

Income Tax Appellate Tribunal - Delhi

Sheraton International Inc., New ... vs Assessee

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

BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER
AND

SHRI I.C. SUDHIR, JUDICIAL MEMBER

ITA No. 5480/Del/2010
Assessment Year: 2007-08

Sheraton International Inc.,
C/o Nangia & Co.,
Suite-4A, Plazma M-6,
Jasola, New Delhi.
PAN No. AAGCS6140J

DDIT,
Circle 2(2),
International Taxation,
New Delhi.

(Appellant)

(Respondent)

Appellant by: Sh. Amit Arora, CA
Respondent by: Sh. D.K. Gupta, CIT(DR)

ORDER

PER S.V. MEHROTRA, A.M.

This appeal filed by the assessee is directed against the assessment order dated 04/10/2010 passed u/s 144C(1) read with section 143(3) in consequence to the directions issued by Dispute Resolution Panel u/s 144C(5) dated 27/09/2010 for A.Y. 2007-08.

2. Brief facts of the case are that the assessee is a company incorporated in USA. The assessee is engaged in the business of providing various kinds of services to the Hotels across the world. The assessee had entered into agreements with a chain of ITC Hotels and some other Hotels. During the financial year under consideration the assessee had shown the following amounts on cash basis under different heads for the services rendered to the following Hotels: -

S.No. Name of the Marketing Frequent Starwood Total Hotels Fee Flier Preferred Program Guest (In Rupees) (In Rupees) (In Rupees) (In Rupees)

1. Maurya Sheraton 54025669 1826962 12390793 68243425

2. Grand Maratha 22306607 3111644 15114344 40532595

3. Sonar Bangla 8209771 174573 726402 9110745

4. Grand Central 12365377 436655 5833182 18635213

5. Kakatia 12638213 77893 1204067 13920173
6. Park Sheraton 13282919 1453542 992608 15729069
7. Windsor Manor 29772853 35422 8912221 38720496
8. Rajputana Palace 14328645 - - 14328645
9. Chola Seraton 7172141 217247 1690574 9079963
10. Mughal Sheraton 9821767 19861 40019 9881647
11. Adjustment 475831 475831 Total 184399793 7353799 46904210 238657802

3. The assessee in the note attached to the return of income submitted as under: -

"The assessee is a Non-resident Company incorporated under the laws of USA and carries on the business of providing various hotel related services in several countries around the world. Sheraton has entered into agreements with the Indian Hotels for providing worldwide publicity, marketing and advertising of hotels through Sheraton's worldwide system of sales, advertising, promotion, public relations and reservations.

During the year under question, the assessee has derived income viz. Marketing Fees & SPG from the Indian Hotels in respect of the aforesaid agreements. It is the contention of the assessee company that the aforesaid revenue derived by it is in the nature of business profits as defined in Article 7 of the Double Tax Avoidance Agreement between India and USA ("DTAA").

The Company does not have a Permanent Establishment in India as defined in Article 5 of the DTAA.

In view of the fact that the Company does not have a PE in India, the aforesaid sums are not chargeable to tax in India."

4. The AO required the assessee to explain as to why the aforesaid sums should not be taxed as income from 'royalty' and/or 'fees for technical services'. The assessee's reply has been reproduced in para 4.1 which was as under: -

"Under the previously entered contracts, the assessee company has rendered services to Indian hotels, which are predominantly in relation to advertisement, publicity and sales promotion of hotel business worldwide in mutual interest and the use of trademark, trade names etc. of the assessee company by the Indian hotels as well as the provision of other services and facilities as in terms of the agreements were

merely incidental to the undertaking of this main activity. Further, the programmes in question known as FFP and SPG implemented in the Sheraton Group of Hotels including the Indian hotels were also incidental to the said activity. The services rendered by Sheraton do not make available any technical knowledge or expertise and hence, cannot be termed as fees for included services in terms of Article 12(4)(b) of the DTAA between India and USA. Further, the implementation of the Sheraton's programme by the Indian hotels is neither ancillary nor subsidiary to the enjoyment of right or property or information as envisaged in art. 12(3)(a) of the DTAA. Accordingly, the same can also not be treated as fees for included services within the meaning given in art. 12(4)(a) of the DTAA."

5. The assessee also relied on the decision of ITAT in its own case for assessment years 1995-96 to 2000-01. The assessee also referred to the decision of Hon'ble Delhi High Court approving the aforesaid decision reported in 313 ITR 267, wherein the Hon'ble Delhi High Court approved the Tribunal's finding that the payments received were in the nature of business income and since assessee admittedly had no permanent establishment under Article 7 of the DTAA, business income received by the assessee could not be brought to tax in India. The AO, however, observed that since the decision of Hon'ble Delhi High Court had not been accepted by the department and the appeal has been preferred before the Hon'ble Supreme Court, therefore, following the order for AY 1998-99 the assessee's claim was not acceptable. He computed tax @ 15%.

6. Being aggrieved with the assessment order, the assessee is in appeal before us and has taken following grounds of appeal: -

1. "That the AO has erred on facts and in law in assessing the income of the appellant at Rs. 238,657,802/- by holding that the payments received by the appellant for rendering various marketing and advertisement services to customers in India, were taxable as "Royalty" and/or "Fees for Technical services", in terms of section 9 of the Income Tax Act, 1961 ("the Act") as well as Article 12 of the India-US Double Taxation Avoidance Agreement ("DTAA").

1.1 That the AO has erred on facts and in law in apportioning part of the consideration received by the appellant towards, (i) use of trademark,

(ii) making available technical know-how, skills, (iii) use of CRS systems for making reservations and, (iv) providing marketing, advertisement services merely based on conjectures and surmises and without having any cogent basis for the same.

1.2 That the AO has erred in facts and on law in assigning a part of the aforesaid payments towards the right to use trademark and holding that the same were was taxable as "Royalty" as per the provisions of the Act.

1.3 That the AO has erred in facts and on law in assigning a part of the aforesaid payments towards making available technical know-how skills and managerial practice, marketing, publicity and

reservation fees and for use of highly sophisticated CRS systems and holding that the same were taxable as "Fees for Technical services" as per the provisions of the Act.

2. That the AO, while holding as above, has failed to appreciate that the appellant had rendered the above services in pursuance of an integrated business arrangement for rendering marketing and advertisement services, which constitute business profits of the appellant and as per provisions of Article 7 (read with Article

5) of the DTAA, business income received by the appellant cannot be brought to tax in India since the appellant does not have a permanent establishment in India.

3. That the AO has erred in holding that the contributions received by the appellant towards Frequent Flier Program ("FFP") and Starwood Preferred Guest Program ("SPGP") were liable to tax in India, even though there is no finding in the assessment order about the taxability thereof.

4. That the AO has erred in law and on facts in mechanically following the assessment order for AY 1998-99 and disregarding the fact that the same has been overruled by the decision of the Hon'ble Delhi High Court in appellant own case for AYs 1995-96 to 2000-01 vide order dated 30.01.2009.

5. That the AO has erred in law in not following the decision of the Hon'ble Delhi High Court merely on the ground that the same has not been accepted by the Department and an appeal against the said decision has been filed before the Hon'ble Supreme Court."

7. We have considered the submissions of both the parties and have perused the record of the case. We find that Hon'ble Delhi High Court in the case of Director of Income Tax vs. Sheraton International Inc. vide its judgment dated 30/01/2009 reported in 313 ITR 267 held as under: -

"In view of the 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 interests 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, that the payments received were neither in the nature of royalty u/s 9(1)(vi) r/w Explan. 2 or in the nature of fee for technical services u/s 9(1)(vii) r/w Explan. 2 or taxable under art. 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 PE under the art. 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 colorable device, in particular, that the payments received were for use of trademark, brand name and stylized mark "S". The reasoning adopted by the Tribunal is sustainable. Moreover, these are findings of fact which could be gone into only if a question was proposed impugning the findings of the Tribunal judgment. No such question has been proposed in the appeal. No fault can be found with the

impugned judgment. No question of law, much less a substantial question of law, has arisen for consideration. In the result the appeals are dismissed - K. Ravindranathan Nair vs. CIT (2000) 164 CTR (SC) 498: (2001) 247ITR 178 (SC) relied on; Sheraton International Inc. vs. Dy. Director of IT (2007)106 TTJ (Del.) 620 : (2007) 107 ITD 120 (Del.) affirmed."

8. Respectfully following the decision of Hon'ble Delhi High Court, it is held that the main services rendered by the assessee, a company incorporated and tax resident in USA, to Indian company, was advertisement, publicity and sales promotion keeping in mind their mutual interest and in that context, the use of trademark, trade name etc. and other enumerated services referred to in the agreement with the assessee were incidental to main service and, therefore, the payments received were neither in the nature of royalty nor in the nature of fee for technical services, but business income and assessee not having any PE in India, such business income was not taxable in India.

9. In the result, the assessee's appeal is allowed.

Order pronounced in the open court on 14/12/2012 Sd/- Sd/-

(I.C. SUDHIR)
JUDICIAL MEMBER

(S.V. MEHROTRA)
ACCOUNTANT MEMBER

Dated: 14/12/2012
*Kavita

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.

TRUE COPY

By Order

ASSISTANT REGISTRAR