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

% Judgment delivered on : 30.01.2009

ITA Nos. 924/2007, 921/2007, 922/2007, 932/2007, 933/2007, 1033/2007, 1037/2007, 1044/2007, 1050/2007 & 1092/2007

DIRECTOR OF INCOME TAX,
NEW DELHI .....APPELLANT

versus

SHERATON INTERNATIONAL INC.,
NEW DELHI ..... RESPONDENT

Advocates who appeared in this case:

For the Appellant	:	Mr Sanjeev Sabharwal, Advocate
For the Respondent	:	Mr D Pal, Sr. Advocate with Mr Ananda Sen, & Mr S.K. Aggarwal, Advocates.

CORAM :-

HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

1. The captioned appeals have been preferred by the Revenue against a common judgment dated 04.10.2006 of the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') passed in ITA Nos.

50/Del/2006 to 55/Del/2006 pertaining to assessment years 1995-96 to 2000-01 and ITA Nos. 168/Del/2006 to 171/Del/2006 in respect of assessment years 1995-96, 1996-97, 1999-2000 and 2000-01. The Tribunal by the impugned judgment has disposed of ten appeals, out of which six appeals were filed by the assessee i.e., Sheraton International Inc. while the remaining four appeals were filed by the Revenue. As is evident from the impugned judgment of the Tribunal, both the assessee, as well as, the Revenue had filed four cross appeals each for assessment years 1995-96, 1996-97, 1999-2000 and 2000-01. The remaining two, were the appeals of the assessee, for assessment years 1997-98 and 1998-99.

2. The Revenue being aggrieved by the impugned judgment has preferred the present appeals under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). Even though the Revenue, in these appeals, has proposed a total of ten questions, at the time of hearing the learned counsel for the Revenue, Mr Sanjeev Sabharwal confined his submissions to the following proposed questions of law:-

> *(A) Whether the Tribunal was justified in law in holding that the amount received by the assessee from the Indian hotels/clients for the services rendered under the terms of the agreements was in the nature of 'business profits' not liable to tax in terms of the Article 7 of the Indo-American DTAA?*
>
> *(B) Whether the income of the assessee from the receipts for services rendered to Indian clients/hotels was*

taxable in India with reference to the charging provisions of sections 4, 5 and 9 of the Act?

(C) Whether income received by the assessee was taxable in India as 'royalty' and/or 'fee for included services' as per article 12(3)(a) and/o article 1294)(a) and/or article 12(4)(b) of the Double Taxation Avoidance Agreement between India and USA?

(D) Whether the amount received by the assessee under the terms of the agreements with the Indian clients/hotels was in the nature of 'royalty' as contemplated in Explanation-2 to section 9(1)(vi) and (vii) of the Act?

(E) Whether the Ld Tribunal has correctly interpreted the relevant clauses and Articles of the agreements to arrive at a conclusion that the intention/purpose of the arrangement was to promote hotel business worldwide and the other services enumerated in the Articles were merely ancillary or auxiliary to the main object.

(F) Whether the relevant agreement executed by the assessee was a colourable device only for the purpose of voiding chargeability of tax in India?

(I) Whether the amount of contribution received by the assessee from the Indian hotels/clients in respect of "Sheraton Club International"/ "Starwood Preferred Guest" Programme and "Frequent Flyer Programme" would fall within the ambit of article 12 of the DTAA as "free for included services"?

The following three questions i.e. (G), (H) & (J) were not pressed before us:-

(G) Whether the Ld. ITAT was correct in law in holding that no interest under Section 234B is liable to be levied when the payments received by the assessee are subjected to deduction of tax at source irrespective of the actual deduction?

(H) Whether the Tribunal was right in holding that the provisions of Section 209(1)(a) and 209(1)(d) apply even in

the case of an assessee who denies its liability to be assessed under the Act and who has not filed a voluntary return, and consequently no interest under Section 234B can be charged in such a case if income is subsequently assessed in its hands?

(J) Whether while deleting the addition to the extent of 25% made by the AO in the set aside proceedings for the assessment years 1996-97 and 1997-98, the Tribunal has correctly interpreted the relevant statutory provisions with regard to scope of remand proceedings?

3. We propose to dispose of these appeals by a common judgment as the issues raised in these appeals are inter-related and based on a common set of facts. In order to dispose of these appeals it would be important to note the following undisputed facts.

3.1 The assessee is a company incorporated in USA and a non-resident under the Indian Tax Laws. The assessee is engaged in providing service to hotels in various parts of the world. Towards this end, the assessee, on 27.01.1979 entered into, one such, agreement with ITC Ltd for providing services to three of its hotels, viz., Welcomegroup Mourya Sheraton, New Delhi, Welcomegroup Mugal Sheraton, Agra and Welcomegroup Chola Sheraton, Madras. The scope of services envisaged in the agreement was publicity, advertisement and sales including reservation services. The tenure of the agreement was fixed at 10 years. In consideration of the services the assessee was required to render, ITC Ltd agreed to pay a fee at the rate of 3% of the room sales to the assessee.

3.2 Due to a re-organization, the rights and obligations, which enured to ITC Ltd under the agreement dated 27.01.1979 got vested in ITC Hotels ltd.

3.3 On 09.05.1985 the assessee entered into a similar agreement with ITC Hotels Ltd in respect of the hotel Windsor Manor, Bangalore. In so far as the agreement dated 27.01.1979 was concerned the same was renewed on 30.12.1988.

3.4 The assessee also entered into similar agreement with the Aidyar Hotels Ltd, in respect of, its Hotel Park Sheraton, Madras.

4. Over the years, that is, in respect of, the period prior to India and USA entering into a Double Taxation Avoidance Agreement (hereinafter referred to as 'DTAA') dated 01.04.1991, the fee received by the assessee was taxed as a "business income" on which, tax was deducted at source under Section 195(2) of the Act on an estimated income of 10% of such fee. After the coming into force of the DTAA the assessee reviewed its stand taken before the Revenue and claimed that the fee received by it was not taxable in India as it had no permanent establishment in India. Interestingly, this stand of the assessee was accepted by the Revenue and accordingly, the Revenue gave its no objection on 28.10.1991, whereby, the assessee was permitted remittance of the fee earned in India without deduction of tax at source.

4.1 It transpires that in November, 1999 the Revenue woke up to the fact that the fee received by the assessee was taxable and hence, it issued a notice dated 25.11.1999 to ITC Hotels Ltd under Section 163 of the Act treating it as the agent of the assessee.

4.2 The afore-mentioned notice was followed by a notice to the assessee dated 26.11.1999 under Section 142, in respect of, assessment year 1997-98. The said notice was followed by two more notices dated 6.1.2000 and 28.1.2000. The last notice was accompanied by a questionnaire. It is not disputed that since assessee did not comply with the notices the Assessing Officer proceeded to determine the taxable income of the assessee based on best judgment. The Assessing Officer, in doing so, relied upon the agreement executed between the assessee and ITC Hotels Ltd. The Assessing Officer concluded, on an analysis of the terms and conditions contained in the agreement that, what the assessee was making available to the ITC Hotels Ltd was: technical and consultancy services; provision of training to its employees; the use of its trade mark (even though they were free of cost these were services according to him linked to the trade mark); making available technical know-how, documentation and manuals for which while the assessee was not charging a lump sum fee the consideration received by the assessee was relatable to the business concluded by its client-hotels; and the reservation network.

4.3 Based on the aforesaid findings the Assessing Officer came to the conclusion that the payments received by the assessee were fee for included services as provided in Article 12(4)(b) of the DTAA. The Assessing Officer also concluded that the assessee had a business connection with India and hence, fee received on account of services rendered by the assessee were deemed to accrue, or arose in India and therefore, the assessee's case was covered under Section 9 of the Act. In the alternative he held that the assessee's income was taxable as per the provisions of Article 12 of the DTAA. The Assessing Officer estimated the income of the assessee at Rs 30 crores and having held that they were fee for included services made them exigible to tax at the rate of 15%.

5. Aggrieved by the Assessing Officer's order the assessee preferred an appeal to the Commissioner of Income Tax (Appeals) [hereinafter referred to as the 'CIT(A)'].

5.1 Briefly, the CIT(A) vide order dated 22.03.01 classified the services rendered by the assessee into four categories. According to the CIT(A) the fee received by the assessee for the following three categories constituted payment of royalty under Article 12(3)(a):-

(i) Use of trademarks, trade name and the stylized "S" service mark. Even though the agreement allowed its use at no cost it being a colourable device the payment received by the assessee had to be attributed to the user of the said intangible asset;

(ii) payments towards reservation services; and

(iii) lastly, payment towards services for maintenance of high international standards

5.2 In respect of the last category of services which were in the nature of publicity, marketing and promotion activities and had been rendered outside India, according to the CIT(A), they constituted commercial income and in the absence of a permanent establishment in India the said payments could not be brought to tax.

5.3 Based on the aforesaid the CIT(A) concluded that only 75% of the fee received by the assessee was in the nature of royalty and hence, taxable in India under Article 12 of the DTAA, based on a rationale that three(3) out of the four(4) services as categorized by him were taxable in India. The CIT(A), however, disagreed with the estimation of income as quantified by the Assessing Officer as the assessee had claimed that it had received only Rs 7,83,36,687/- on account of the aforesaid services. Accordingly, the CIT(A) directed the Assessing Officer to verify the amount received and after due verification bring to tax 75% of the actual amount received by the assessee.

6. It would be important to note at this juncture that similarly for assessment year 1998-99 the assessee was issued notices dated 6.1.2000, 28.1.2000 and 05.1.2001 under Section 142 of the Act. The last notice

was accompanied by a questionnaire. The assessee, however, for assessment year 1998-99 filed a return on 30.01.2001. For this assessment year the Assessing Officer classified the income into four(4) categories as indicated above and out of the four(4) categories three(3) categories were brought to tax on the basis that payments constituted royalty under Article 12(3)(a) and/or as fee for included services as per Article 12(4)(b) of the DTAA. The last category, that is, payments received towards advertisement, publicity and promotion was treated as business income and since, the assessee did not have a permanent establishment in India, they were not chargeable to tax in India. Thus 75% of Rs 7,78,26,499/- was brought to tax at the rate of 15% as per Article 12 of the DTAA.

6.1 The assessee being aggrieved carried the matter in appeal to the CIT(A). The CIT(A) vide order dated 11.11.2001 disposed of the appeal for assessment year 1998-99 based on the reasoning given in its order dated 22.03.2001 in respect of assessment year 1997-98. The aforesaid events prompted the Assessing Officer to re-open the proceeding for assessment years 1995-96, 1996-97, 1999-2000 and 2000-01. Accordingly, a notice under Section 148 was issued on 25.01.2002. The reasons recorded in re-opening the assessment under Section 148 as extracted in the Tribunal's orders are as follows:-

"Sheraton International Inc. is a company incorporated under the laws of USA. It carries on the business of providing hotel related services worldwide. It entered into agreement with M/s ITC Hotels Ltd. and other 'Welcome Group' companies in India for providing various service like training, managerial assistance etc. It also provides its logo "S" and the name "Sheraton" to the Hotels it has entered into contract with. For these services the assessee was in receipt of income amounting to crores. The same is clearly taxable as fee for included services in terms of Article 12 of the DTAA between India and the USA as well as Section (1) of the Income Tax Act, 1961.

Orders u/s 143(3) passed for A. Yrs. 1997-98 and 1998-99 were passed on the above lines and the same were confirmed by the CIT(A)-XXIX.

In view of the above, I have reasons to believe that income of the assessee accruing or arising in India has escaped assessment within the meaning of section 147 of the I.T. Act. Therefore, proceedings u/s 147 of the I.T. Act is hereby initiated. Issue notice u/s 148 of the I.T. Act."

7. Interestingly the Assessing Officer in its proceedings went even further than what was the view of his predecessor for assessment years 1998-99, as well as, that of the CIT(A) for assessment years 1997-98 and 1998-99 by holding that the entire amount received by the assessee from the Indian hotels including contribution towards Sheraton Club International (SCI) and Frequent Flier Programme (FFP) was taxable in India as royalty and/or fee for included services. The assessments for the four assessment years i.e. assessment year 1995-96, 1996-97, 1999-2000 and 2000-01, were brought to tax at the rate of 15% as per Article 12 of the DTAA. Assessments were completed under Section 148 read with Section 143(3). In the meanwhile the appeals filed by the assessee, in respect of, CIT(A) orders dated 22.03.2001 and 11.11.2001 for

assessment years 1997-98 and 1998-99 respectively came up for hearing before the Tribunal. The Tribunal by a common order dated 23.10.2002 set aside the order of the CIT(A) for assessment years 1997-98 and 1998-99 and remanded the matter to the file of the Assessing Officer for a fresh adjudication. The main ground for setting aside the order was that the Tribunal found fault with the approach adopted by the authorities below. The Tribunal was of the view that the taxability of income of a non-resident had to be first determined in the light of the provisions of Sections 4, 5 and 9 of the Act. According to the Tribunal the provisions of DTAA would come into play only if the assessee, which is admittedly a non-resident, was required to pay tax, both under the Indian Income Tax Act, as well as, that of U.S.A. In its view the approach adopted by the authorities was thus, faulty because they had proceeded to examine the matter from the point of view of the provisions of the DTAA, whereas the approach ought to have been the other way round.

8. On remand the Assessing Officer held that the entire amount received by the assessee constituted royalty and/or fee for included services and was thus, taxable with reference to the charging provisions of section 4, 5 and 9 of the Act and since, the assessee did not have a permanent establishment in India the same was taxable in India as royalty and/or fee for included service as per article 12(3) and/or article 12(4)(b) of the DTAA. The Assessing Officer thus, brought to tax in

India the entire amount of Rs 7,83,36,687/- and Rs 7,78,26,449/- received by the assessee during the previous year relevant to assessment year 1997-98 and 1998-99 respectively at the rate of 15%. The said order was passed by the Assessing Officer under Section 143(3) read with Section 254 on 28.11.2003.

8.1 Against the order of the Assessing Officer dated 28.11.2003, in respect of, assessment years 1997-98 and 1998-99 the assessee, being aggrieved, preferred an appeal to the CIT(A).

8.2 In the interregnum appeals against the Assessing Officer's orders under Section 148 read with Section 143(3) for assessment years 1995-96, 1996-97, 1999-2000 and 2000-01, had also reached the CIT(A). The CIT(A) disposed of the said six appeals by a common order dated 31.10.2005.

8.3 Briefly, the CIT(A) by its order held that the entire payment received by the assessee for services rendered in terms of the various agreements entered into by it with hotels in India were in the nature of 'royalty' under Section 9(1)(vi) of the Act, as also, under Article 12(3)(a) of the DTAA. The CIT(A) thus, sustained the order of the Assessing Officer bringing to tax the entire receipts at the rate of 15% for the six years considered by him. In so far as the payments which had been received by the assessee from its customers, that is, the hotels in India, in respect of, SCI and FFP which were held to be taxable by the

Assessing Officer in his assessment order under Section 148 read with Section 143(3) of the Act for assessment years 1995-96, 1996-97, 1999-2000 and 2000-01, as these were not contributions which were received by the assessee in pursuance of the agreements entered into with Indian hotels; he noted that these contributions received from the hotels, which were given back to their guests in the form of rewards. The CIT(A) further observed that the contributions received towards SCI were for facilitating promotion of business of hotels worldwide and hence, could not be termed as fee for technical services or royalty. He held the said contributions would constitute commercial income of the assessee and since, the assessee did not have a permanent establishment in India it could not be brought to tax in India. The CIT(A) thus deleted the Assessing Officer's additions on account of contributions to SCI and FFP for assessment years 1995-96, 1996-97, 1999-2000 and 2000-01.

8.4 Being aggrieved by the order of the CIT(A) dated 31.10.2005 in respect of the remaining issues, the assessee preferred appeals to the Tribunal for the following six years i.e. assessment years 1995-96 to 2000-01, while the Revenue preferred the appeals to the Tribunal in respect of the relief granted on SCI/FFP contributions in respect of assessment years 1995-96, 1996-97, 1999-2000 and 2000-01. Consequently, the cross-appeals, were filed as noted hereinabove; four each by the assessee and the Revenue, apart from two appeals by the

assessee, in respect of, the assessment year 1997-98 and 1998-99. As noted in the beginning the Tribunal by the impugned judgment disposed of the eight cross-appeals and two appeals filed by the assessee.

SUBMISSIONS OF THE COUNSEL

9. Before us the learned counsel for the Revenue Mr Sanjeev Sabharwal, Advocate, submitted that the entire payments received by the assessee were in the nature of royalty and/or fee for included services. For this purpose he referred to various clauses of the agreement to demonstrate that the assessee had a vast knowledge and experience in the field of hotel business. This experience, according to the learned counsel for the Revenue, which the assessee acquired in the hospitality industry, is in the nature of information pertaining to an industrial and commercial and scientific experience and hence, payments received by the assessee are covered under the provisions of Section 9 of the Act, as well as, Article 12 of the DTAA. He further contended that the services rendered in connection with publicity, marketing and promotion being in the nature of ancillary and subsidiary services were covered within the meaning of the provisions of Article 12(4) of the DTAA. It was the submission of the learned counsel for the Revenue that the assessee was imparting technical knowledge, whereby the computers of client-hotels were synchronized with that of the assessee through satellite link which enabled their client-hotels access to the reservations systems of the

assessee. This according to the learned counsel was nothing but a case of assessee imparting technical knowledge. It was further contended by the learned counsel that, even though there was a composite payment envisaged under the agreement it was really a colourable device in order to obfuscate the payments made towards use of trademark, supply of information concerning industrial, commercial and scientific experience, reservation of rooms etc. The learned counsel for the Revenue submitted, that the fact that, the agreement stated that the assessee's clients were allowed to use trade name and trademark free of cost was really of no consequences, in the event one were to hold that it was a colourable device adopted by the assessee to avoid payment of tax in India. As regards contributions received with respect to SCI and FFP by the assessee, it was contended that these were in the nature of fee for included services as mentioned in Article 12(4)(a) which includes all services which are ancillary and subsidiary to the enjoyment of right of property or information for which payment as described in Article 12(3)(a) is made. It was the contention of the learned counsel for the Revenue, which was really a reiteration of stand before the Tribunal, that the said services, would enhance the enjoyment of property or right to property for which payments were made as described in Article 12(3)(a) and would enable generation of revenue and hence, were covered under Article 12(4)(a).

10. In reply Mr Debi Pal, the learned Senior counsel appearing for the assessee submitted that the services for which income had been received were rendered by the assessee entirely outside India and this being so, the income which has been received by the assessee had neither accrued nor arisen to the assessee in India. It was submitted, since the assessee did not have any business connection in India, the income received by it could not be brought to tax by resorting to the deeming provision of Section 9(1)(i) of the Act. It was further submitted that the assessee had rendered its service in the nature of advertisement, publicity and sales to its clients, that is, the hotels in India through systems and facilities located outside India. It was the contention of the learned Senior counsel for the assessee that the income of the assessee was in the real sense a business income and, in view of the fact that the assessee did not have a permanent establishment in India, the said income could not be brought to tax in India by virtue of Article 7 of the DTAA. It was strenuously urged by the learned Senior counsel for the assessee, that the primary service rendered by the assessee under the agreement was marketing, publicity and reservation services and it was only to facilitate this primary objective that the assessee permitted the use of trade name or trademark or the stylized "S" to its clients i.e., Indian hotels only to ensure optimum marketing and sales. It was contended that the permission given to its clients in India to use the brand name 'Sheraton' was only to facilitate 'cluster advertising' which resulted in reduction of

costs and maximization of clients or tourist procurement on a worldwide basis with a view to enhance the revenue of the assessee which was directly related to the sales revenue of the client-hotels. According to the learned counsel the use of the brand name and trademark was for the purposes of promoting mutual business as it enabled the assessee to earn more profits. It was contended that the agreement had been vetted by various other statutory authorities when approval was first sought and, the agreement has all along been treated by all such authorities as one which the assessee had entered with its clients-hotels at arm's length and, hence, could not be termed as a device, much less a colourable device, as now contended by the Revenue. The terms of the agreement clearly stipulated that no fee was being recovered by the assessee, in respect of, use of the trade name or trademark or the stylized "S" and hence, on a mere *ipse dixit* of the Revenue it could not be held otherwise, based on some supposed underlying motive. It was submitted that the assessee had not been paid fee for use of any patent, model, design, secret formula or process or trademark and therefore, the fee received could not be regarded as royalty within the meaning of clause 3(iii) of explanation 2 of Section 9(1)(vi) or even Article 12(3) of the DTAA. It was submitted that the payments received by the assessee were attributable to marketing, promotion and reservation services which were essentially business income which did not fall within the provisions of Section 9(1) of the Act.

10.1 In so far as the Revenue's contention as regards applicability of Article 12(4) of the DTAA was concerned i.e., fee for included services it may be noted that the Revenue had raised this as an additional ground for the first time before the Tribunal (see paragraph 72 of the impugned judgment). The Tribunal, however, permitted the Revenue to raise the ground as it was, according to the Tribunal, a pure legal issue. On this aspect of the matter the contention of the learned Senior counsel for the assessee, however, was that Article 12(4)(a) would be applicable, only if, payments received by the assessee are covered under Article 12(3)(a) or Article 12(4)(b). Since this was not so; Article 12(4)(a) had no application. It was contended that, in so far as, Article 12(4)(b) was concerned the same was not applicable as, in order to fall within the purview of the said Article the payment should be one which is received for technical and consultancy services which are of technical nature. It was the learned counsel's contention that advisory services, marketing advice, etc., were not the kind of technical and consultancy services as envisaged under Article 12(4)(b) of the DTAA.

11. The submission of the learned Senior counsel for the assessee was that in any event no substantial question of law arose for consideration of this court. The Tribunal, according to him, had returned the findings of fact based on the material before it, which ought not to be disturbed as there was no perversity attached to any of the findings returned by it.

12. Having heard both the learned counsel for the Revenue, as well as, the assessee we are of the view that the impugned judgment of the Tribunal deserves to be sustained for the reasons given hereinafter:-

12.1 But first, the findings of fact returned by the Tribunal:

(i) the main purpose of the agreement entered into between the assessee and its client-hotels was to promote business keeping in mind their mutual interests, through worldwide publicity, marketing and advertisement. All other services rendered by the assessee as encapsulated in various Articles of the agreement were incidental and/or ancillary to its main object. The permission to use the trademark, brand name, as well as, the stylized "S" given by the assessee to its client-hotels was examined by the Tribunal. It returned a finding that there was nothing on record for it to come to conclusion that the real transaction was other than what was stated in the agreement, that is, the use of the trademark etc. was not free of cost but was camouflaged in the composite payment made for various services;

(ii) the assessee, ITC Ltd had its own brand by the name of 'Welcomegroup' which, as noted in the impugned judgment, was used alongside the assessee's brand name 'Sheraton'. Furthermore, ITC hotels ltd like the assessee also had its own network by the name of 'WELCOMNET" which was used for reservations within the country;

(iii) the entire transaction entered into between the assessee and its client-hotels was an 'integrated business arrangement' under which the main purpose was to carry out advertisement, publicity and sales promotion for mutual benefit, in this context all other services i.e., use of trademark, trade name, computer reservations were incidental to the main purpose as stated above;

(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(1)(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(1)(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:-

> *"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(1)(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(10(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."

(v) it found that Article 12(4)(b) had no applicability and for this purpose it relied upon the Memorandum of Understanding dated 15.05.1989 and the examples set out therein. After perusing the examples given therein, it came to the conclusion that it had no applicability to the hotel industry. It held that Article 12(4)(b) applied to those services which related to areas where technology was made available, whereas what the assessee in the present case was extending was services to the hotel industry in relation to advertisement, publicity and sales promotion, which were, not in the nature of technical or consultancy service involving "making of any technology available". The finding to this effect is given in paragraph 83 of the impugned judgment. The relevant extract is given hereinbelow:-

"It is also further clarified in the Memorandum of Understanding that technical and consultancy services as envisaged under paragraph 4(b) of Article 12 could make ***technology available in a variety of settings, activities and industries and some of the areas to which such services may relate are also enumerated in the MoU which do not include the hotel industry.*** *One of such areas as indicated in the MoU is "communication through satellite or otherwise" and relying on the same, learned Special Counsel for the Revenue has contended that the interface between the reservation system of the assessee company and that of the Indian hotels/clients was covered in this category. We, however, find it difficult to agree with this contention of the learned*

Special Counsel for the Revenue. First of all, it is the area which has been specified in the MoU for ascertaining the services relating thereto being of technical and consultancy nature making technology available whereas the services rendered by the assessee in the present case are in the field of hotel industries and such services are in relation to advertisement, publicity and sales promotion which are not in the nature of technical and consultancy services involving making of technology available. Secondly, the interface between the computerized reservation system of the assessee and the computerized reservation system of the Indian hotels/clients was provided to facilitate the reservation of hotel rooms by the customers worldwide as an integral part of the integrated business arrangement between the assessee and the Indian hotel/clients. This interface thus was not separable from and independent of the main integrated job undertaken by the assessee company of rendering services in relation to marketing, publicity and sales promotion and the same, in any case, was not in the nature of technical and consultancy services making any technology available to the Indian hotels/clients in the field/area of communication through satellite or otherwise. Moreover, as pointed out by the learned counsel for the assessee before us, no communication through satellite was involved in the interface between the computerized reservation system of the assessee and that of the Indian hotels/clients."

"What is transferred to the Indian company through the service contract is commercial information and the mere fact that technical skills were required by the performer of the service in order to perform the commercial information services does not make the service a technical service within the meaning of paragraph 4(b) of Article 12. Since the facts of the present case are almost similar to the facts of this case given in Example 7 of the memorandum of Understanding, it leaves no doubt that the payment in question received by the assessee company from the Indian hotels/clients or any part thereof could not be treated as 'fees for included services' within the meaning of paragraph 4(b0 of Article 12."

12.2 As regards the agreement being a colourable device the Tribunal noted that nothing was brought on record by the Revenue Authorities to show that the intention of the said arrangement or even the action of the parties, as reflected in the agreement, was at variance with the terms of the agreement. It noted that since both the assessee and its clients were operating at arm's length, no collusion could be attributed to the parties to the agreement since, no evidence whatsoever to support or substantiate the said allegation was placed before them. It also noted the fact that not only all statutory requirements have been fulfilled and compliances had been obtained by the assessee from time to time, but that even the Income Tax Authorities had given a 'no objection' under Section 195(2) of the Act (see observations in paragraph 90 of the impugned judgment). As regards the payments received on account of SCI and FFP the Tribunal noted that since the job undertaken by the assessee company was in the nature of 'integrated business' arrangement, whereby services were rendered to its client-hotels in relation to advertisements, publicity and sales promotion of hotel business worldwide to further their mutual interest all services including the use of trademark and other services enumerated in the Article including the programmes, in issue, such as SCI and FFP were incidental to the said business arrangement between the assessee and its client-hotels. It concluded by holding that these programmes were not independent or separate from the main job undertaken by the assessee

and since, the entire amount towards the service had been held by the Tribunal as business income, the contributions received by the assessee towards the said programmes i.e., SCI and FFP were also in the nature of business income. It thus rejected the contention of the Revenue that these contributions were in the nature of included services under Article 12(4)(a) of the DTAA (see paragraph 114).

13. In view of the aforesaid findings of the Tribunal that the main service rendered by the assessee to its client-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(1)(vi) read with explanation 2 or in the nature of fee for technical services under Section 9(1)(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. The findings of the Tribunal on this account cannot be faulted. The Tribunal pointedly observed that there was no evidence brought on record by the

Revenue to enable them to hold that the agreement was a colourable device, in particular, that the payments received were for use of trade mark, brand name and stylized mark "S". We agree with reasoning adopted by the Tribunal. Moreover, these are findings of fact which could be gone into only if a question was proposed impugning the findings of the Tribunal as perverse. We find that no such question has been proposed in the appeal. The observations of the Supreme Court in the case of ***K. Ravindranathan Nair vs CIT; (2001) 247 ITR 178 at page 181*** being relevant are extracted below:-

> *"The High Court overlooked the cardinal principle that it is the Tribunal which is the final fact-finding authority. A decision on fact of the Tribunal can be gone into by the High Court only if a question has been referred to it which says that the finding of the Tribunal on facts is perverse, in the sense that it is such as could not reasonably have been arrived at on the material placed before the Tribunal. In this case, there was no such question before the High Court. Unless and until a finding of fact reached by the Tribunal is canvassed before the High Court in the manner set out above, the High Court is obliged to proceed upon the findings of fact reached by the Tribunal and to give an answer in law to the question of law that is before it.*
>
> *The only jurisdiction of the High Court in a reference application is to answer the questions of law that are placed before it. It is only when a finding of the Tribunal on fact is challenged as being perverse, in the sense set out above, that a question of law can be said to arise."*

14. In these circumstances we are of the view that no fault can be found with the impugned judgment. No question of law, much less a

substantial question of law, has arisen for our consideration. In the result the appeals are dismissed.

RAJIV SHAKDHER, J

January 30, 2009 **BADAR DURREZ AHMED, J**

kk