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

BEFORE SHRI SAKTIJIT DEY, HON'BLE VICE-PRESIDENT
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No.1627/Del/2023
Assessment Year: 2018-19
With
ITA No.1628/Del/2023
Assessment Year: 2019-20

DCIT, Circle -3(1)(2), International Taxation, New Delhi	**Vs.**	Starwood (M) International Inc., C/o- M/s. Nangia & Co. LLP, A-109, Sector-136, Noida
		PAN :AANCS4030J
(Appellant)		**(Respondent)**

Assessee by	Sh. Amit Arora, CA Sh. Vishal Missra, CA
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	20.09.2023
Date of pronouncement	22.09.2023

ORDER

Captioned appeals by the Revenue arise out of two separate orders, both dated 22.03.2023, of learned Commissioner of Income Tax (Appeals)-43, New Delhi, pertaining to assessment years 2018-19 and 2019-20.

2. The only effective ground raised by the Revenue, which is common in both the appeals, reads as under:

> *"(i) Whether the Ld. CIT(A) has erred in law in holding that the entire payments received by the assessee from its Indian customers on account of Centralized Services did not constitute Fee for Technical Services as defined u/s 9(1)(vii) of the Income Tax Act, 1961 or "Fee for included services as defined under Article 12(4)(a) of the Indo-US DTAA."*

3. Briefly the facts relating to this issue are, the assessee is a non-resident corporate entity incorporated in United States of America ('USA') and is a resident of that country. Basically, the assessee is engaged in the business of providing various services to hotels in different countries across the world, including India. During the assessment years under dispute, the assessee provided centralized services to various Indian Hotel owners/properties, which are primarily in nature of sales and marketing, reservation, loyalty programs and other centralized services. These services were provided to the Indian customers from outside India. For the assessment year under dispute, the assessee filed its Income Tax Returns declaring nil income and claimed credit of the tax deducted at source. Before the Assessing Officer, the assessee claimed that the receipts from Indian Hotel owners towards centralized services, are in the nature of business profit and in absence of Permanent Establishment ('PE') in India

are not taxable in terms of India – USA Double Taxation Avoidance Agreement (DTAA). The Assessing Officer, however, did not accept assessee's claim. He was of the view that the receipts from provision of centralized services are in the nature of Fee for Technical Services ('FTS')/Fee for Included Services ('FIS'), both under the provisions of the Act as well as under Article 12(4) of India – USA DTAA. Accordingly, he finalized the assessment orders for the impugned assessment years by bringing to tax the receipts from centralized services by treating them as FTS/FIS. The assessee contested the aforesaid decision by filing appeals before the first appellate authority. Learned first appellate authority, having taken note of the fact that identical issue arising in assessee's own case in assessment years 2016-17 and 2017-18 has been decided by the Tribunal in favour of the assessee and the decision of the Tribunal has been confirmed by Hon'ble Delhi High Court, reversed the decision of the Assessing Office and held that the receipts from provisions of centralized services are not taxable in India as FTS/FIS. Being aggrieved with the aforesaid decision of learned first appellate authority, the Revenue is in appeal before us.

4. We have heard the parties and perused the materials on record. Before us, learned counsel appearing for the assessee as well as learned Departmental Representative have agreed that the issue arising in the present appeals are squarely covered by the decision of the Tribunal and Hon'ble High Court in assessee's own case in assessment years 2016-17 and 2017-18

5. Having considered the submissions of the parties, we find, while deciding identical issue in assessee's own case in ITA No.397 & 398/Del/2022 for assessment years 2016-17 and 2017-18, the Tribunal, in order dated 15.09.2022, after analyzing in detail the nature and character of receipts has held that they cannot be treated as FTS/FIS, either under the provisions of the Act or under the treaty provisions. The observations of the Coordinate Bench in this regard are as under:

"6. We have given a thoughtful consideration to the order so the authorities below. We find force in the contention of the counsel because identical grievance have been heard and decided by this Tribunal (supra) in favour of the assessee and against the revenue. The relevant findings read as under:

> *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.

28. For the sake of completeness, we must observe, in course of hearing, learned Departmental Representative has relied upon some judicial precedents to drive home the point that the payment received towards centralized services fee is in the nature of FIS under Article 12(4)(a) of the Treaty. In this context, we must observe, after carefully examining the decisions of the Coordinate Bench in case of Marriott Hotel (supra), we are of the view that it is clearly distinguishable on facts. On a reading of the decision, it is very much clear that after examining the agreements entered into with the Indian hotels, the Bench has recorded a finding of fact that the agreements are interrelated/interlinked in essence that they refer to each other. Further, the Bench has observed that for all practical purposes, the clients (Indian hotels) have construed all the agreements as a single agreement for the purpose to promote brand. Thus, in this factual context, the Bench has concluded that the assessee has split up the royalty received into different segments. However, in the appeals before us, there are no such findings by the departmental authorities which can demonstrate that for all practical purposes the License Fee Agreement and Centralized Services Agreement are to be construed as one agreement and has been so understood by the Indian clients. The case of JC Bamford Excavators Ltd. (supra) is also factually distinguishable. Therefore, in our considered opinion, the decisions cited by learned Departmental Representative would be of no help to advance the case of the Revenue.

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

7. Respectfully following the decision of the coordinate Bench (supra, we direct the AO to delete the addition."

6. Notably, the aforesaid decision of the Coordinate Bench has been affirmed by the Hon'ble Jurisdictional High Court while deciding Revenue's appeal in judgment dated 22nd May, 2023 in ITA 294/2023. The observations of the Hon'ble Delhi High Court in the judgment are as under:

> *"8. Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the appellant/revenue, concedes that the*

issue raised in the instant matter is covered in the respondent/assessee's own case in other AYs.

8.1 In this context, Mr Bhatia has placed before us, the order dated 05.04.2023 passed in ITA 197/2023 and ITA 200/2023.

9. The Tribunal, in short, has held that centralized services fee earned by the respondent/assessee is not taxable. The fee concerns various aspects, such as sales and marketing, loyalty programs, reservation service, technological service, operational service and training programs/human resources.

10. The Tribunal has noted, that the issue stands covered by the judgment of the coordinate bench in the case of Director of Income Tax v. Sheraton International Inc (2009) 178 taxmann 84 (Del).

11. Furthermore, in the respondent/assessee's case for other AYs, the coordinate bench has followed the same approach i.e., accepted the ratio of the judgment in Sheraton International Inc.

12. In view of the above, according to us, no substantial question of law arises for our consideration in the above-captioned appeal.

12.1 Accordingly, the above-captioned appeal is closed."

7. Since, the issue in dispute is squarely covered in favour of the assessee by the decision of the Tribunal and Hon'ble Jurisdictional High Court, we find no reason to interfere with the decision of learned first appellate authority in declaring the receipts from centralized services to be not in the nature of FTS/FIS. Ground is dismissed.

8. In the result, appeals are dismissed.

Order pronounced in the open court on 22nd September, 2023

Sd/-	***Sd/-***
(DR. B.R.R KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 22nd September, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi