

**IN 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. 2355/Del/2023 : Asstt. Year: 2020-21

Six Continents Hotels Inc., C/o BSR & Co. LLP, DLF Building, 10, 8 th Floor, DLF Cyber City, Phase- II, Gurgaon, Haryana-122002 (APPELLANT)	Vs	ACIT, Circle-3(1)(2), International Taxation, New Delhi (RESPONDENT)
PAN No. AAHCS7853B		

**Assessee by : Sh. S. K. Aggarwal, CA &
Sh. Himanshu Aggarwal, CA
Revenue by : Sh. Vizay B. Vasanta, CIT-DR**

Date of Hearing: 30.04.2024

Date of Pronouncement: 09.05.2024

ORDER

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

The present appeal has been filed by the assessee against the order dated 27.06.2023 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

Ground No. 1

Additions made in respect of receipts on account of Marketing, Distribution Marketing, and Frequency Marketing Programme (i.e. IHG Rewards) (hereinafter collectively referred to as 'System Fund support fee') and SCHI Facility charges (also referred as 'Technology Services Fees'), accrued to the Appellant from its group entity (i.e. InterContinental Hotels Group (India) Private Limited, ((IHG India')), amounting to INR 28,11,42,298.

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 System Fund support fee and Technology Services Fees amounting to INR 28,11,42,298.*

1.2 *On the facts and in circumstances of the case and in law, the Id. AO and the Hon'ble DRP have erred in treating System Fund support fee and Technology Services Fees as Fee for Technical Services ('FTS') under section 9(1)(vii) of the Act and as Fee for Included Services ('FIS') under Article 12 of India - USA DTAA.*

1.3 *On the facts and in circumstances of the case and in law, the Id. AO and the Hon'ble DRP have erred in treating the System Fund support fee and Technology Services Fees, received from IHG India taxable as FIS under Article 12(4) of the DTAA without appreciating that:*

- a. *The said services are neither technical nor consultancy in nature;*
- b. *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; and*
- c. *The said services do not make available any technical knowledge, experience, skill, know-how, or processes, etc.*

1.4 *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 System Fund support fee and Technology Services Fees received from IHG India is taxable as FIS under Article 12(4)(a) of India-USA DTAA.*

1.5 *On the facts and in circumstances of the case and in law, the Id. AO and the Hon'ble DRP while treating System Fund support fee and Technology Services Fees as FIS under Article 12(4)(a) of the India-US DTAA, have failed to appreciate that no fee in the nature of Royalty accrues to the Appellant.*

1.6 *On the facts and in circumstances of the case and in law, the Id. AO and the Hon'ble DRP have erred in holding that System Fund support fee and Technology Services Fees is 'ancillary and subsidiary' to the license fee received*

by the affiliate group entity, for granting the rights to use the brands to the Indian Hotels.

1.7 On the facts and in circumstances of the case and in law, the Id. AO and the Hon'ble DRP have erred in concluding that the System Fund support fee and Technology Services Fees is taxable as FIS under Article 12(4)(a) of India-USA DTAA based on following incorrect assertions:

- a. That the Appellant has artificially bifurcated the royalty and centralized services receipts; and*
- b. That arrangement has been organized in a manner to avoid taxability as FIS under Article 12(4)(a) of India-USA DTAA.*

1.8 On the facts and in circumstances of the case and in law, the Id. AO and the Hon'ble DRP while treating System Fund support fee and Technology Services Fees as FIS under Article 12 of the India-US Treaty, have failed to appreciate that said services do not make available any technical knowledge, experience, skill, know-how, or processes etc.

1.9 On the facts and in circumstances of the case and in law, the Id. AO and the Hon'ble DRP have erred in concluding that System Fund support fee received from IHG India are taxable in India without appreciating that:

- a. The amount is not in the nature of income and cannot subjected to tax on principles of mutuality;*
- b. The amount is not taxable on principles of 'Diversion of income by overriding title';*
- c. The amount is in the nature of unfettered receipts in the hands of the Appellant.*

1.10 On the facts and in circumstances of the case and in law, the Id. AO and the Hon'ble DRP have erred in not following the binding decision of Hon'ble Mumbai ITAT in Appellant's own case which has decided the matter in favour of the Appellant on similar facts.

Ground No. 2:

Addition made in relation to Travel Agent Commission ('TACP') amounting to INR 10,02,93,045 from third party Indian hotels

2.1 *On the facts and in circumstances of the case and in law, the Id. AO has erred in holding that the TACP amounting to INR 10,02,93,045, recovered from Indian Hotels is taxable in the hands of the Appellant as FTS/ FIS under the Act and under the India-USA DTAA.*

2.2 *On the facts and in circumstances of the case and in law, the Ld. AO has erred in holding that the receipts amounting to INR 10,02,93,045 is taxable as FIS, without taking cognizance of the detailed factual and legal submissions made by the Appellant with regard to non-taxability, of such receipts during the course of the assessment proceedings.*

2.3 *On the facts and in circumstances of the case and in law, the Id. AO has erred in not complying with the directions of the Hon'ble DRP, for verification of invoices and back-up statements of TACP filed during the assessment proceedings. Thus, making the additions bad in law and liable to be deleted.*

2.4 *On the facts and in circumstances of the case and in law, the Ld. AO has erred in holding that TACP amounting to INR 10,02,93,045 received from third party Indian hotels is taxable as FTS/ FIS under the Act and under the India-USA DTAA, without appreciating the fact that the same are reimbursement in nature, and therefore, do not partake the character of Income.*

2.5 *On the facts and in circumstances of the case and in law, the Id. AO violated the principle of natural justice by not providing any opportunity to furnish the balance invoices and back-up statements of TACP, before making the addition of INR 10,02,93,045 in the assessment order.*

2.6 *On the facts and in circumstances of the case and in law, the Id. AO has erred in not following the decision of Hon'ble Commissioner of Income-tax (Appeals) ('CTT(A)) in Appellant's own case in earlier years, wherein taxability of TACP was held in favour of the Appellant on identical facts.*

3. *That on the facts and in the circumstances of the case and in law, the Id. AO erred in charging interest under section 234A and 234B of the Act.*

4. *That on the facts and in the circumstances of the case and in law, the Id. AO erred in initiating the penalty*

proceedings under section 270A of the Act on account of underreporting of income by way of misreporting.”

3. SCHI is a company incorporated and a tax resident of USA and beneficial provisions of India-USA DTAA applies. The Assessee is part of the InterContinental Hotel Group ('IHG'), a global hospitality player.

4. With effect from 1 November 2010, the economic and beneficial ownership of certain IHG brands including 'Holiday Inn', 'Holiday Inn Express' and 'Crowne Plaza' brands were assigned to InterContinental Hotels Group (Asia Pacific) Pte. Ltd., Singapore ('IHGAP Singapore'). IHG also has a group entity in India, InterContinental Hotels Group (India) Private Limited, ('IHG India'). Effective from 01 April 2019, IHG India has been granted a non-exclusive license by IHG AP Singapore for allowing use of trademark/ brand rights to the third-party Indian hotels. The license fee so received by IHG India is taxable in their hands as business income.

5. SCHI is required to provide Marketing, Distribution Marketing, Frequency Marketing Programme and SCHI facility related support services (i.e. 'Marketing and Reservation related services') in respect of hotels using the group brand name and receives the amount for marketing and reservation services from IHG India.

Ground No. 1

Additions made in respect of receipts on account of Marketing, Distribution Marketing, Frequency Marketing Programme (i.e. IHG Rewards) (hereinafter collectively referred to as 'System Fund support fee ') and SCHI Facility charges (also referred as Technology Service Fees) amounting to INR 28,11,42,298:

Business Model prior to 1 April 2019:

6. Before 1 April 2019, a tri-partite agreement [Hotel Management Agreement ('FIMA ')] was entered into between IHG India, IHG AP Singapore and third-party hotels owners. As per HMA, IHG AP Singapore granted license to third-party hotels for use of brand name. IHG India was designated as 'Manager', obligated to provide Hotel Management, Operation and technical support services to IHG brand Hotels in India. SCHI (as an affiliate of IHG AP Singapore), was required to provide certain marketing and reservation related services to such third- party hotel owners for which it received marketing and reservation contribution from each of the IHG brand hotels in India.

Business Model with effect from 1 April 2019:

7. With effect from 1st April 2019, IHG India has been granted a non-exclusive license by IHG AP Singapore for granting use of trademark/ brand rights to the third-party hotels owners and the license fees received is taxable in India in the hands of IHG India as business income.

8. Accordingly, from 01 April 2019, IHG India has entered into a Hotel Management Agreement ('HMA') with third party

IHG brand Hotel in India. Under the HMA, IHG India grants license to the third-party hotel owners for the use of brand name/ trademark, provides hotel management services and provision of system fund services (which is in relation to marketing and reservation related services).

9. As per above referred HMA, IHG India is required to provide/ procure marketing and reservation related services to the Indian Hotels. Such marketing and reservation services were earlier provided by SCHI to the hotel owners in India. For providing marketing and reservation related services, IHG India facilitates provision of marketing and reservation services through its team of employees in India and has also entered into agreements with the Assessee to seek its support for provision of marketing and reservation related services (which IHG India is unable to provide to the Hotels on its own).

10. With the above background, to be able to provide services to third party hotel owners, IHG India has entered into following inter-company agreements with the Assessee:

- *System Fund Support Services Agreement ('SFS Agreement') between the SCHI and IHG India: Under this agreement, SCHI is required to provide Marketing, Distribution Marketing and Frequency Marketing Programme related support services to IHG India (to the extent such services cannot be performed locally by IHG India) for it to fulfill its obligations under the agreements with third party owned hotels in India.*
- *Reservation System Facility Agreement ('RSF Agreement') between SCHI and IHG India: Under this agreement, SCHI is required to provide support services related to the reservation system*

maintained by it in USA (hereinafter referred to as Reservation System Support Services) to IHG India.

11. For the System fund support services provided by SCHI, IHG India shall pay to SCHI a fee equal to amount payable by Indian third-party hotel owners to IHG India in respect of such services less all the expenses incurred by IHG India with respect to such services. Further, in consideration for reservation system support services, IHG India pays to SCHI, a fee equal to 95% of the total fees payable by third-party Indian hotels to IHG India.

Assessment Order and Id. DRP directions for A.Y. 2020-21

12. The AO passed the draft assessment order for A.Y. 2020-21 on the same line as in A.Y. 2012-13 onwards, alleging that marketing and reservation related receipts are ancillary and subsidiary to Royalty received by the group entity for the use of brand name and taxable as Fees for Included Services ('FIS') under Article 12(4)(a) of India-US DTAA (internal page 16 of the final assessment order at page 25 of the appeal set). In making the above allegation in the draft order, the AO referred the agreement with Duet Hotels.

13. The Id. DRP in its directions dated 12 May 2023 stated that the issue of taxability of marketing and reservation related services is covered from A.Ys. 2012-13 to 2018-19 and taxable under Article 12 of India-USA DTAA (internal page 4 to 7 of the DRP directions) and held as under:

"5.3 Mere tweaking of business model doesn't change the nature of the receipts chargeable to tax. However, the AO may discuss the new business model, which has come into existence with effect from 01.04.2019, in the final assessment order".

14. Thus, the Id. DRP following the orders of earlier years held that marketing and reservation related receipts are ancillary and subsidiary to Royalty received by the group entity for the use of brand name and taxable as FIS under Article 12(4)(a) of India-USA DTAA.

15. In this regard, it is submitted that the Id. DRP has relied on its past years orders which have been decided in favour of the Assessee by the ITAT.

16. It was submitted that the issue of taxability of Marketing and reservation related receipts has been subjected to scrutiny in the past years and the same has been consistently held in favour of the Assessee by

- (i) The ITAT in Assessee's own case for A.Y. 1997-98, A.Y. 2003-04, A.Y. 2004-05, AY 2005- 06. These orders of the ITAT were accepted by the tax department and no appeal was filed before Hon'ble High Court.
- (ii) The AO/DRP in the Assessment order(s) for A.Y. 2006-07 to A.Y. 2011-12 held that Marketing and reservation related receipts is not taxable as 'Royalty'/ 'Fees for Technical Services', following the aforesaid orders of the ITAT.

- (iii) The Mumbai ITAT in their combined order dated 08 February 2024 for A.Y. 2012-13 to A.Y. 2015-16 again held that Marketing and reservation related receipts is not taxable as 'Royalty'/ 'Fees for Technical Services' under India-USA DTAA and deleted the additions made in the assessment order(s).
- (iv) The Delhi ITAT in the order dated 10 April 2024 for A.Y. 2016-17 again held that Marketing and reservation related receipts is not taxable as 'Fees for Technical Services' under Article 12(4)(a) of India-USA DTAA and deleted the additions made in the assessment order.
- (v) For A.Y. 2017-18 and A.Y. 2018-19, the Delhi ITAT quashed the assessment orders on non-compliance of the DIN requirement.
- (vi) For A.Y. 2019-20, the matter was not picked up for scrutiny assessment and there was no assessment order.

17. Keeping in view of the above, the issue of taxability of marketing and reservation related receipts as Royalty/FTS is squarely covered by the decision of ITAT, the appeal of the assessee on this ground is allowed.

Ground No. 2:

Additions in relation to Travel Agent Commission ('TACP') amounting to INR 10,02,93,045 received from third-party Indian hotels.

18. At the outset, it was submitted that the Id. CIT (A) in Assessee's own case in A.Y. 2013-14, A.Y. 2014-15 and A.Y. 2015-16 has held that the amount of TACP received by SCHI is not in the nature of FTS. The Id. CIT(A) in passing the above appellate order noted that the AO in the assessment order for A.Y. 2016-17 has held that TACP receipts are not taxable as FTS under the India-USA DTAA.

19. Further, the tax department has accepted the above order of Id. CIT(A) for A.Y. 2013-14, A.Y. 2014-15 and A.Y. 2015-16 and has not filed an appeal before the ITAT. Accordingly, the taxability of TACP receipts have already been settled in favour of the assessee in previous years and the same are not taxable in view of 'Rule of consistency'. Further, no addition in relation to TACP was made by the Id. AO in A.Y. 2016-17 and A.Y. 2017-18. The AO deviated from the settled position and taxed the amount of TACP in A.Y. 2020-21 without taking cognizance of the earlier position and documents filed by the Assessee during the assessment proceedings.

20. The Id. CIT (A) in Assessee's own case in A.Y. 2013-14, A.Y. 2014-15 and A.Y. 2015-16 has held that the amount of TACP received by SCHI is not in the nature of FTS basis the observation of the then AO made in the assessment order of AY 2016-17. Accordingly, the taxability of TACP receipts have

already been settled in favour of the assessee in previous years.

21. On perusal of definition of FTS defined under the Act, there are broadly three components i.e. managerial, technical and consultancy services.

22. It was submitted that the expression 'managerial, technical and consultancy services' have not been defined either under the Act or under the General Clauses Act, 1897. Therefore, the said terms have to be read together with the word 'services' to understand and appreciate their purport and meaning.

23. In this respect the Delhi Tribunal, while interpreting the meaning of FTS as per Explanation 2 of section 9(1)(vii) of the Income tax Act, 1961 held as under:

".....A look at the above Explanation shows that it contains a definition of FTS and says that FTS means any consideration for the rendering of any managerial, technical or consultancy services including the provision of services of technical or other personnel, but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries The content of the Explanation unmistakably is that the payment must be made as quid pro quo for such services rendered as have been enumerated therein. It postulates that the remitter of the amount has received the benefit of the technical services and that the technical services have been rendered by the recipient of the amount" (emphasis supplied)

24. Thus,

- The services were rendered by the travel agents to the Indian Hotels i.e. the Assessee did not render any service to the Indian hotels, as envisaged under section 9(1)(vii) of the Act;
- The Assessee made payments to travel agents on behalf of the Indian hotels; and
- Subsequently, the Assessee recovered such payments made to distribution channels from Indian hotels on cost-to-cost basis without any element of income.

25. Thus, it can be found that the Assessee has rendered services in relation to booking of hotel rooms to the Indian Hotels in consideration of commission, it cannot be treated as FTS under the Act.

26. The following judicial precedents held that commission charged by commission agents outside India is not taxable in India:

- DIT (International Taxation) vs. Panalfa Autoelektrik Ltd. [2014] 49 taxmann.com (Delhi High Court)
- Group Ism (P.) Ltd. 57 taxmann.com 450 (Delhi High Court)
- CIT (Central) vs. Model Exims [2014] 42 taxmann.com 446 (Allahabad High Court)
- Le Passage to India Tours and Travel (P.) Ltd. 54 taxmann.com 138 (Delhi ITAT)

- Dy. CIT vs. Troikaa Pharmaceuticals Ltd. [IT Appeal No. 2028/Ahd./13 and CO No 13/Ahd./14]
- DCIT vs. Welspun Corporation Ltd. [2017] 77 taxmann.com 165 (Ahmadabad ITAT)
- Armayesh Global vs. ACIT 45 SOT 69 (ITAT Mumbai)
- DCIT, Chennai vs. Mainetti (India) (P.) Ltd. [2011] 12 taxmann.com (ITAT Chennai)
- CLSA Ltd. vs. ITO, (International Taxation) [2013] 31 taxmann.com 5 (ITAT Mumbai)
- Pahilajrai Jaikishin (66 taxmann.com 30) (ITAT Mumbai)

27. In view of the principles emerging from the above judicial precedents, it can be concluded that the amount charged by the Assessee as TACP for booking hotel rooms for third-party Indian Hotels cannot be said to be in the nature of managerial, technical or consultancy in nature for treating the same as FTS under the provisions of section 9(1)(vii) of the Act.

28. The appeal of the assessee on this ground is allowed.

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

Order Pronounced in the Open Court on 09/05/2024.

Sd/-

(Yogesh Kumar US)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 09/05/2024

Subodh Kumar, Sr. PS