**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"I" BENCH, MUMBAI**

**BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND**

**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

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| **ITA no.3662/Mum./2019** (Assessment Year : 2012–13) | **ITA no.6655/Mum./2019** (Assessment Year : 2013–14) |
| **ITA no.6656/Mum./2019** (Assessment Year : 2014–15) | **ITA no.6657/Mum./2019** (Assessment Year : 2015–16) |

Six Continents Hotels, Inc.
3, Ravinia Drive, Suite 100
Atlanta, Georgia, 30346–2149, U.S.A.
Local Address: C/o BSR & Co., LLP ……. Appellant
DLF Building # 10, 8th Floor
Tower–B, DLF Cyber City, Phase–II
Gurgaon 122 002 Haryana PAN–AAHCS7853B

v/s

Dy. Commissioner of Income Tax (I.T.)
Circle–4(2)(1), Mumbai ……. Respondent

Assessee by : S/Shri S.K. Aggarwal a/w Siddesh Chaugule, Piyush Gupta and Himanshu Aggarwal
Revenue by : Shri Anil Sant

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| Date of Hearing – 11/01/2024 | Date of Order – 08/02/2024 |

**O R D E R**

**PER BENCH**

The present appeals have been filed by the assessee challenging the separate impugned orders passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)–58, Mumbai, [*"learned CIT(A)"*], for the assessment years 2012-13 to 2015-16.

2. Since these appeals involve a similar issue arising from the similar factual matrix, therefore these appeals were heard together and are being decided by way of this consolidated order. With the consent of the parties, the assessee's appeal for the assessment year 2012-13 is taken up as the lead case and the decision rendered therein shall apply *mutatis mutandis* to the other appeals in the present batch.

**ITA No.3362/Mum./2019**
**Assessee's Appeal – A.Y. 2012–13**

3. In this appeal, the assessee has raised the following grounds:–

*"1.1 That on the facts and in the circumstances of the case and in law, the order passed by the CIT(A) confirming the addition to the income made by the Ld. AO in relation to Marketing Contribution, Priority Club receipts, Reservation Contribution and Holidex (collectively referred to as Marketing and Reservation contribution) amounting to INR 11,53,92,265 is wrong and bad in law.*

*1.2 That on the facts and in the circumstances of the case and in law, the CIT(A) has erred in treating the amount received by the Appellant from Hotels in India towards Marketing and Reservation contribution to be in the nature of Royalty.*

*1.3 On the facts and in circumstances of the case and in law, the CIT(A) has erred in not appreciating that the Marketing and Reservation contribution received from Indian hotels is neither taxable as Royalty under section 9(1)(vi) of the Act nor under Article 12(3) of the India - USA Double Taxation Avoidance Agreement ('DTAA').*

*1.4 On the facts and in circumstances of the case and in law, the CIT(A) has erred in not appreciating that the action of ld. AO invoking Article 3(2) of the DTAA to draw the meaning of royalty from the provisions of the Act is incorrect, when DTAA specifically provides the meaning of Royalty.*

*1.5 On the facts and circumstances of the case, the CIT(A) has erred in not quashing the assessment order, wherein the Id. AO concluded that the Marketing and Reservation contribution is taxable as Royalty under the Act and DTAA based on the following incorrect assertions:*

- *That the Appellant is not providing any extra services to the Indian hotels in lieu of the Marketing and Reservation contribution and therefore, the same are in fact a part of the License fee received by the Appellant.*
- *That the Appellant has artificially split the interdependent and interlacing activities under different heads to reduce tax liability as no deduction is*

*available against the receipts in the nature of Royalty which are taxed on a gross basis.*

- *That the whole structure of the Appellant's group has been organized in a manner with the sole intention to reduce tax liability and therefore is a colourable device.*

*1.6 On the facts and in circumstances of the case and in law, the CIT(A) has erred in not appreciating that the Marketing and Reservation contribution received from Indian hotels cannot be held taxable as Fee for Included Services ('FIS') under Article 12(4) of the DTAA, as held by the Id. AO without appreciating that:*

- *The said services are neither technical nor consultancy in nature;*

- *The said services are not ancillary and subsidiary to the application or enjoyment of the right, property or information for which royalty is received by the Appellant;*

- *The said services do not make available any technical knowledge, experience, skill, know-how, or processes etc.*

*1.7 On the facts and in circumstances of the case and in law, the CIT(A) has erred in concluding that the amount of Marketing Contribution, Priority Club receipts and Reservation Contribution received from Indian hotels are taxable in India without appreciating that:*

- *The amount is not in the nature of income and cannot be subjected to tax on principles of mutuality.*

- *The amount is paid by Indian Hotels specifically towards defraying costs associated with advertising, promotion, publicity, market research and for reservation and related activities for the benefit of the said Indian hotels;*

- *Marketing and Reservation contribution received from Indian hotels are not in the nature of an unfettered receipt in the hands of the Appellant;*

*1.8 On the facts and in circumstances of the case and in law, the CIT(A) has erred in holding that the principle of Mutuality is not applicable in case of the Appellant in relation to receipts and Reservation Contribution received Marketing Contribution, Priority Club receipts and Reservation Contribution received from Indian hotels by stating that;*

- *That the amount is recovered from Indian Hotels as a fixed percentage, therefore the same partakes the character of license fee;*

- *The amount is inseparable and Interlinked to the sales of the India Hotels and expenditure against such receipts, results in increasing in the value of the brand, which in-turn result into increase in revenue of the India Hotels.*

*1.9 to On the facts and in circumstances of the case, the CIT(A) has erred in not following the binding decision of the jurisdictional Hon'ble Mumbai ITAT in Appellant's own case which has decided the matter in favour of the Appellant on identical facts. The CIT(A) has further erred in arriving at his conclusion in*

*his order by relying on the decision of Hon'ble Mumbai ITAT in case of Marriott International Inc. (ITA No. 1996 & 1997/Mum/2011 / ITA No. 1451/Mum/ 2013 / ITA No.1452/Mum/2013 / ITA No.1270/Mum/2013) which has not specifically overruled the Hon'ble Mumbai ITAT decision in Appellant's own case, stating that the same is a later decision and closer to the facts of the Appellant.*

*2. On the facts and circumstances of the case and in law, the CIT(A) has erred in not appreciating that the interest under section 234B of the Act levied by the AO is incorrect.*

*3. The above grounds of appeal are independent and without prejudice to one another.*

*4. That the Appellant reserves its right to add, alter, amend and/or modify any ground of appeal before or at the time of hearing of this appeal."*

4. The only dispute raised by the assessee is against the addition made by treating the amount received by the assessee towards Marketing Contribution, Priority Club receipts, Reservation Contribution, and Holidex Fees as Royalty.

5. The brief facts of the case are that the assessee is a company incorporated and a tax resident of the USA. The assessee is a part of InterContinental Hotel Group ("*IHG*") and held the registered trademark of "*Holiday Inn*" for the first six months of the financial year 2011-12. The economic and beneficial ownership of the "*Holiday Inn*" and "*Crowne Plaza*" brands were assigned to another group entity, namely InterContinental Hotels Group (Asia Pacific) PTE Ltd., Singapore ("*IHGAP*") with effect from 01/11/2010. The assessee entered into license agreements with various Indian hotels allowing them the use of these trademarks in the business. Further, the hotels were provided with various programs and other systems including reservation/sales and marketing support, which would enable them to provide the same standard quality of services as offered by Holiday Inn and Crowne Plaza worldwide. The assessee entered into license agreements with hotels in India and earned Royalty income, which was offered to tax in India. The

Marketing Contribution and Reservation Fees received by the assessee from hotels in India were claimed as not taxable on the basis that the same is in the nature of reimbursement of common expenses. During the assessment proceedings, the assessee was asked to show cause as to why the amount received for marketing contribution computer systems should not be treated as its income. In response thereto, the assessee submitted that it maintains a separate fund where the Marketing Contribution and Reservation fees received from various hotels (including contributions from Indian hotels) are credited. It was further submitted that the amount lying in this fund is used for the sole purpose of incurring marketing and advertisement expenditures worldwide and for maintaining the Reservation system. Accordingly, the assessee submitted that the marketing contribution is merely a receipt towards reimbursement of common expenses to be defrayed by the assessee. Similarly, the Reservation fees are also in the nature of reimbursement for the expenditure incurred for maintaining the Reservation system and for providing a free booking facility to the customers of the Holiday Inn chain of hotels worldwide. It was also submitted that the Marketing Contribution and Reservation Fees received by the assessee were received with a corresponding obligation to use it for the agreed purposes. The assessee further submitted that a similar issue came up for consideration before the coordinate bench of the Tribunal in preceding years and therein the claim of the Revenue that Marketing Contribution and Reservation Fees are in the nature of Royalty was rejected.

6. The Assessing Officer ("*AO*") vide order dated 06/05/2015 passed under section 144C(3) read with section 143(3) of the Act did not agree with the submissions of the assessee and held that the Management Agreement

between the assessee and the Indian hotels is a composite agreement for the license and management of the hotels. Along with the license fees, the assessee is also receiving a fixed percentage of 4% of the Gross Room Revenue. The AO held that this shows that all the revenues are being earned by the assessee from the composite agreement and no extra services are being provided to the Indian hotels for receiving the services claimed to be "*Marketing Contribution and Reservation Fees*". Therefore, it was held that the receipts of the assessee from the services claimed to be "*Marketing Contribution and Reservation Fees*" is nothing but a part of the Royalty for the issue of licences to Indian hotels for operating under the Brand name "*Holiday Inn*" or "*Crowne Plaza*". The AO also placed reliance upon the decision of the coordinate bench of the Tribunal in Marriott International Inc v/s DDIT, [2015] 41 ITR (T) 542 (Mumbai-Trib.). Accordingly, the AO came to the conclusion that "*Marketing Contribution and Reservation Fees*" received by the assessee are taxable in India as Royalty under the provisions of the Act as well as India-USA DTAA. The AO further held that the assessee has charged the Indian hotels for providing the right to use the systems developed by it or its affiliates specifically for the Indian hotels and also by providing technical services for the maintenance and use of such systems, which are ancillary and subsidiary to the application or enjoyment of the right to use the systems. Accordingly, the AO held that the aforesaid fees are also taxable as Fees for Technical Services under section 9(1)(vii) of the Act as well as Fees for Included Services under the provisions of India-USA DTAA. The AO also rejected the plea of the assessee that its income is reimbursement in nature and thus not taxable on the basis that the assessee has not provided any satisfactory submissions to

support the aforesaid plea. The AO held that the assessee has merely produced the copies of invoices raised by it without providing any basis for arriving at the figures of such invoice amounts and methods/manner in which the reimbursement amounts were determined. Further, it was held that there is no evidence on record that the market value of services received by the Indian hotels was equivalent to the payments made by the assessee to those third parties outside India as the market value of services received by any hotel may vary from country to country, whereas the assessee has charged hotels on a fixed basis only. Accordingly, the AO treated the entire amount of "*Marketing Contribution and Reservation Fees*" as Royalty as well as Fees for Included Services taxable in India and added the same to the total income of the assessee.

7. The learned CIT(A), vide impugned order, while dismissing the ground raised by the assessee on this issue held that the payment of marketing-related items to the assessee is tagged with the payment of Royalty offered as income and there is no logic or reason to hold that the receipt is distinct and separate, especially when both are paid as a fixed percentage of turnover. It was further held that the whole arrangement is deeply interlinked and inseparable, therefore the recipient cannot unbundle this integrated receipt and claim that certain parts are not taxable. Accordingly, the learned CIT(A) upheld the conclusion of the AO in treating the Marketing Contribution and Reservation Fees as Royalty. Further, the learned CIT(A) held that the issue of taxation as Fees for Included Services or non-taxation as reimbursement of expenses does not arise. Being aggrieved, the assessee is in appeal before us.

8. We have considered the submissions of both sides and perused the material available on record. As per the assessee, the nature of various receipts under the head "*Marketing Contribution and Reservation Fees*" is as under:-

(a) Marketing Contribution: Marketing Contribution is received by the assessee from IHG-managed hotels worldwide (including hotels in India) as their share towards the common marketing expenditure to be incurred by the assessee for the benefit of all IHG-managed hotels. The marketing and advertisement expenditure is incurred by the assessee to promote the business of IHG-managed hotels worldwide including the hotels in India, operating under the brand name of "*Holiday Inn*", "*Holiday Inn Express*" and "*Crowne Plaza*" and other brand names owned by the assessee. This expenditure is incurred for the common benefit of all the hotels and is therefore recovered from the hotels by way of marketing contribution, based on an agreed percentage of gross room revenue.

(b) Priority Club Reward receipts ('PCR, earlier known as a Frequency marketing program and now known as IHG One Rewards): PCR is a frequent guest loyalty program where members earn points at the hotels based on their visits/stay. The amount is collected by the assessee from the hotels for the cost of points issued to members based on a percentage of revenue for each night of hotel stay by a guest. The revenue for computing priority club reward receipts comprises revenues on account of room reservations and other charges associated with those room reservations (e.g. in-room movies, laundry, food and beverage), etc. Members can redeem points accumulated (whether from Hotels or Co-partners) by availing of various rewards, including complimentary room nights, discounts, airline travel, rental cars, merchandise, etc.

The receipts from hotels on account of priority club reward receipts are utilized for making payments to hotels that provide rooms pursuant to points redemptions, preparation of Priority Club letter, membership packages, maintaining member database, etc., meeting cost of the staff required to manage and promote the program.

(c) Reservation Contribution: Reservation Contribution collected by the assessee is utilized to provide a network that assists customers in making room reservations at the hotels and undertake other guest relationship activities. The network consists of reservation/ call centers operated to attend reservation calls from guests, assist them in making the necessary hotel reservation, and attend to guests' queries or complaints. The reservation contribution is utilized to cover expenses in relation to the operation of call center (which comprises payments of employee compensation, equipment costs, and rental for office facilities), costs in relation to maintenance of other reservation channels such as tracking, billing, and payment of travel agents commission, etc.

(d) Holidex Fees: Holidex Fee is an amount paid by the hotels to the assessee to facilitate the booking of hotel rooms and reservations for hotel customers. In order to facilitate booking of guest rooms for guests globally and on multiple booking channels, the assessee operates a Central Reservation System known as "*Holidex Plus*" ("*Holidex*"). Holidex is hosted and maintained in the United States of America. The assessee collects the Holidex Fee from Hotel owners towards maintenance and operational cost of Central Reservation System i.e. Holidex (now known as "*IHG Concerto*")."

9. It is the claim of the assessee that the aforesaid fund contributed by the member hotels is used solely for the purpose of incurring marketing and advertisement expenditure worldwide and for maintaining the Reservation system. It is further the plea of the assessee that the money received on account of Marketing Contribution and Reservation Fees was received with a corresponding obligation to use it for the agreed purposes. The assessee has also placed on record the Statement of Revenue and Expenses along with the report of the Independent Auditor, forming part of the paper book from pages 179-194, wherein it is stated that the fund is obligated to expend assessment proceeds on behalf of the hotels and the fund's objective is to be self-funded

each year. In the aforesaid report, it is further stated that primarily due to the timing of revenue and expenses, the fund may spent in any fiscal year, an amount greater or less than the aggregate fees and contributions collected in that year.

10. We find that the taxability of similar receipts came up for consideration before the coordinate bench of the Tribunal in assessee's own case in Bass International Holdings NV v/s JCIT, in ITA No.4341/Mum./2002, for the assessment year 1997-98. Vide order dated 12/05/2006 the coordinate bench of the Tribunal held that money was received by the assessee, on account of Marketing and Reservation fees, with a corresponding obligation to use it for the agreed purposes and it was not an unfettered receipt in the hands of the assessee and therefore it was a kind of a trust money received in fiduciary capacity. It was further held that the receipt cannot be termed as a consideration for the use of any intellectual property asset of the company, even though the receipt may have been incidental to the same. Accordingly, the coordinate bench came to the conclusion that the receipt is not taxable as a Royalty or Fees for Technical Services and therefore is not taxable in the hands of the assessee in the absence of any PE in India. The relevant findings of the coordinate bench, in the aforesaid decision, are reproduced as under:-

> *"7. We find that the assessee has produced the financial statements of the Holiday Inn Worldwide Systems Fund and independent auditors report thereon by Deloitte & Touche LLP. These evidences clearly show that the moneys received on account of marketing and reservation where for the agreed purposes and it was not an unfettered receipt in the of the assussee it was a kind of trust money and received capacity. We have also noted, as evident from the significant accounting policies reproduced earlier in this order, that in the past, a part of collections for marketing and reservation fees was refunded to the participating properties on the basis of certain assessments. In the light of these facts the marketing and reservation contributions received by the*

*company cannot be viewed as income of the assessee. These contributions having been made by the participating hotels mandatorily does not affect the determination of the character of receipts. This receipt cannot be termed as a consideration for use of any of the intellectual property asset of the company or for the fees for technical services even though this receipt may have been incidental to the same. Unless it is a consideration of such a nature it cannot in our understanding be taxed as royalty or fees for technical services. Since the assessee company does not have any PE in India, there is no question of business profits under Article 7 either in the light of these discussions, we are of the considered opinion that the CIT(A) was indeed not justified in holding that the amount of Rs 4,80,876 received by the assessee as marketing contribution was taxable in the hands of the assessee. We direct the Assessing Officer to delete the addition. The assessee gets relief accordingly."*

11. We find that similar findings were rendered by the coordinate bench of the Tribunal in assessee's own case in Six Continents Hotel Inc. v/s DCIT, in ITAs No. 3618 and 3619/Mum./2008, vide order dated 11/05/2011, for the assessment years 2003-04 and 2004-05. Similarly was held in the assessment year 2005-06 by the coordinate bench of the Tribunal in ITA No. 5914/Mum./2009, vide order dated 30/03/2011. We find that in other assessment years, i.e. assessment year 2002-03, 2006-07, 2007-08, 2008-09 to 2011-12, the AO/learned DRP treated the Marketing Contribution and Reservation Fees as not taxable in India.

12. It is evident from the record that in the year under consideration, the AO as well as the learned CIT(A) deviated from the settled position in the case of the assessee on the basis of the subsequent decision of the coordinate bench of the Tribunal in Marriott International Inc (supra). At the outset, it is pertinent to note that it is undisputed that the facts of the present case are similar to the preceding years, wherein the similar addition was either not made by the AO/learned DRP or the same was deleted by the coordinate bench. This fact is further corroborated by the sample agreement dated 26/11/2009, forming part of the paper book from pages 41-110, under which

one of the Indian hotels has paid Marketing Contribution and Reservation Fees to the assessee in addition to, separate and distinct from the license fee which is payable specifically for the use of the brand. Further, the Marketing Contribution and Reservation Fees are found to be with a corresponding obligation to use it for the agreed purposes and it was held to be not an unfettered receipt in the hands of the assessee, which fact has also been substantiated by the Independent Auditor in its report as noted above. However, from the perusal of the aforesaid decision, relied upon by the lower authorities, we find that the aforesaid aspects did not arise in the facts of that case. Therefore, we are of the considered view that the conclusion reached by the coordinate bench in the aforesaid decision is based on the peculiar facts of that case. Further, in the present case, it is also undisputed that the orders passed by the coordinate bench in assessee's own case have been accepted by the Revenue and no appeal has been filed against the same before the Hon'ble High Court. Therefore, in view of the above, we find no merits in the reliance placed by the lower authorities on the aforesaid decision in Marriott International Inc (supra).

13. Accordingly, respectfully following the judicial precedence in assessee's own case, the Marketing Contribution and Reservation Fees received by the assessee are not Royalty and therefore, the impugned addition is deleted. Further, since the Revenue is not in an appeal against the findings of the learned CIT(A) that the issue of taxation as Fees for Included Services or non-taxation as reimbursement of expenses does not arise, therefore we are not expressing any opinion on the same. As a result, grounds no.1.1 to 1.9 raised in assessee's appeal are allowed.

14. Ground no.2 pertains to the levy of interest under section 234B of the Act, which is consequential in nature. Therefore, the same needs no separate adjudication.

15. In the result, the appeal by the assessee for the assessment year 2012-13 is allowed.

**ITAs No.6655, 6656, and 6657/Mum./2019**
**Assessee's Appeals – A.Y. 2013–14 to 2015-16**

16. In the appeals for the assessment years 2013-14 to 2015-16, the assessee has raised similar grounds challenging the addition made by treating Marketing Contribution and Reservation Fees as Royalty. Therefore, our findings/conclusions as rendered in the appeal for the assessment year 2012-13 shall apply *mutatis mutandis*. Accordingly, the grounds raised by the assessee are allowed.

17. In the result, the appeal by the assessee for the assessment years 2013-14 to 2015-16 are allowed.

18. To sum up, all the appeals by the assessee are allowed.

Order pronounced in the open Court on 08/02/2024

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| **Sd/-** | **Sd/-** |
| **OM PRAKASH KANT** | **SANDEEP SINGH KARHAIL** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

**MUMBAI, DATED: 08/02/2024**

*Copy of the order forwarded to:*

*(1) The Assessee;*

*(2) The Revenue;*

*(3) The PCIT / CIT (Judicial);*

*(4) The DR, ITAT, Mumbai; and*

*(5) Guard file.*

True Copy
By Order

*Pradeep J. Chowdhury*
*Sr. Private Secretary*

Assistant Registrar
ITAT, Mumbai