of this Article is receives; or" *We find that for invoking Article 12(5)(a) and holding the consideration received by an assessee from certain "ancillary and subsidiary technical or consultancy services rendered for the application or enjoyment of the right, property or information as FTS, presupposes receipt by the assessee of a consideration towards royalty as provided in Article 12(4) of the tax treaty.* *We are of the considered view that as the assessee was not the owner of any brand or trademark for which any royalty would have been received by it under Article 12(4) of the India-Netherland tax treaty, hence the services provided to the Indian Hotels were in the ordinary course of its business, and could not be brought within the sweep of "ancillary and subsidiary services as provided in Article 12(5)(a) of the India-Netherland tax treaty. We thus, are of a strong conviction that the CIT (A) losing sight of the fact that as the assessee was not in receipt of any royalty as per Article 12(4) of the India-Netherland tax treaty, hence had failed to appreciate that the training services rendered by it could not have been held to be "ancillary and subsidiary" services under Article 12(5)(a). We thus, are of the view that the consideration received by the assessee for providing training services to the Indian Hotels could not be held as FTS under Article 12(5)(a) of the India Netherland tax treaty We are of the considered view that in terms of our aforesaid observations, as neither the training services rendered by the assessee to the Indian Hotels could be held to be technical services, nor the same could have been characterised as "ancillary and subsidiary services as per Article 12(5)(a) hence the consideration received by the assessee for rendering the training services could not be held as FTS in its hands. We thus, not being persuaded to subscribe to the view taken by the CIT(A) that the consideration received for providing training services to the Indian Hotels was chargeable as FTS in the hands of the assessee, set aside his order. The Ground of appeal No. 2 is allowed in terms of our aforesaid*	

	observations. ***<u>For Consideration received in relation to providing access to Computer System</u>*** *13. We shall now advert to the assailing of the order of the CIT(A) by the assessee, on the ground that he had erred in holding that the amounts received by the assessee for providing access to the international CRS, Property Management Systems and Other Systems was ancillary and subsidiary to the enjoyment of the right "Marriott" and hence, taxable as FTS under the India-Netherland tax treaty as well as under the Act. We find that since inception, it has been the claim of the assessee that as the providing of access to CRS, Property Management Systems and Other Systems to the Indian Hotels, were standard facilities/services, thus they could not be characterised as technical services" and the consideration received in lieu thereof he subjected to tax as FTS receipts. We find from a perusal of the agreement entered into between the assessee and the Indian Hotels that the assessee had made available the CRS, Property Management Systems and Other Systems for use by the Indian Hotels in their business. We find that the ld. AR in support of his contention that the consideration received by an assessee for granting license to use its copyrighted software for the licensees own business purpose only, could not be brought to tax as royalty, had relied on the judgment of the Hon'ble High Court of Delhi in the case of DIT Vs. Infrasoft Ltd. (2013) 39 taxmann.com88 (Delhi) and host of other judicial pronouncements. However, as the CIT (A) had concluded that the consideration received by the assessee from the Indian Hotels for providing access to CRS. Property Management Systems and Other Systems was FTS in the hands of the assessee, hence we refrain from referring to and dealing with the contentions advanced by the ld. A.R in support of his claim that the same could not be held as royalty. We find that the High Court of Delhi in the case of DIT Vs. Sheraton International Inc (2009) 313 ITR 267 (Del) had observed that consideration received by the assessee for providing access to reservation system*	

	could not be brought to tax as FTS in the hands of the assessee We further find that the Hon'ble Supreme Court in the case of CIT vs. Kotak Securities Ltd. (2016) 383 ITR 1 (SC) had in the backdrop of the facts involved in the case before it had observed that services made available by Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which transaction charges were paid by members of BSE were for common services that every member of Stock Exchange was necessarily required to avail of to carry out trading in securities in Stock Exchange, thus such services did not amount to technical services provided by Stock Exchange, as the same were not services which were specifically sought for by the user or consumer. The Hon'ble Apex Court following the aforesaid view, had thereafter observed in the case of CIT (T)-1 Vs. AP Moller Maersk AS (2017) 392 ITR 186 (SC), that where the assessee, it foreign shipping company had set up a telecommunication system in order to enable its agents across globe including India to perform their role more effectively, the payment received for providing such facility was not taxable as fee for technical services. We have perused the facts of the case before us and offer deliberating on the same in the backdrop of the aforesaid judicial pronouncements are of the considered view that as the access to CRS, Property Management System and Other Systems provided to the Indian Hotels by the assessee were common facilities provided to the members of the Marriott chain of hotels across the world by the assessee, and were not tailor made services to suit their specific requirements, thus the said facility could not be construed as technical services". *14. We shall now advert to the observations of the CIT (A) that as the consideration received by the assessee on account of providing access to CRS. Property Management Systems and Other Systems facility was ancillary and subsidiary to the enjoyment of the right to use the brand "Marriott, thus the same would be taxable as FTS under Article 12(5) (a) of the India-Netherlands tax treaty. We are of the considered view that as observed by us hereinabove, invoking of*	

	Article 12(5)(a) and holding the consideration received by an assessee from certain "ancillary and subsidiary" technical or consultancy services rendered for the application or enjoyment of the right, property or information as FTS, itself presupposes receipt by the assessee of a consideration towards royalty as provided in Article 12(4) of the tax treaty. We are of the considered view that now when the assessee was not the owner of any brand or trademark for which any royalty would have been received by it under Article 12(4) of the India- Netherland tax treaty, hence the services of providing access to CRS. Property Management System and Other Systems to the Indian Hotels were provided by it in the ordinary course of its business and could not be brought within the sweep of "ancillary and subsidiary" services under Article 12(5)(a) of the tax treaty. We thus, are of a strong conviction that the CIT(A) losing sight of the fact that as the assessee had neither granted any right of enjoyment of the brand "Marriott" to the Indian Hotels and thus was not in receipt of any royalty as provided in Article 12(4) of the tax treaty, thus the consideration received by it from the Indian Hotels for providing access to CRS Property Management System and Other Systems, could not have been brought within the sweep of "ancillary and subsidiary services under Article 12(5)(a), We thus, in terms of our aforesaid observations are of the considered view that as providing of access to CRS Property Management Services and Other services could neither be held to be technical services, nor the same in terms of our aforesaid observations could have been characterised as ancillary and subsidiary services under Article 12(5)(a). Hence the consideration received by the assessee for rendering the said services facility could not be held as FTS in its hands. We thus, set aside the order of the CITCA) holding that the consideration received by the assessee for providing of access to CRS Property Management Services and Other Systems was chargeable as FTS in the hands of the assessee. The Ground of appeal No. 3 is allowed in terms of our aforesaid observations	

	4.4. We find that this Tribunal for Asst Years 2011-12 and 2012-13 in ITA Nos. 5678/Mum/2016 and ITA No. 764/Mum/2017 respectively vide order dated 9.8.2019 had held that the computer system receipts do not qualify as Royalty. This order was also followed by this tribunal in assessee's own case for the Asst Years 2010-11 and 2014-15 in ITA Nos. 5677/Mum/2016 and ITA No. 1629/Mum/2020 respectively vide order dated 24.2.2022. 4.5. The Id. DR placed reliance on the decision of Pune Tribunal in the case of Vanderlande Industries Private Limited vs. ACIT in ITA no. 48/Pun/2018 dated 9.2.2022 in support of his arguments that receipts from training services and computer reservation systems should be treated as Equipment Royalty. We have gone through the decision of the Pune Tribunal which was placed on record by the Id. DR at the time of hearing. In our considered opinion, it is abundantly clear from the agreement entered into by the assessee that the hotel owners are required to purchase and install at its own cost, the necessary Hardware and Software for accessing the CRS. The main distinguishing feature with Pune Tribunal decision and that of the assessee is that in the case of the assessee, there is no provision of any equipment / infrastructure by the assessee. The assessee herein had merely provided a service by giving a right to access the CRS to the Indian Hotel owners. The	

	servers are not leased to the Indian Hotel owners. Hence rendition of a service by a service provider using the equipment or an apparatus would not constitute Royalty, in contrast to specifically allowing or granting the use or right to use of such equipment or apparatus in the hands of the customer by way of renting or leasing of equipment or allowing the customer to commercially exploit such equipment for the customer's own benefit. Moreover, in our considered opinion, in order for a consideration to be treated for use or right to use of an equipment, both under the provisions of the Act as well as under the Treaty, the same has to be with respect to specifically identified equipment which is not in the assessee's case. At the cost of repetition, in the instant case before us, the assessee is merely providing an access to CRS. Hence we hold that the decision of Pune Tribunal is factually distinguishable with that of assessee and does not advance the case of the revenue. 4.6. It is not in dispute that the facts prevailing in Asst Years 2009-10, 2010-11, 2011-12, 2012-13 and 2014-15 are identical with the facts prevailing in Asst Year 2013-14 as they form part of the same agreement and same nature of activities carried out by the assessee. Hence we hold that the decision rendered by this tribunal in assessee's own case for Asst Years 2009-10 to 2012-13 and 2014-15 shall apply mutatis	

	mutandis to Asst Year 2013-14 also. Accordingly, the Ground Nos. 1 & 2 raised by the revenue is dismissed.	

Ground No.3:

S.No.	Finding of the ITAT	A.Y.
	5. With regard to consideration received in relation to burnt of expenses, we find that the id. AG had held that reimbursement of expenses are nothing but partakes the character of the amounts received from rendering services under the Training and Computer St Agreement (TCSA). We find that the Ld. CIT (A) held that the taxability of reimbursement of expenses should be the same as the primary res Le training receipts and computer system receipts and hence an offshoot of those receipts only. The Id. CIT (A) held that since the primary receipts are not taxable in India, the off shoot receipts there are a not taxable in India. We find that the Id. DR argued that the id CA) had not gone into the facts of this issue by ascertaining the d of reimbursement provided by assessee. But we find that the AE had been rendering only training services Computer reservation systems services and other than this, does not perform any other function. Hence the claim of the assessee that the reimbursement of opens would pertain only to the training and CRS activities deserves to be accepted.	Will per take character of main receipts, thus not taxable Para 5, pg. 79-80

12. We have duly considered the grounds raised by the Revenue vis-a-vis covered position in favour of assessee for all the three grounds since A.Y. 2009-10 to A.Y. 2015-16. Facts for these two years vis-a-vis earlier years are similar. We have not observed any difference either in terms of facts or law in these two years as compared to the earlier years mentioned in table (supra). Revenue failed to bring on record any new material based on which any deviation in the settled position in favour of assessee can be explored.

13. Based on our above discussion and facts of the case as discussed above, we respectfully follow the earlier orders of ITAT, Mumbai in favour of assessee and dismiss both the appeals of the Revenue.

14. **In the result, appeals filed by the Revenue are dismissed.**

ITA No. 1526/Mum/2021 (A.Y. 2016-17)

15. Issue raised by assessee in Ground Nos. 1 & 2 are similar to what this Tribunal already adjudicated in favour of assessee in A.Y. 2010-11 vide ITA No. 5677/Mum/2016, A.Y. 2014-15 vide ITA No. 1629/Mum/2020 and A.Y. 2015-16 vide ITA No. 1453/Mum/2021.

16. Tribunal while adjudicating the similar issue under similar circumstances for A.Y. 2014-15 had held as under:

> *"11.1. The aforesaid grounds have already been adjudicated by this Tribunal in AY 2010-11 supra wherein it was held that amounts received by the assessee towards training and computer systems agreement and not taxable in India both under the Act as well as under Indo-Netherlands treaty But there is a small change on facts during the year under consideration. We find that in A.Y.2014-15, the assessee itself had offered receipts from training services as FTS on the basis of earlier year assessment orders. This was sought to be reversed by the assessee during the*

course of assessment proceedings which was denied. The Id. CIT(A) also did not agree to this contention of the assessee. In fact the assessee had raised an additional ground before the ld. CIT(A) on this count. We find that the Id. CIT(A) had denied admission of the additional ground raised by him. We find that the Id CIT(1) had rejected the admission of additional ground raised by the assessee seeking reduction of income from training services from taxable income, on the ground that assessee had not made this claim in the return of income. The Id. CIT(A) in this regard had placed in the decision of the Hon ble Jurisdictional High Court in the case of Ultratech Cements Ltd., vs. Additional Commissioner of Income Tax. Range 2(2) in Income Tax Appeal No. 1060 of 2014 dated 18/04/2017 in support of his decision of refusing to admit additional ground.

12. At the outset, we find that the issue in dispute as far as the taxability of receipts from training services and computer reservation systems had already been decided by this Tribunal in favour the assessee holding that the said receipts are not taxable in India either as FTS or as royalty as per the Act and as per Indo-Netherlands treaty. Merely because the assessee had offered income from training services to tax in the return of income for the A.Y.2014-15 (i.e. the year under consideration), the assessee should not be unjustly taxed on a receipt which is otherwise not chargeable to tax both as per the Act and as per the treaty. We find that the Hon'ble Supreme Court in the case of Goetze India Ltd. reported in 284 ITR 323 had held that any claim of the assessee could be made only by way of a valid return. In the instant case, the assessee could not file a revised return within the time prescribed under the Act. It is a fact that assessee had offered the income while filing its return for AY 2014-15. Thereafter, during the course of assessment proceedings, in view of the subsequent development that had cropped up in assessee's own case wherein the Tribunal for A.Y 2009-10 had taken a decision in favour of the assessee on the very same taxability of receipts from training services, the assessee made a claim before the ld. AO that the said receipt should not be taxed in the hands of the assessee. We find that the decision of Goetze India categorically states in the final paragraph that the restriction of entertaining a claim otherwise than by way of valid return shall not apply to appellate authorities. Hence, we hold that the ld CIT(A) ought to have entertained the said claim of the assessee. In any case, there is no estoppel against the statute and law is very well settled on the same. As on date, this Tribunal in assessee's own case for A. Yrs 2009-10, 2011-12 and 2011-12 had categorically held that receipts from training services are not taxable in the hands of the assessee either as FTS as per Act as well as under the Indo-Netherlands treaty. The decision relied upon by the ld CIT(A) on the decision of the Hon'ble Jurisdictional High Court in the case of Ultratech

Cement does not apply to the facts of the instant case in view of the fact that in the case before the Hon'ble Jurisdictional High Court, the assessee raised an additional ground for claiming deduction u/s.80 IA of the Act before the Tribunal for the first time when no claim was made before the lower authorities. In that case the facts relevant for adjudication of the claim of deduction us 80IA of the Act were not available on record before the lower authorities. Hence, the Tribunal had rejected the claim of admission of additional ground in the case of Ultratech, which was upheld by the Hon'ble Jurisdictional High Court In the instant case, the entire facts relevant for taxability of receipts from training services are already on record which have already been culled out by the ld. AO in pages 2 & 3 of the assessment order. In these circumstances, the ld. CITA) ought to have admitted the additional ground raised by the assessee, even though it results in assessed income below the returned income. Hence, we hold that income from training services should not be brought to tax in the hands of the assessee in A.Y.2014-15. Even though this would result in a situation where it would go below the returned income, still the assessee would be entitled for the relief. Reliance in this regard is made on the decision of the Hon'ble Gujarat High Court in the case of Gujarat Gas Limited vs. JCIT reported in 245 ITR 84 and Milton Laminates Ltd, vs. CIT reported in 37 Taxmann.com 249 (Hon'ble Gujarat High Court).

12.1. On merits, the ld. DR also pointed out that during the year, the ld. AO treated the receipts from computer reservation system as equipment royalty which was not decided by the Tribunal in earlier years and accordingly he argued that the decision of the Tribunal in earlier years would not be applicable for this assessment year. Per contra, the ld. AR argued that the term "equipment" referred to by the ld. AO only means "server". The very same server was available in earlier years also for rendering the computer reservation system services by the assessee. Hence, there is absolutely no change in the facts. We also find that servers are owned and used by the assessee and not by the Indian entity. The servers are not given on rent to Indian Hotels. Hence, we are in agreement with the argument advanced by the ld. AR in this regard and hold that the year under consideration is no way factually different from earlier years and hence, the decision rendered by this Tribunal in A.Y.2010-11 supra shall apply mutatis mutandis to this assessment year also.

12.2. In view of the aforesaid observations, we hold that receipts of the assessee from training services and computer reservation system services shall not be chargeable to tax both under the Act as well as under the treaty. Accordingly, the grounds raised by the assessee are allowed."

17. There is absolutely no change in the facts. Hence, we are in agreement with the argument advanced by the ld. AR in this regard and hold that the year under consideration is no way factually different from earlier years and hence, the decision rendered by this Tribunal in A.Y.2014-15 supra shall apply mutatis mutandis to this assessment year also. In view of the aforesaid observations, we hold that receipts of the assessee from training services and computer reservation system services shall not be chargeable to tax both under the Act as well as under the treaty.

18. In view of the above, we hold that as amount received by assessee on account of conducting core managerial training programme amounting to Rs. 3,26,06,229/-, amount received of Rs. 22,04,08,147/- on account of Centralized Reservation System, Property Management System and other systems and amount received of Rs. 1,86,18,792/- received towards Human Resources related cost hold to be non-taxable under Article-12(5) of the India-Netherlands Tax Treaty and section 9(1)(vii) of the Act, the abovementioned amount should be reduced out of statutory total income of assessee. It may result in reducing the retuned income of assessee. Still while passing order giving effect, AO has to follow our directions in terms of deletion of abovementioned amount out of statutory total income and returned income also**. Accordingly, both the grounds raised by the assessee are allowed.**

19. **In the result, appeal filed by assessee is allowed.**

Order pronounced in the open court on 25th day of November, 2022.

Sd/-	Sd/-
(VIKAS AWASTHY)	(GAGAN GOYAL)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, दिनांक / Dated: 25/11/2022
SK, Sr.PS
Copy of the Order forwarded to:

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय. अपी. अधि., मुबंई / DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

BY ORDER,

//True Copy//

(Dy. /Asstt.Registrar)
ITAT, Mumbai