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

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No. 698/Del/2021 : Asstt. Year: 2017-18

M/s Inter Continental Hotels Group (Asia Pacific) Pte Ltd., 230, Victoria Street, # 13-00, Bugis Junction Towers, Singapore	Vs.	ACIT, Circle-2(1)(1), International Taxation, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AABCI6407M		

Assessee by : Sh. S. K. Aggarwal, CA &
Sh. Himanshu Aggarwal, CA
Revenue by : Sh. Anshuman Pattnaik, CIT DR

Date of Hearing: 13.03.2023		**Date of Pronouncement: 05.04.2023**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 19.04.2021 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. The solitary ground raised by the assessee is as under:

"***Ground 1: Management Support Service held taxable as Fee for Technical Services ('FTS')***

1.1 That on the facts and in the circumstances of the case and in law, the Ld. AO and the Hon'ble DRP have erred in making the addition to the income of the Appellant in relation to Management Support Charges amounting to INR 14,47,42,517.

1.2 That on the facts and in the circumstances of the case and in law, the Ld. AO and the Hon'ble DRP have

erred in treating the amount received by the Appellant from InterContinental Hotels Group (India) Pvt. Ltd. (THG India') towards provision of Management Support Service to be in the nature of Fee for Technical Services ('FTS') under Article 12 of India-Singapore Double Taxation Avoidance Agreement ('DTAA'/'Treaty').

1.3 That on the facts and in the circumstances of the case and in law, the Ld. AO and the Hon'ble DRP have erred in holding that the consideration against Management Support Service received by the Appellant from IHG India is taxable as FTS under Article 12(4)(a) of India-Singapore Treaty.

1.4 That on the facts and in the circumstances of the case and in law, the Ld. AO and the Hon'ble DRP have erred in holding that the consideration received by the Appellant from IHG India against rendition of Management Support Service is 'ancillary and subsidiary' to the license fee received by it from the Indian Hotels for granting them right to use the brands, which were beneficially held by the Appellant.

1.5 That on the facts and in the circumstances of the case and in law, the Ld. AO and the Hon'ble DRP while treating Management Support Service taxable as FTS under Article 12(4)(a) of the India-Singapore Treaty, have failed to appreciate that the consideration against rendition of Management Support Service is received from IHG India, whereas consideration against right to use the Hotel brand name (i.e. license fee) is received from Indian Hotels, under different contracts.

1.6 That on the facts and in the circumstances of the case and in law, the Ld. AO and the Hon'ble DRP have failed to appreciate that merely because the services are managerial, technical and consultancy in nature, the same will not ispo-facto result into FTS under Article 12 of India-Singapore DTAA, unless the services results into making available technical knowledge, experience, skill, know-how or processes, which enables the service recipient to apply the technology contained therein.

1.7 That on the facts and in the circumstances of the case and in law, the Ld. AO and the Hon'ble DRP have erred in holding that the Management Support Services 'make available' technology, knowledge, skill, experience to the recipient, ignoring the explicit language of Article 12(4)(b) of the DTAA which provides that the recipient should be in a position to apply the technology contained in the services.

1.8 That on the facts and in the circumstances of the case and in law, the Ld. AO and the Hon'ble DRP have failed to appreciate that the support services provided by the Appellant are required by IHG India on an on-going basis and hence the technology, experience etc., cannot be said to be made available by the Appellant to IHG India."

3. The issue of Management Support Charges/FTS and the issue of make available stands adjudicated by the order of the Tribunal in assessee's own case for the A.Y. 2012-13 in ITA No. 4524/Del/2017 vide order dated 24.09.2021 and in A.Ys. 2013-14 and 2014-15 in ITA No. 2986 & 4608/Del/2019 vide order dated 1.01.2023. The relevant part of the earlier orders of the Tribunal is reproduced as under:

ITA No. 4524/Del/2017

"30. We have gone through the agreement and the TP study report o f the IHG India with regard to the services provided. We find that the operational support such as Providing advice, information and competitive expertise to local general CMH Hotel management on the operation of Hotels in accordance with brand standards, maintaining the qualification available with regard to the international hotel business and its management techniques and Coordinating the managerial plan and actions, advising local general CMH Hotel management on trends and changes in the

hotel business in general and provide advice on the production of operating and capital budgets at the level of the CMH Hotels, which are consistent with the strategic plan can at best be the managerial consultancy service but not the services made available so that the recipient can use or replicate the such services received from the assessee."

ITA No. 2986 & 4608/Del/2019

15. Thus, we have to examine whether the services rendered by the assessee under Management Support Service Agreement are ancillary and subsidiary to the license granted for user of brand name, charges received from which are in the nature of royalty. For this purpose, first, we have to see Article 12(4)(a) of the treaty, which reads as under:

> *(a) "are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received."*

16. Having given a thoughtful consideration to the submissions of the parties in the context of the aforesaid finding of learned Commissioner (Appeals), we find, the license granted by the assessee to various hotels in India for user of brand name from earlier times and the assessee had been offering such income as royalty. Whereas, the assessee had entered into Management Support Services agreement at a later point of time. These facts show that the agreements for user of brand name and for Management Support Services are independent of each other, hence, not connected or dependent upon each other. It is also relevant to observe, while the license agreements for user of

brand name are with various third party hotels in India, the agreement for provision of Management Support Services is with the Indian subsidiary. Therefore, it cannot be said that the amount received from provision of Management Support Services is ancillary and subsidiary to the license agreement. It is further relevant to observe, in the year under consideration, the assessee had received more income from provision of Management Support Services than royalty. In that sense also, Management Support Services cannot be considered to be ancillary and subsidiary to the license agreement. These aspects could have been clarified by the assessee, had learned Commissioner (Appeals) given an inkling that he intends to apply Article 12(4)(a) of the treaty to bring to tax the Management Support Services fee.

17. Be that as it may, the nature and character of Management Support Services fee received by the assessee in the impugned assessment year is no different from similar fee received in assessment year 2013-14. After threadbare analysis of Management Support Services Agreement and the fee received under various heads in pursuance to such agreement, the Co-ordinate Bench in assessee's own case in assessment year 2012-13(supra) has given a categorical finding that it does not come under Article 12(4) of India-Singapore DTAA. The decision of the Co-ordinate Bench as aforesaid, will also apply mutatis-mutandis to this appeal. However, for the sake of completeness, we must observe, in course of hearing learned counsel for the assessee has brought to our notice a decision of the Co-ordinate Bench in case of Starwood Hotels & Resorts Worldwide Inc. vs CIT & Ors. In ITA No.2011/Del/2019 order dated 29.04.2022 in the context of the applicability of Article 12(4)(a) of the DTAA.

18. Having carefully perused the aforesaid decision, we find, while dealing with an identical issue, the Bench has held as under:

"12. Therefore, the only issue which arises for our consideration is, whether the amount received by the assessee for various services, commonly known as centralized services, will fall within the ambit of FIS under Article 12(4)(a) of the Treaty. For holding the payment received by the assessee to be in the nature of FIS under Article 12(4)(a), learned Commissioner (Appeals) has attempted to link the Centralized Services Agreement entered into by the assessee with License Agreement entered into by the Indian Hotels with group affiliates for grant of right to use trade name. It is a fact on record, under License Agreement for grant of right to use trade name, the Indian hotels have paid license fee to the affiliates. The affiliates have also offered such license fee as royalty income. There is no dispute that the license fee paid to the affiliates have been taxed in India. It is the reasoning of learned Commissioner (Appeals) that since the services rendered by the assessee under Centralized Services Agreement is ancillary and subsidiary to the License Agreement for grant of right to use trade name, the amount received by the assessee in pursuance to Centralized Services Agreement has to be treated as FIS under Article 12(4)(a) of the Tax Treaty.

13. It is relevant to observe, identical issue relating to taxability of centralized service fee as FIS under Article 12(4) came up for consideration before the Coordinate Bench in case of Sheraton International Inc. (supra) in assessment years

1995-96, 1996-97, 1999-2000 and 2000-01. After analyzing the terms of Centralized Services Agreement, which is more or less identical to the agreement entered into by the present assessee, the Tribunal observed that the assessee is basically providing the Indian hotels services for publicity, marketing and reservation. The main purpose/intention of the association between the assessee and the Indian hotels was to promote the hotel business in their mutual business interest through worldwide publicity, marketing and advertisement. The various facilities as well as services provided were merely the means to attain this main objective. The Tribunal observed, the main job undertaken by the assessee is promoting hotel business by worldwide publicity, marketing and advertisement and any other services provided are in the nature of ancillary and auxiliary to the main job. The Tribunal observed that the rationale behind providing the use of trade mark/trade name was not only going to help and assist the assessee in rendering its services relating to publicity, advertisement and business promotion of the Indian hotels, but such use was also going to help the assessee in advertising its other hotels worldwide and to promote their business as the Indian Hotels, in terms with the agreement, will take steps to recommend and promote Sheraton Inn/Hotels worldwide and to make every reasonable effort to encourage the use of same by all of its customers and guest. Thus, the intention behind entering into agreement was to benefit from mutual promotional effort undertaking by each of the entity.

14. It is quite evident, the basis for learned Commissioner (Appeals) to conclude that the fee received by the assessee for

centralized services is in the nature of FIS under Article 12(4)(a) of the Treaty is because of the following reasons:

(i) Centralized Services Agreement is actually a subsidiary and ancillary agreement of the license agreement.

(ii) Primary agreement which enables and sets off of the business of the franchisee is the License Agreement for which license fee is paid and such license fee is taxable as royalty advance of the affiliates which receives the license fee.

(iii) There is no need for satisfying 'the make available' clause under Article 12(4)(a) of the Treaty. In case of Sheraton International Inc. neither the Tribunal nor the Hon'ble Jurisdictional High Court to examine the implication and applicability of Article 12(4)(a) of the Tax Treaty.

15. Learned Commissioner (Appeals) has observed that the five determinative factors for classification of the consideration received as FIS under of paragraph 12(4)(a) of the treaty, as, explained in the Memorandum of Understanding (MoU) to India–US Treaty are clearly satisfied, as, the predominant factor in relation to the clients is the grant of license to use the name, which gave rise to royalty and all other payments and agreements flow from the License Agreement.

17. For better appreciation, it is necessary to look into the provisions contained under Article 12(4)(a), which in turn, refers to Article 12(3) of the Tax Treaty. Article 12(3) of the Tax Treaty reads as under:

"USA

ARTICLE 12 ROYALTIES AND FEES FOR INCLUDED SERVICES

1. ……..

2. ……

3. The term "royalties" as used in this Article means : (a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; and (b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8."

18. As could be seen from the opening sentence of the Article, it defines the term 'Royalty". It is quite obvious that the payment made by the Indian hotels to one of the group affiliates towards use of trademark has been treated as royalty and there is no dispute to the aforesaid factual position as the concerned group

affiliates have offered the amount to tax as royalty. Article 12(4) of the Tax Treaty defines FIS as under:

"USA

ARTICLE 12

ROYALTIES AND FEES FOR INCLUDED SERVICES

1. *……..*
2. *……*
3. *……..*
4. *For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :*

   (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or

   (b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design."

19. As discussed earlier, even learned Commissioner (Appeals) does not dispute the fact that Article 12(4)(b) would not apply to the centralized fee received by the assessee as the 'make available' condition is not satisfied. Therefore, to overcome this deficiency, learned Commissioner (Appeal) has made an attempt to invoke the provision of Article 12(4)(a) of the Treaty. A

reading of Article 12(4)(a) would make it clear that the payment received for rendering any technical or consultancy services would come within the ambit of FIS, if such services are ancillary and subsidiary to the application and enjoyment of the right, property or information for which the payment described in Article 12(3) is received. So, the conditions to be satisfied to be regarded as FIS under Article 12(4)(a) are, services for which the payment was received must be ancillary and subsidiary to the application or enjoyment of the right, property or information for which the payment in the nature of royalty under Article 12(3) is received.

20. In the facts of the present appeal, undisputedly, the assessee is neither the owner of the trademark nor has received any payment as a consideration for the use of, or right to use of trademark in terms of Article 12(3)(a). The payment was received by the group affiliates under a distinct and separate license agreement. Whereas, the assessee provided centralized services relating to marketing, advertisement, promotion etc. under a distinct and separate agreement. So, when the assessee is not the owner of the property, there is no question of allowing a third party to use or right to use of the property. That being the case, the services for which payments are received cannot be considered to be ancillary and subsidiary to the application or enjoyment of the right of property or information for which royalty has been paid. Further, the MoU to India – USA Tax Treaty while explaining the import of Article 12(4)(a) has laid down the following parameters:

"Paragraph 4(a)

Paragraph 4(a) of Article 12 refers to technical or consultancy services that are ancillary and subsidiary to the application or enjoyment of any right, property, or information for which a payment described in paragraph 3(a) or (b) is received. Thus, paragraph 4(a) includes a technical and consultancy services that are ancillary and subsidiary to the application or enjoyment of an intangible for which a royalty is received under a licence or sale as described in paragraph 3(a), as well as those ancillary and subsidiary to the application or enjoyment of industrial, commercial, or scientific equipment for which a royalty is received under a lease as described in paragraph 3(b).

It is understood that, in order for a service fee to be considered "ancillary and subsidiary" to the application or enjoyment of some right, property, or information for which a payment described in paragraph 3(a) or (b) is received, the service must be related to the application or enjoyment of the right, property, or information. In addition, the clearly predominant purpose of the arrangement under which the payment of the service fee and such other payments are made must be the application or enjoyment of the right, property, or information described in paragraph 3. The question of whether the service is related to the application or enjoyment of right, property, or information described in paragraph 3 and whether the clearly predominant purpose of the arrangement is such application or Payment must be determined by reference to the facts and circumstances of

each case. Facts which may be relevant to such determination (although not necessarily controlling) include:

1. The extent to 'which the services in question facilitate the effective application or enjoyment of the right, property, or information described in paragraph 3;

2. The extent to which such services are customarily provided in the ordinary course of business arrangements involving royalties described in paragraph 3 ; 3. Whether the amount paid for the services (or which would be paid by parties operating at arm's length) is an insubstantial portion of the combined payments for the services and the right, property, or information described in paragraph 3;

4. Whether the payment made for the services and the royalty described in paragraph 3 are made under a single contract (or a set of related contracts); and 5. Whether the person performing the services is the same person as, or a related person to, the person receiving the royalties described in paragraph 3 [for this purpose, persons are considered related if their relationship is described in Article 9 (Associated Enterprises) or if the person providing the service is doing so in connection with an overall arrangement which includes the payer and recipient of the royalties]. To the extent that services are not considered ancillary and subsidiary to the application or enjoyment of some right, property, or information for which a royalty payment under paragraph 3 is made, such services shall be

considered "included services" only to the extent that they are described in paragraph 4(b).”

21. If one critically examines the determinative factors/parameters to qualify as FIS under Article 12(4)(a), it can be seen, most of the determinative factors/parameters do not apply to the centralized service fee received by the assessee. This is so, because, the services rendered by the assessee do not facilitate the use of trade name/trademark. Rather, as has been held by the Coordinate Bench in case of Sheraton International Inc. (supra) and affirmed by the Hon’ble Jurisdictional High Court, the predominant object is advertisement, marketing and promotion of the hotels. The assessee does not provide such services in ordinary course of business arrangement involving royalty as described under Article 12(4)(a). The amount received by the assessee towards centralized services cannot be considered to be insubstantial and certainly not part of combined payment of services rendered and license fee. The payments for centralized services and royalty are not under a single contract and cannot be said to be related contracts. Thus, many of the determinative factors mentioned in the MoU to India-USA treaty are absent to constitute the centralized service fee as FIS under Article 12(4)(a). In this regard, the following example given in the MOU to India– US Tax Treaty would be of much relevance:

Example. 2
Facts: An Indian manufacturing company produces a product that must be manufactured under sterile conditions using

machinery that must be kept completely free of bacterial or other harmful deposits. A U.S. company has developed a special cleaning process for removing such deposits from that type of machinery. The U.S. company enters in to a contract with the Indian company under which the former will clean the latter's machinery on a regular basis. As part of the arrangement, the U.S. company leases the Indian company a piece of equipment which allows the Indian company to measure the level of bacterial deposits on its machinery in order for it to known when cleaning is required. Are the payments for the services fees for included services?

Analysis:

In this example, the provision of cleaning services by the U.S. company and the rental of the monitoring equipment are related to each other. However, the clearly predominant purpose of the arrangement is the provision of cleaning services. Thus, although the cleaning services might be considered technical services, they are not "ancillary and subsidiary" to the rental of the monitoring equipment. Accordingly, the cleaning services are not "included services" within the meaning of paragraph 4(a).

22. As could be seen from the aforesaid illustration, though, both the services are interlinked, however, the predominant purpose of the arrangement is provision of cleaning services, hence, will not be ancillary or subsidiary to the rental of monitoring machine. Hence, the cleaning services are not to be regarded as FIS under Article 12(4)(a) of the Tax Treaty.

23. The factual position, in a way, is quite similar in the present case. The aforesaid illustration to some extent can be made applicable to the facts of the present appeal. Even if one agrees with learned Commissioner (Appeals) that the License Agreement and Centralized Services Agreement are related to each other and the Centralized Services Agreement actually flows out of the License Agreement but still the issue which requires examination is, whether the Centralized Services Agreement is ancillary or subsidiary to the License Agreement. In our view, the answer to the aforesaid question would be in the negative. Clearly, predominant purpose of the Centralized Service Agreement and the overall arrangement between the parties is to provide advertisement, marketing and promotion of the hotel business. Even, the quantum of fees received under both the agreements would demonstrate the aforesaid fact.

24. As could be seen from the materials placed on record, as against the license fee of Rs.6,05,43,227/- received by the affiliates, the assessee has received centralized services fee of Rs.6,93,56,315/-. Therefore, the quantum of fee received by the assessee in no way makes it ancillary and subsidiary to the licence fee received by the group affiliates. Further, the observations of learned Commissioner (Appeals) that in case of Sheraton International Inc. (supra) neither the Tribunal nor the Hon'ble Jurisdictional High Court have examined the taxability of centralized services fee in the context of Article 12(4)(a) of the Tax Treaty, is totally incorrect and misleading statement. If one reads the decision of the Tribunal in case of Sheraton International

Inc. (supra), it would be very much clear that before the Tribunal an additional ground was raised by the Revenue regarding applicability of Article 12(4)(a) of India–US Tax Treaty to the centralized service fee received. However, after in depth examination of the issue, the Tribunal has held as under:

> *72. It appears from the orders of the authorities below passed in the present case that while treating the amount in question received by the assessee from Indian hotels/clients as 'royalty' and/or 'fees for included services' the Assessing Officer relied on Article 12(3) and 12(4){b) of the lndo-American DTAA besides the provisions of section 9(l)(v«) of the Income-tax Act, 1961 whereas the learned CIT(A) applied Article 12(3)(a). At the time of hearing before us, the learned Special Counsel for the Revenue Shri Y.K. Kapur has sought to rely, by way of raising the additional grounds in the appeals filed by the Revenue, Article 12(4)(a) to support the Revenue's case that the amount in question being in the nature of 'fees for included services' was liable to tax in India also. The learned counsel for the assessee has raised a strong objection for admission of these additional grounds stating that neither the Assessing Officer nor the learned CIT(A) having applied Article 12(4)(a) of the DTAA in their orders passed in the assessee's case, the Revenue cannot rely on the said Articles to support its case at this stage during the course of appellate proceedings before the Tribunal. Keeping in view that the issues sought to be raised by*

the Revenue in these additional grounds are purely legal and all the facts relevant to consider and adjudicate the same are on record, we. however, find no merits in the objection raised by the learned, counsel for the assessee and admitting the additional grounds raised by the Revenue, we now proceed to consider and decide the issues raised in these additional grounds also on merits. In support of the Revenue's case that the impugned amount received by the assessee from the Indian hotels/clients was in the nature of 'royalty' or 'fees for included services' as per the DTAA between India and America, reliance thus has been placed by it mainly on the provisions of Articles 12(3)(a) as well as 12(4)(r/) and 12(4)(b). Article 12(3){b) being specifically applicable only to payments received for the use of or the right to use of any equipment of industrial, commercial or scientific nature, in any case, is not applicable to the facts of the present case. It is, therefore, relevant to consider as to whether the payment received by the assessee from the Indian hotels/clients was in the nature of "royalties" or "fees for included services" within the meaning given in Article 12(3)(a), 12(4)(a) or 12(4){b) of the DTAA between India and USA or "fees for technical services" within the meaning given in Explanation 2 to section 9(1){vii).

73. In order to decide this issue relating to the applicability of Article 12(3)(a), 12(4)(a) or 12(4)(b)

of the DTAA or the provisions of section 9(1)(vii) read with Explanation 2 to the payment received or receivable by the assessee from the Indian hotels/clients in pursuance of the agreements entered into with them, it is necessary to appreciate the exact nature of services rendered by the assessee as is evident from the said agreements. In this regard, it is necessary to read the said agreements as a whole as held in the various judicial pronouncements discussed above so as to ascertain the exact nature of services as well as the relationship between the two parties. We have already done this exercise in the context of issue relating to applicability of section 9(1)(vi) read with Explanation 2 and after examining and analyzing all the relevant clauses and articles of the said agreements in detail, we have come to a conclusion that the arrangement between the assessee company and the Indian hotels/clients was in the nature of integrated business arrangement predominantly for rendering the services in connection with publicity, advertising and sales including reservations of the Indian hotels worldwide. The main intention/purpose of the said arrangement was to promote the hotel business worldwide in the mutual interest of both the sides and the other services enumerated in the various Articles of the agreements to be rendered by the assessee-company were merely ancillary or auxiliary to this main objective/intention. This precisely was the sum and substance of the agreement if the same is read as a

whole and thus, it was a case in which the assessee-company had undertaken to provide services in connection with advertising, publicity and sales promotion including reservations for the Indian hotels/clients. Even the payment was entirely made as expressly stipulated in the agreement for these services and this is the way in which the entire arrangement was not only made but was also understood by both the sides. Even the use of trademark, trade names etc. of the assessee-company by the Indian hotel /clients was an integral part of this arrangement and such use was allowed at no cost as expressly provided in the relevant agreements. Moreover the rationale behind providing such use at no cost has been explained on behalf of the assessee which is found to be satisfactory by us for the detailed reasons given in the foregoing portion of this order. Having regard to all these aspects, we have come to a conclusion that the various services rendered by the assessee to enable it to complete efficiently and effectively the job undertaken by it as an integrated business arrangement to provide the services relating to advertising, publicity and sales promotion including reservations of the Indian hotels worldwide in mutual interest cannot be relied upon by picking and choosing the same in isolation so as to say that part of the consideration received by the assessee, as attributable to the said services, was in the nature of 'royalties' or 'fees for included services'. Such an approach adopted by the Revenue authorities, in our opinion, was neither

permissible in law nor practicable in the facts of the case and the conclusion drawn by them on the basis of such approach to cover the said services taken individually or in isolation divorced from the main intention within the meaning of 'royalties' or 'technical services' as defined in Explanation 2 to section 9(1)(v/) or to section 9(l)(v») and/or that of "royalties" or "fees for included services" as defined in Article 12(3) and 12(4) of the DTAA between India and USA was neither well-founded nor justified.

74. On the other hand, the predominant object/purpose of the integrated business arrangement/between the assessee-company and its Indian clients/hotels as reflected in the relevant agreements so also as understood by both the sides was that of providing the services in relation to marketing, publicity and sales promotion and even the payments in question were entirely made by the Indian hotels/clients to the assessee-company for such services as expressly provided in the relevant agreements.

75. In the case of Dy. CAT v. Boston Consulting Group Pte Ltd. [2005] 94 ITD 3 1 (Mum.) the assessee was a foreign company receiving income by providing strategy consultancy services such as marketing and sales strategy, business strategy and portfolio strategy to its clients in India and the said income was sought to be held as in the nature of 'fees for technical services' within the meaning given in relevant Articles of the

DTAA between India and Singapore and after comparing the scope of Article 12(4)(/?) of India US Treaty with that of the same Article of the India-Singapore Tax Treaty, it was held by the Tribunal that the services rendered by the assessee-company being non-technical services could not be covered by the scope of Article 12(4)(6) of the Indo-American DTAA as well as that of India-Singapore DTAA. It was held by the Tribunal that the nature of services being rendered by the assessee company such as business strategy, marketing and sales strategy etc. were materially different and they were not of technical in nature which would enable the person acquiring the services to apply the technology contained therein. Explaining further, it was also observed by the Tribunal that so far as the provisions of India-Singapore DTAA as well as the provisions of Indo-American DTAA are concerned, payments for services which are non-technical in nature or, in other words, payment for services not containing any technology, are required to be treated as outside the scope of 'fees for technical services'. It was further held by the Tribunal that the scope of 'fees for technical services' under Article 12(4)(b) does not cover consultancy services unless these services are technical in nature.

76. In the case of Raymond Ltd. v. Dy. CIT [2003] 86 ITD 791. Mumbai Bench of ITAT held that the normal, plain and grammatical meaning of the language employed using the expressions 'making available' and

'making use of' is that the mere rendering of services is not roped in unless the person utilizing the services is able to make use of the technical knowledge etc. by himself in his business or for his own benefit and without recourse to the performer of the services in future. The technical knowledge, experience, skill etc. must remain with the person utilizing the services even after the rendering of the services has come to an end. The fruits of the services should remain available to the person utilizing the services in some concrete shape such as technical knowledge, experience, skill etc.

77. As already observed, a close reading of the relevant agreements especially the payment clause, the predominant nature of the services rendered, the integrated arrangement between assessee company and Indian hotels/clients as well as the nature of relationship between them as reflected in the relevant agreements so also as understood by both the sides leaves no doubt that the entire consideration was paid by the Indian hotels/clients to the assessee company for the services rendered in relation to advertisement, publicity and sales promotion of the hotel business worldwide and this being so as well as considering all the facts of the case including especially the fact that other services to be rendered by the assessee as enumerated in the various Articles of the relevant agreements were merely ancillary or auxiliary in nature being incidental to the integral job undertaken by the assessee to provide the services in relation to

advertisement, publicity and sales promotion of the hotel business worldwide, it is very difficult to accept the stand of the Revenue that the amount so paid by the India hotels/clients to the assessee-company or any part thereof was paid for the use of a patent, invention, model, design, secret I formula or process or trademark or similar property or for imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill as envisaged in Article 12(3)(a), 12(4)(a) or 12(4)(b) of the DTAA or in section 9(1)(vii) read with Explanation 2.

78. The supply of drawings, design, documents, information etc. such as fire safety system, computer reservation system etc. as mentioned in the relevant Articles of the agreements on which much emphasis has been laid by the learned Special Counsel for the Revenue was made by the assessee to enable it to execute the job undertaken by it to render services in relation to advertisement, marketing and sales promotion of hotel business worldwide and such supply was merely incidental to the performance of integrated business arrangement which included mainly rendering services in relation to advertisement, publicity and sales promotion of hotel business. The payment made by the Indian hotels/clients to the assessee-company on account of such job or any part thereof, therefore, cannot be attributed to the use of a patent, invention, model, design, secret formula or process or trademark or similar property or for imparting of any information

concerning technical, industrial, commercial or scientific knowledge, experience or skill. The decision of Hon'ble Madras High Court in the case of Nayveli Lignite Corpn. Ltd. (supra) and that of Hon'ble Andhra Pradesh High Court in the case of Klayman Porcelains Ltd. (supra) fully support this view. Even the decision of Authority for Advance Ruling in the case of Rotem Co. In re |2005| 279 1TR 165 ^ (AAR - New Delhi) is to the similar effect wherein after discussing the various judicial pronouncements, it was held that the principle which emerges from the various decisions is that in a contract for manufacture, installation, sale or supply of goods, the element of services will always be present and where such services are inextricably linked with manufacture, installation, sale or supply, they cannot be evaluated for the purpose of FTS. It is only where services are separable and independent that the FTS will be assessable. In the present case, the services sought to be treated as 'fees for technical services' or 'fees for included services' were of ancillary or auxiliary in nature and being integral part of the job undertaken by the assessee-company, the same were neither independent of nor separable from the said job undertaken by the assessee in relation to publicity, advertisement and sales promotion of the hotel business worldwide.

79. Before us, the learned Special Counsel for the Revenue has referred to some of the Articles of the agreements between the assessee and the Indian

hotels/clients to submit that the drawings, designs, documents, systems and other facilities agreed to be provided by the assessee to the Indian hotels/clients in terms of the said Articles are the components which have been provided/supplied in the process of rendering of the services in relation to advertisement, marketing and sales promotion. He has contended that since the same come within the purview of one or the other clauses contained in Explanation 2 to section 9(1)(vi) and (vii) as well as Article 12(3) and 12(4) of the DTAA between India and USA, the payment/consideration attributable to the same should be apportioned so as to bring the same to tax in India. In this regard, it is observed that a similar contention was raised before the Hon'ble Delhi High Court on behalf of the Revenue in the case of Mitsui Engg. & Ship Building Co. Ltd. (supra). The same, however, was rejected by the Hon'ble Jurisdictional High Court holding that it was not possible to apportion the consideration for design on the one part and engineering, manufacturing, shop testing etc. on the other since the price paid by the assessee to the supplier was a total contract price which covered all the stages involved in the supply of machinery from the stage of design to the stage of commissioning. ln the present case also, the entire price was paid by the Indian hotels/clients to the assessee-company in pursuance of the relevant agreements expressly for rendering the services in relation to advertisement,

publicity and sales promotion and it was neither possible nor practicable nor permissible to apportion the said consideration as sought to be done by the Revenue authorities.

80. As regards the applicability of Article 12(3)(a) of the DTAA, we have already held that its trademark, trade name etc. were made available by the assessee-company to the Indian hotels/clients as an integral part of the business arrangement between them and the same, therefore, was merely incidental to carry out the job of advertisement, publicity and sales promotion undertaken by the assessee-company. Moreover, the said use was allowed for mutual benefit and the exact benefits derived by the assessee- company from such use have already been discussed by us. As expressly provided in the relevant agreements, it was agreed that no cost is to be paid by the Indian hotels/clients to the assessee-company for such use and the entire payment/consideration was on account of the services rendered in relation to advertisement, publicity etc. This was the arrangement between the parties as is evident from the relevant terms and conditions of the agreements and this is the way in which both the sides had apparently understood and acted upon such arrangement. It was thus neither desirable nor possible to apportion any portion of the consideration received by the assessee company from the Indian hotels/clients towards use of trademark, trade name etc. by the Indian hotels/clients. Having regard to all these facts

and circumstances of the case borne out from the record including especially the relevant agreements between the parties, we find it difficult to accept the stand taken by the Revenue that the payments received by the assessee-company from the Indian hotels/clients in pursuance of the said agreements or any part was in the nature of royalties within the meaning of Article 12(3)(a).

81. As regards Article 12(3)(b) covering the payments received as consideration for the use of or the right to use any industrial, commercial or scientific equipment, we have already noted that neither the Revenue has invoked the provisions of this Article in the assessee's case nor the same otherwise also is applicable to the facts of the present case since there was no such use or the right to use any industrial, commercial or scientific equipment. This takes us to Article 12(4)(a) of the DTAA which covers only the "payments made for rendering of any technical or consultancy services which are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received. As clarified and explained in the Memorandum of Understanding dated 1 5thi May, 1989, paragraph 4(a) of Article 12 thus includes technical and consultancy services that are ancillary and subsidiary to the application or enjoyment of an intangible for which a royalty is received under a license or sale as described in paragraph 3(a) as well as those ancillary and

subsidiary to the application or enjoyment of industrial, commercial or scientific equipment for which a royalty is received under a lease as described in paragraph 3(b). In this regard, we have already held that the payments received by the assessee in the present case from the Indian hotels/clients were not in the nature of royalties within the meaning given In paragraph 3(a) or 3(b) of Article 12. It, therefore, follows that paragraph 4(a) of Article 12 also cannot be applied to cover any of the services rendered by the assessee company to the Indian hotels/clients in the present case."

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."

19. In our view, the ratio laid down in the aforesaid decision of the co-ordinate Bench squarely applies to the facts of the present appeal. Hence, we delete the addition made.

20. In the result, the appeal is allowed."

4. Since, the matter stands adjudicated by the order of the Tribunal, in the absence of any change in the material facts and legal proposition, the appeal of the assessee is hereby allowed.

5. In the result, the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 05/04/2023.

Sd/-	Sd/-
(Yogesh Kumar US)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 05/04/2023
Subodh Kumar, Sr. PS

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR