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

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

I.T.A. No. 5191/DEL/2017 (A.Y 2014-15)
(THROUGH VIDEO CONFERENCING)

ACIT International Taxation, Circle-3(1)(2), Room No. 418, E-2, Dr. SPM Civic Centre, New Delhi **(APPELLANT)**	Vs	Starwood (M) International Inc. C/o. Nangia & Co. A-109, Sector-136, Nodia, Uttar Pradesh **PAN:AANCS4030J** **(RESPONDENT)**

I.T.A. No. 5336/DEL/2017 (A.Y 2014-15)

DCIT International Taxation, Circle-3(1)(1), Room No. 419, Block, E-Dr. SPM Civic Centre, J. L. N Delhi **(APPELLANT)**	Vs	M/s Westin Hotel Management LP C/o. M/s Nangia & Co. A-109 Secotr-136, Noida Uttar Pradesh **PAN:AAAFW9088N** **(RESPONDENT)**

Appellant by	**Sh. Satpal Gulati, CIT DR**
Respondent by	**Sh. Amit Arora, CA**

Date of Hearing	**20.07.2021**
Date of Pronouncement	**30.07.2021**

ORDER

PER SUCHITRA KAMBLE, JM

This two appeals are filed by the Revenue against the order dated 06/06/2017 passed by CIT(A)-43, New Delhi for assessment year 2014-15.

2. The grounds of appeal are as under:-

> *"Whether on the facts and in the circumstances of the case, the CIT(A) has erred in holding that the receipts of the assessee from various activities of hotel management ranging interalia from ticketing, reservation, marketing, advertising, operation, administration, catering, network support services, Starwood Portal Services, imparting of skill sets through trainings etc. were not taxable as "Fee for Technical Services" (FTS) within the meaning and scope of section 9 of the Income Tax Act, 1961 as well as Article 12 of the India-US Double Taxation Avoidance Agreement (DTAA).*

I.T.A. No. 5336/DEL/2017 (A.Y 2014-15)

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3. We are firstly taking facts of M/s Starwood (M) Intenrtinal Inc. for Assessment Year 2014-15 as the facts are identical as well in case of Westin Hotel Management which is a group company. The assessee Company is incorporated in USA and carries on the business of providing various centralized services to the hotels in several countries across the world. During the year under consideration, the appellant had provided worldwide marketing and advertising services of the hotels through Starwood's worldwide system of sales, advertising, promotion, public relations and reservations in the usual course of its business to some hotels owned/managed by the Indian companies, all such services are provided from outside India. The assessee company has agreed to provide the following services to various hotels operating in India. The range of these services have been broadly classified as under:-

- Sales & Marketing
- Loyalty Programs
- Reservations Service
- Technological Services
- Operational Services
- Training Programs/Human Resource

The above services, according to the assessee company, were provided by the assessee company outside India and the income was received in the form of marketing fees, and fees for 'Frequent Flier Program (FTP), and 'Starwood Preferred Guest' (SPG). The assessee company does not have a P.E. in India. The said fact has not been disputed by the Assessing officer. As per the contentions of the assessee company before the Assessing Officer, the assessee company submitted that the revenue derived by it is in the nature of business profits as defined in Article 7 of the Double Taxation Avoidance Agreement between India and the USA. The Assessing Officer held that the assessee company had received income from fees from technical services as per provision of both DTAA and section 115A of the Income Tax Act, 1961. The Assessing Officer relying on the assessment order of group concern i.e. M/s Sheraton International Inc. wherein the similar payments were also held to be covered by the definition of 'fees for technical services' as DTAA and as per Explanation 2 of section 9(l)(vii)of the Act, being a consideration for the rendering of technical, managerial and consultancy services. The revenues received from rendering services of advertisement, networking and promotion was also held to be taxable as fees for technical services.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) allowed the appeal of the assessee.

5. At the time of hearing the Ld. AR submitted that the decision in case of M/s Westin Hotel Management for Assessment Year 2013-14 by the Tribunal

in (ITA No. 5146/Del/2016 order dated 07/01/2020) squarely covers the issue contested in both these appeals and also relied upon the decisions of the Hon'ble Delhi High Court in case of DCIT vs. Sheraton International Inc. (2009) 313 ITR 267.

6. The DR submitted that the decision in case of Westin Hotel Management is not applicable in the present case in relation to the following written submissions:-

Issue Involved-

1. The issue involved in aforesaid cases are similar in nature. The assessee has offered Royalty Income in return of income (refer para 1 of the AO order in case of Westin, para 3.2 of the AO order in case of Starwood). The assessee has earned service income which has not been offered to tax on two grounds—

a) *the services do not constitute FTS as per article 12(4)(b) of DTAA and*
b) *the assessee does not have PE in India.*

2. However, the AO considered it to be FTS as per I.T. Act as well as article 12(4)(b) of DTAA as the services do make available the skill set to the recipient.

3. It is claimed that the Hon'ble Tribunal has already decided the issue in favour of the assessee on this issue wherein it is held that the services are not in the nature of make available.

4. In this regard, it is submitted that the argument of treating the services in the nature of FTS under article 12(4)(a) was not taken up before Hon'ble Tribunal in the cases relied upon by the assessee. Therefore, the same may not be applied in the cases in hand.

5. It is also noted that Hon'ble Tribunal has relied on the decision of Hon'ble

Delhi High Court in the case of Sheraton International Inc 178 Taxman 84 (Delhi). However, it is prayed that the facts of the case decided by Hon'ble High Court are distinguishable as the assessee in the cited case was not having any Royalty Income from the clients in India. The relevant facts of the cited case are reproduced as under for ready reference-

> *"The assessee, a non-resident company incorporated in the USA, was engaged in providing services to hotels in various parts of the world. Towards that end, it entered into agreements with ITC Hotels Ltd. (ITC) for providing services to some of its hotels. The scope of services envisaged in the agreements was publicity; advertisement and sales promotion including reservation services. In consideration of the services which the assessee was required to render, ITC agreed to pay a fee at the rate of 3 per cent of the room sales to the assessee. The assessee claimed that the fee received by it was business income and same was not taxable in India, as it had no permanent establishment in India. The Assessing Officer held that what the assessee was making available to the ITC were technical and consultancy services; provision of training to its employees; and the use of its trademark; technical know-how, documentation and manuals and the reservation network and, therefore, the entire fee/amount received by the assessee from the ITC, including contribution towards Sheraton Club International (SCI) and Frequent Flier Programme (FFP) was royalty and/or fee for included services as provided in article 12(4)(b) of the DTAA."*

6. *As per the aforesaid facts of the case, there is no Royalty Income claimed to.have been received by the cited assessee. As against this, the cases in hand do have royalty income and the same has been offered to tax in ITR.*

How the receipt of Royalty Income changes the taxability of services in question?

7. *It may be relevant to take note of the article 12(4) of DTAA at this juncture-*
   12(4) "The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of

such services through 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, knowhow or processes, which enables the person acquiring the services to apply the technology contained therein." or
(c) consist of the development and transfer of technical plan or design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein.

8. Perusal of article 12(4)(a) shows that in a case where the services are ancillary and subsidiary to the enjoyment of the right, property or information for which a Royalty payment described in Paragraph 3 of article 12 is received, the same would be in the nature of Fee for technical services.

9. It is prayed that the cases in hand do have admitted position of Royalty Income and the services rendered in the case (sales and marketing, loyalty, reservation, technological, operational and training programs) are with an objective to ensure the end to end delivery of quality services by Indian Hotels to the end consumers of the Hotels and such services in turn would upkeep the brand value of the assessee for which royalty income has been received. Thus, such services are ancillary to the Royalty income received in the cases in hand. Hon'ble Tribunal being the final fact finding authority may like to call for examination of license/royalty agreement and services agreement with Indian Clients which will throw light in this regard.

10. It may be noted that Hon'ble Delhi High Court in the case of M/S JANSAMPARK ADVERTISING AND MARKETING (P) LTD. ITA 525/2014 categorically held at para 38 of the order that "Whilst it is true that it is the obligation of the AO to conduct proper scrutiny of the material, given the fact that the two appellate authorities above are also forums for fact-finding, in the event of AO failing to discharge his functions properly, the obligation to

conduct proper inquiry on facts would naturally shift to the door of the said appellate authority" Accordingly, Hon'ble Tribunal may like to ensure that clear cut facts of the case are on record as per the Royalty agreement and Services agreement and the decision may be taken on the basis of the same.

11. It is submitted that Hon'ble Tribunal may duly consider the aforesaid written submission and it is also prayed that this submission may be made part of the order."

7. The Ld. AR submitted that the issue of Article 12 has been decided by the Hon'ble Delhi High Court in case of Sheraton (supra) and the same was taken into account by the CIT(A) in the order and the Ld. AR relied upon the order of the CIT(A). The Ld. AR further submitted that there is no distinguishable fact which was made in the submissions of the Ld. DR. Hence, the appeal of the Revenue be dismissed. The Ld. AR has also given the written submissions which is reproduce as under:

A. *"Issue in Dispute:*

Whether Centralized Services Fees received by Respondent-Assessee is taxable as Royalty/ Fee forTechnical Services under Section 9(l)(vi) or Section 9(l)(vii) ofthe Income Tax Act, 1961 ('Act') and / or Article 12 of India-.USA DTAA?

B. *Our Submissions:*

At the outset, it is respectfully submitted that the taxability of Centralized Services fees (namely sales & marketing services, reservations, loyalty programs etc.) is duly covered by decision of this Hon'ble Tribunal Assessee's own case for AY 2013-14 in ***ITA No. 5146/DEL/2016*** *in identical facts.*

Copy of decision of Hon'ble Tribunal is enclosed herewith as ***Annexure-1*** *for your kind reference and records.*

It is further submitted that in the present case, both Ld. AO and Ld. CIT(A) have held the nature' of services to be same as those rendered by the Assessee in the earlier years and also same as nature of services

rendered by a group entity, namely Sheraton International Inc, which has been examined in detailed and found to be 'not taxable' in hands of the Assessee by this Hon'ble Tribunal in ***Sheraton International Inc. vs DDIT [(2007) 106 TTJ 620 (Delhi Tribunal)]*** *- copy enclosed as* ***Annexure-2*** *and confirmed by Hon'ble Delhi High Court in case of* ***DIT vs Sheraton International Inc. [(2009) 313 ITR 267 (Delhi HC)]*** *- copy enclosed as* ***Annexure-3.***

Specific reference is being made to relevant extracts of the judgment of Hon'ble Tribunal in case of, ***Sheraton International Inc. vs DDIT f(2007) 106 TTJ 620 (Delhi)l,*** *wherein, the Hon'ble ITAT has specifically held that the payments received by the Assessee for services provided were neither in the nature of "Royalty" as defined under section 9(l)(vi) read with Explanation 2, nor were they in the nature of "Fees for Technical Services" as defined under section 9(l)(vii) read with Explanation 2 of the Act. Relevant extracts of decision of Hon'ble Delhi Tribunal in case of Sheraton International, Inc. have been reproduced hereunder:*

> *"85. As such, considering all the facts of the case, the relevant provisions of the Income-tax Act, 1961 as well as that of DTAA between India and USA and keeping in view the legal position emanating from various judicial pronouncements discussed above, we are of the opinion that the amount received by the assessee from the Indian hotels/clients for the services rendered under the relevant agreements was not in the nature of 'royalties' within the meaning given in section 9(l)(vi) read with Explanation 2 thereto of the Income-tax Act, 1961 or as given in Article 12(3) of Indo-American DTAA. The same was also not 'fees for technical services' or 'fees for included services' as defined in section 9(l)(vii) read with Explanation 2 thereto of the Income-tax Act, 1961 or Article 12(4) of the Indo-American DTAA respectively. Having regard to the integrated business arrangement between the assessee-company and the Indian hotels/clients as evident from the relevant agreements as well as the nature of assessee's own business, the said amount clearly represented its 'business profit' which was not liable to tax in terms of Article 7 of the Indo-American DTAA. We, therefore, allow the relevant grounds raised in the assessee's appeals on this issue and dismiss the additional grounds raised by the Revenue in its appeals.*

Further, it is submitted that the above judgment of the Jurisdictional ITAT has also been upheld by the Hon'ble Delhi High Court in ***PIT vs Sheraton International Inc. [(2009) 313 ITR 267 (Delhi)I.*** *Relevant extracts have been reproduced as below (para 12):*

> *"(iv) it found as a matter of fact that the payments received by the assessee were neither in the nature of royalty under section 9(l)(vi) read with Explanation 2 or article 12(3) of the DTAA nor fee for technical services or fee for included services under section 9(l)(vii) read with Explanation 2 or article 12(4) of the DTAA. See observations in paragraph 85 of the impugned judgment. The relevant portion of the finding is extracted below*
>
> *.....*
>
> ***13.*** *In view of the aforesaid findings of the Tribunal that the main service rendered by the assessee to its clients-hotels was advertisement, publicity and sales promotion keeping in mind their mutual interest and, in that context, the use of trademark, trade name or the stylized 'S' or other enumerated services referred to in the agreement with the assessee were incidental to the said main service, it rightly concluded, in our view, that the payments received were neither in the nature of royalty under section 9(l)(vi) read with Explanation 2 or in the nature of fee for technical services under section 9(l)(vii) read with Explanation 2 or taxable under article 12 of the DTAA. The payments received were thus, rightly held by the Tribunal, to be in the nature of business income. And since the assessee admittedly does not have a permanent establishment under the article 7 of the DTAA 'business income' received by the assessee cannot be brought to tax in India "*

c. ***Response to submission of Ld. CIT-DR on applicability of Article 12(4)(a) of India-***

USA DTAA

At paragraph 8 of his written submission, referring to Article 12(4)(a) of India-USA DTAA, Ld. CIT-

DR has submitted as under:

"8. Perusal of article 12(4)(a) shows that in a case where the services are ancillary and subsidiary to the enjoyment of the right, property or information for which a Royalty payment described in Paragraph 3 of article 12 is received, the same would be in the nature of Fee for technical services."

In response to the above, it is respectfully submitted that this specific aspect has already been duly considered and decided in Assessee's favour by Hon'ble Delhi Tribunal at Para 81 and confirmed by Hon'ble Delhi High Court at Para 12 and Para 13 in case of Sheraton International, Inc. (supra), facts of which are identical to those of Respondent-Assessee, as admitted by Ld. AO and Ld. CIT(A) as well.

Hon'ble ITAT in case of Sheraton International, Inc. (supra) has taken a view that Article 12(4)(a) of the India-USA DTAA cannot be applied to any of the services rendered by the Assessee to the respective Indian Hotels/ clients. The Jurisdictional ITAT has taken a view that the activities of advertisement, publicity and sales promotion are the main activities of the business and the use of trademark and tradename are incidental to the said main service. Article 12(4)(a) is specifically applicable to those cases where the main service falls within the ambit of Article 12(3), i.e. Royalty. The Hon'ble ITAT has accordingly held that since the primary condition of classifying the fees for main activity as royalty is not satisfied, there is no question of applicability of Article 12(4)(a). Relevant extract of the decision of Hon'ble Tribunal has been reproduced as follows:

"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 15th 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, is 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."

Prayer

In view of the above, it is prayed that your Honours may graciously be pleased to kindly dismiss the appeal filed by the Income tax Department and uphold the decision of Ld. CIT(A) deleting the additions made by the Ld. AO during the course of assessment proceedings."

8. We have heard both the parties and perused the material available on record. It is pertinent to note that the Assessing Officer has simplicitor made addition in respect of FTS under Article 12 but no limb of Article 12 was given by the Assessing Officer and there is no specification which comes out from the assessment order as contemplated by the Ld. DR during the hearing. The main contentions of the Ld. DR which are totally new in the present assessment year and not presented before either of the Revenue Authorities in Assessment Year 2013-14 as well as 2014-15. These contentions are coming for the first time and are not emerging from the actual assessment order which is contested before this forum. Services in the nature of FTS whether constitutes FTS or not and whether the assessee has PE in India or not, was very well settled and was undisputed as per the submissions and records before the Assessing Officer as well as before the CIT(A). The Revenue is projecting a new case which was not part of assessment order as well as order of the CIT(A). Therefore, the written submissions made by the Ld. AR are just afterthought and cannot be taken into account as the same are not plausible.

The issue involved is squarely covered by the Tribunal's decision in Assessment Year 2013-14 in case of Westin Hotel (supra) as well as by the decision of the Hon'ble Delhi High Court in case of Sheraton (supra) and hence both the appeals of the Revenue are dismissed.

9. In result, the appeals of the Revenue are dismissed.

Order pronounced in the Open Court on this 30th Day of July, 2021.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUCHITRA KAMBLE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 30/07/2021

*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI