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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision : 17.04.2025+ **ITA 554/2024**THE COMMISSIONER OF INCOME
TAX - INTERNATIONAL TAXATION -3

.....Appellant

Through: Mr. Ruchir Bhatia, Mr. Anant Mann,
Mr. P. Gupta, Ms. Aditi Sabharwal &
Mr. Abhishek Anand, Advts.

Versus

SIX CONTINENTS HOTELS INC.

....Respondent

Through: Mr. Manuj Sabharwal, Mr. Drona
Negi, Mr. Devvrat Tiwari, Advts.**CORAM:****HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MR. JUSTICE TEJAS KARIA****VIBHU BAKHRU, J. (ORAL)**

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 [**the Act**], *inter alia*, impugning the order dated 09.05.2024 [**impugned order**] passed by the learned Income Tax Appellate Tribunal [**ITAT**] in ITA No. 2355/DEL/2023 captioned *Six Continents Hotels Inc. v. Assistant Commissioner of Income Tax-3(1)(2), International Taxation, New Delhi*. The said appeal was preferred by the respondent [**Assessee**] against an order dated 27.06.2023 passed by the Assessing Officer [**AO**] under Section 143(3) read with Section 144C of the Act in respect of Assessment Year [**AY**] 2020-21.

2. The Assessee had during the Financial Year [**FY**] 2019-20 received a



sum of ₹ 28,11,42,298/- which comprised of marketing contribution, Priority Club receipts and Reservation Contribution aggregating to ₹21,22,52,199/-; and the Holidex fees amounting to ₹6,88,90,099/- from Indian affiliate being InterContinental Hotels Group (India) Private Limited [**IHG India**] towards the centralised marketing and reservation related services.

3. The Assessee filed its revised return of income for AY 2020-21 on 31.03.2021 declaring a total income of ₹1,05,20,740/- which was picked up for scrutiny and the Assessing Officer [**AO**] passed a draft assessment order dated 15.09.2022. The AO held that the amounts paid by the Indian hotels for marketing contribution and reservation fees were taxable as Royalty under the Act as well as under the India-USA Double Taxation Avoidance Treaty [**the DTAA**]. In the alternative, the AO held that the same would be taxable as Fees for Included Services under Section 9(1)(vii) of the Act as well as under Article 12(4)(a) and Article 12(4)(b) of the DTAA. Accordingly, the AO determined the total taxable income at ₹39,19,56,083/- after making an addition of ₹28,11,42,298/- on account of marketing, distribution marketing and frequency marketing programme along with an addition of ₹10,02,93,045/- on account of FIS/FTS held as chargeable to tax under the Act as well as under the provisions of the DTAA.

4. The Assessee filed objections to the said decision before the Dispute Resolution Panel [**DRP**]. The learned DRP did not accept the Assessee's contentions that the receipts were not in the nature of Royalty and concluded that the said fees were in connection with grant of license for the brand for which separate fees was also charged. Accordingly, the DRP concluded as under:



“5.1 The DRP has gone through the submission of the assessee and the draft assessment order. The issue raised above are covered matters on which the Panel has adjudicated for the assessment years 2012-2013 to 2018-19 and held it to be taxable under Article 12 of India-USA DTAA. However, assessee has submitted that it has changed its business model with effect from 01 April 2019. The details of the new business model as below:

7. Before 1 April 2019, IHG Group entered into a tri-partite contract, whereby both IHG India and InterContinental Hotels Group (Asia Pacific) Pte Ltd., Singapore are parties to the Hotel Management Agreement ('HMA') with the third-party hotel owners, for providing hotel management services to IHG brand hotels operating in India. Under the HMA, 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), was required to provide certain marketing and reservation related services to such third-party Indian Hotels.

Business Model with effect from 1 April 2019:

8. With effect from 1st April 2019, considering the needs of the business in India, **IHG India has assumed a greater entrepreneurial role wherein it has been granted a non-exclusive license by IHGAP** (regional headquarters in the IHG group holding the economic and beneficial ownership of IHG brands) for use of trademark/brand rights in connection with owning, operating and managing the third-party Indian hotels.

9. Further, under the new model effective from 01 April 2019, **IHG India has entered into a Hotel Management Agreement with third party IHG brand Hotel in India.** Under the HMA, IHG India undertakes to provide the full set of services related to management of third party Hotels in India including the provisioning of Hotel Management services, granting right to use the trademark/brand license, and the procurement and provision of system fund services (which is in relation to marketing and reservation related



services).

10. Thus, under the new HMAS IHG India is required to provide hotel management services and the rights to use IHG brand, for the operation of the third-party hotels. Further, IHG India is also required to provide marketing and reservation related services to the Indian Hotels, which the Applicant (as an affiliate of IHG AP, being the Licensor under the HMAS) was earlier obligated to provide to the third-party hotels in India. It is also relevant to note that IHG India has its own sales and marketing team which provides marketing and reservation related services to the Indian Hotels. The fees collected from the Indian hotels by IHG India in relation to Marketing, Distribution Marketing, Frequency Marketing Programme is used to defray the sale and marketing costs incurred by IHG India. Further, IHG India has entered into contracts with the Applicant 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). Therefore, IHG India under the new HMAS is providing and procuring system fund related services, to include the third-party Indian Hotels under global marketing programmes, in such a manner that Indian Hotels are able to benefit from the services provided by IHG collectively.

11. Thus, with effect from 1st April 2019, under the HMA, IHG India is also required to provide marketing and reservation related services to the third-party Indian Hotels, which the Applicant (as an affiliate of IHG AP, being the Licensor under the HMAs) was earlier obligated to provide to the third-party hotels in India.”

5.2 In this regard a remand report was sought from the assessing officer on 27.02.2023. Despite sending a number of reminders on multiple dates, the AO has not furnished the remand report. The Panel is therefore constrained to give the direction on the basis of available documents. On this issue the Panel had held that receipts or account of System Fund Support Fee and SCHI facility charges partake the nature as BIS and therefore are chargeable to tax under



Article 12(4) of India-USA DTAA. The Operative para of direction on this subject for assessment year 2018-19 is placed below:

2.1 The Ground relates to additions proposed hi respect of contribution received from Indian hotels on account of Marketing Contribution and Reservation Contribution amounting to INR 39,31,30,050/-. Similar objections were filed by the assessee in AY 2017-18 on which DRP directions were as follows-

"2.11 The assessee has also objected to the AO's action of treating the said receipts as alternately taxable as "fees for included services" under Article 12(4)(a) of the India-US DTAA. The definition of Fee for Included Services under the India-USA DTAA reads as under-

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

- a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or
- b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design

2.12 In the present case, it is not disputed that the consideration on account of license fee arising from the right to use the brand in India is royalty. As discussed in the preceding paragraphs, the various activities in relation to the system contribution fund are essentially of the nature of marketing and brand development activities for the purpose of brand enhancement and hence are ancillary and subsidiary to the application or enjoyment of the right, property or information for which the royalty is received under the said license within the mearing of sub-paragraphs (a) of



paragraph 3 and 4 of Article 12 of the DTAA. This can be seen from the following extract of the Memorandum of Understanding dated 15.05.1989 between India and USA concerning Fees for Included Services in Article 12 thereof

“It is understood that, in order for a service fee to be considered “ancillary and subsidiary” to the application or enjoyment of some right, property, or information for which a payment described in paragraph 3(a) or (6) is received, the service must be related to the application or enjoyment of the right, property, or information. In addition, the clearly predominant purpose of the arrangement under which the payment of the service fee and such other payment are made must be the application or enjoyment of the right, property, or information described in paragraph 3. The question of whether the service is related to the application or enjoyment of the right, property, or information described in paragraph 3 and whether the clearly predominant purpose of the arrangement is such application or enjoyment must be determined by reference to the facts and circumstances of each case. Factors which may be relevant to such determination (although not necessarily controlling) include:

1. the extent to which the services in question facilitate the effective application or enjoyment of the right, property, or information described in paragraph 3;
2. the extent to which such services are customarily provided in the ordinary course of business arrangements involving royalties described in paragraph 3;
3. whether the amount paid for the services (or which would be paid by parties operating at arm's length) is an insubstantial portion of the combined payments for the services and the right, property, or information described in paragraph 3;
4. whether the payment made for the services and the royalty described in paragraph 3 are made under a single contract (or a set of related contracts); and



5. whether the person performing the services is the same person as, or a related person to, the person receiving the royalties described in paragraph 3 (for this purpose, persons are considered related if their relationship is described in Article 9 (Associated Enterprises) or if the person providing the service is doing so in connection with an overall arrangement which includes the payer and recipient of the royalties)...

Example (1) Facts: A U.S. manufacturer grants rights to an Indian company to use manufacturing processes in which the transferor has exclusive rights by virtue of process patents or the protection otherwise extended by law to the owner of a process. As part of the contractual arrangement, the U.S. manufacturer agrees to provide certain consultancy services to the Indian company in order to improve the effectiveness of the latter's use of the process. Such services include, for example, the provision of information and advice on sources of supply for materials needed in the manufacturing process, and on development of sales and service literature for the manufactured product. The payments allocable to such services do not form a substantial part of the total consideration payable under the contractual arrangement. Are the payments for these services fees for "included services"?

Analysis: The payments are fees for included services. The services described in this example are ancillary and subsidiary to the use of a manufacturing process protected by law as described in paragraph 3(a) of Article 12 because the services are related to the application or enjoyment of the intangible and the granting of the right to use the intangible is the clearly predominant purpose of the arrangement. Because the services are ancillary and subsidiary to the use of the manufacturing process, the fees for these services are considered fees for included services under paragraph 4(a) of Article 12, regardless of whether the services are described in paragraph 4(b)"

2.13 The conditions specified above and the examples squarely apply to the assessee's case as the services provided to the Indian hotels are clearly related to the application / enjoyment



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2.13 The conditions specified above and the examples squarely apply to the assessee's case as the services provided to the Indian hotels are clearly related to the application / enjoyment of the brand and the granting of the right to use the brand is the predominant purpose of the arrangement. In this regard, the decisions relied upon by the assessee are clearly distinguishable on facts. For instance, in *Renaissance Services BV vs. DDIT (International taxation)* (2018) 94 Taxmann 465 (Mum. Trib), the assessee therein was not the owner of any brand or trademark for which any royalty was received by it under Article 12(4) of the India-Netherlands DTAA, whereas in the present case, the assessee remains the legal and beneficial owner of the brand, notwithstanding any subsequent agreement for payment of license fees to another group entity. Similarly, the decision of the Hon'ble Delhi High Court in *Sheraton International Inc.* (2009) 178 Taxmann 84 was on the interpretation of the 'make available clause in Article 12(4)(b), whereas in the present case, Article 12(4)(a) of the DTAA applies. In view of the above, the assessee's objections under Ground 1 stand rejected."

2.2 As the legal and factual matrix remains the same, the directions of AY 2017-18 shall apply to this AY as well. The Ground is dismissed.

5.3 Mere tweaking of business model doesn't change the nature of receipts chargeable to tax. However, AO may discuss the new business model, which has come into existence with effect from 01.04.2019, in the final assessment order. The assessee's objection on the above ground is rejected with the observation above."

5. Thereafter, the AO passed the final assessment order dated 27.06.2023. Whilst the Revenue did not appeal the said decision, the Assessee carried the matter in appeal before the learned ITAT. The said appeal was allowed by the learned ITAT following the decision in the Assessee's case in the earlier assessment years. To be noted that the Assessee's contention that the receipts, as mentioned above, are not taxable



by virtue of DTAA has been sustained for the past fifteen assessment years.

6. It is pertinent to note that another appeal [being ITA No. 541/2024 for AY 2016-17] was dismissed by this court after accepting that the questions of law urged by the Revenue, were covered by the decisions rendered by the learned ITAT. Whilst the learned counsel had stated that no appeal was filed by the Revenue, the learned counsel for the Revenue had contended that appeals were filed before the Bombay High Court but had not been listed.

7. The learned ITAT observed that with effect from 01.04.2019, there was a change in business model of the Assessee and under the new business model, 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 was taxable in India in the hands of IHG India as business income. IHG India from 01.04.2019 had entered into a Hotel Management Agreement [**HMA**] with third party IHG brand Hotel in India under which IHG India granted license to the third-party hotel owners for the use of brand name/trademark, provided hotel management services and provision of system fund services which were in relation to the marketing and reservation related services.

8. IHG India provided marketing and reservation related services under the HMA by facilitating 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 was unable to provide to the Hotels on its own.



9. In the aforesaid background, IHG India entered into following inter-company agreements with the Assessee to be able to provide services to third party hotel owners:

- “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.”

10. As per the HMA, for the system fund support services provided by SCHI (a company incorporated and a tax resident of USA and recipient of beneficial provisions of the DTAA), 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.

11. As noted above, the principal question that is required to be addressed is whether the payments received by the Assessee on account of providing certain centralised services including marketing services and reservation services can be construed as fees for technical services as defined under



Section 9(1)(vii) of the Act or Fees for Included Services as covered under Article 12(4)(a) of the DTAA. Admittedly, the said issue is covered in favour of the Assessee and against the Revenue by several decisions of this court including *Director of Income Tax v. Sheraton International Inc.:* (2009) 313 ITR 267; *The Commissioner of Income Tax-International Taxation-3 v. Sheraton International LLC: Neutral Citation: 2023:DHC:4261-DB*; *The Commissioner of Income Tax-International Taxation-3 v. Westin Hotel Management LP: ITA 213 of 2024* decided on 10.04.2024 and *The Commissioner of Income Tax-International Taxation-3 v. Shangri-La International Hotel Management Pte Ltd. : ITA 532 of 2023* decided on 18.09.2023.

12. In the case of *The Commissioner of Income Tax-International Taxation-3 v. Radisson Hotel International Incorporated: Neutral Citation: 2022:DHC:004791*, this court had referred to the earlier decisions and dismissed the case holding that no substantial questions of law arise for consideration by this court. The present appeal must bear the same fate.

13. In view of the above, no substantial questions of law arise for consideration before this court. Thus, the appeal is dismissed.

VIBHU BAKHRU, J

TEJAS KARIA, J

APRIL 17, 2024

‘gsr’

[Click here to check corrigendum, if any](#)