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

**BEFORE SHRI G.S. PANNU, PRESIDENT AND**
**SHRI SAKTIJIT DEY, JUDICIAL MEMBER**

**ITA No.5041/Del/2019**
**Assessment Year: 2015-16**

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| DCIT, Circle-1(1),<br>New Delhi. | **Vs.** | Duet India Hotels (Pune) Ltd.,<br>Unitech Trade Centre,<br>Sector-43, Gurgaon (Hr.)<br>PIN: 122018 |
| **PAN :AAGPD6844F** | | |
| **(Appellant)** | | **(Respondent)** |

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| Assessee by | Shri Anuj Tiwari, CA |
| Respondent by | Shri Sanjay Kumar, Sr. DR |

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| Date of hearing | 17.01.2023 |
| Date of pronouncement | 31.01.2023 |

## ORDER

**PER SAKTIJIT DEY, JUDICIAL MEMBER:**

This is an appeal by the Revenue against order dated 26.03.2019 of learned Commissioner of Income-Tax (Appeals)-1, New Delhi pertaining to assessment year 2015-16.

2. The short issue arising for consideration in the present appeal is, whether the payment of Rs.3,83,08,580 made to M/s. Duet India

Hotels Asset Management Ltd. (Mauritius) is in the nature of fee for technical services (FTS), thereby, requiring the assessee to withhold tax under Section 195 of the Income-Tax Act, 1961.

3. Briefly, the facts are, the assessee is an Indian Corporate Entity engaged in the business of hotel development and operation. Under a franchise agreement with Starwood Hotels & Resorts, the assessee operates a hotel in the name and style of 'Four Points by Sheraton'at Pune for the assessment year under dispute, assessee filed its return of income on 17.11.2015 declaring loss of Rs.29,23,77,887.

4. In the course of assessment proceedings, the Assessing Officer noticed that in the year under consideration, the assessee has paid an amount of Rs.3,83,00,000 to M/s. Duet India Hotels Assets Management Services Mauritius. Being of the view that the payment made is in the nature of FTS, the Assessing Officer called upon the assessee to explain why the payment made should not be disallowed under Section 40(a)(i) of the Act since the assessee has failed to deduct tax at source. Though, the assessee objected to the proposed disallowance, however, the Assessing Officer rejecting the submissions of the assessee disallowed the payment made by invoking

the provisions of section 40(a)(i) of the Act. The assessee contested the aforesaid disallowance before learned Commissioner (Appeals).

5. After considering the submissions of the assessee in the context of facts and material on record, learned Commissioner (Appeals) observed that under the India-Mauritius DTAA, there was no provision dealing with FTS, thus, he was of the view that the payment made by the assessee would either fall under Article 7 of the DTAA which deals with business profit or under Article 22 dealing with other income. Since, the recipient did not have any PE in India, the amount could not be taxed at the hands of the recipient under Article 7. In so far as Article 22 is concerned, learned Commissioner (Appeals) found that as per paragraph-3, any item of income not dealt under any of the provisions of the DTAA can also be taxed in the source country. However, he found that paragraph 3 to Article 22 was introduced to the DTAA w.e.f. 01.04.2017. Thus, he held that provision would not be applicable to the impugned assessment year. Hence, he was of the view that the assessee did not have any liability to deduct tax at source. Accordingly, he deleted the disallowance.

6. We have considered rival submissions and perused the material available on record. There is no dispute to the fact that as per the India Mauritius DTAA applicable to the impugned assessment year, FTS was not included. FTS was brought within the purview of DTAA w.e.f. In fact, the Assessing Officer also accepts the aforesaid factual position. However, referring to Article 3(2) of the India Mauritius DTAA, the Assessing Officer has held that a term, which is not defined in the agreement shall have the meaning it has in the law in force of that contracting State. Thus, taking recourse to Article 3(2), the Assessing Officer held that the definition of FTS in the domestic law will apply. We are not in agreement with the aforesaid view of the Assessing Officer. Admittedly, the India-Mauritius DTAA applicable to the relevant assessment year did not contain any provision defining FTS and taxability of FTS. Only w.e.f. 01.04.2017, provision relating to FTS in the shape of Article 12A was introduced to the DTAA . Thus, prior to 01.04.2017, the treaty did not include FTS. Therefore, as rightly observed by learned Commissioner (Appeals), the payment could either have fallen in the category of business profit under Article 7 of the treaty or other income under Article 22 of the treaty. In

absence of any PE of the recipient in India, the amount paid could not have been assessed as business profit in India. In so far as taxability of the amount as other income, it could have been brought to tax in India under Article 22(3), in case, it was not dealt with in any other provision of the DTAA. However, Article-22(3) was introduced to the DTAA w.e.f. 01.04.2017, hence, cannot be made applicable to the impugned assessment year. Thus, the provisions of the DTAA applicable to the impugned assessment year, being more beneficial to the assessee, would govern. That being the factual and legal position, learned Commissioner (Appeals) was justified in deleting the disallowance made under Section 40(a)(i) of the Act. Accordingly, we uphold the decision of learned Commissioner (Appeals) by dismissing the grounds raised.

7. In the result, the appeal is dismissed.

***Order pronounced in the open court on 31 January 2023.***

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| ***Sd/-*** | ***Sd/-*** |
| **(G.S. PANNU )** | **(SAKTIJIT DEY)** |
| **PRESIDENT** | **JUDICIAL MEMBER** |

***Dated: 31st January, 2023.***
***Mohan Lal***