IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI
BEFORE SHRI G.S.PANNU, AM AND SHRI RAVISH SOOD, JM

ITA No.7159/Mum/2012
(**निर्धारण वर्ष** / Assessment Years:2009-10)

Renaissance Services BV C/o BMR & Associates LLP BMR House, 36B 36B, Dr. R.K Shirodkar Marg, Parel, Mumbai- 400 012	**बनाम**/ Vs.	The Deputy Director of Income-Tax (International Taxation)-2(1), 1st Floor Room No. 120, Scindia House, Ballard Estate Mumbai- 400 038
स्थायी लेखा सं./जीआइआर सं./PAN No. AAECR4995E		
(अपीलार्थी /**Appellant)**	**:**	**(**प्रत्यर्थी / **Respondent)**

अपीलार्थी की ओर से / **Appellant by**	:	S/shri Paras S. Savla and Pratik Poddar, A.Rs
प्रत्यर्थी की ओर से**/Respondent by**	:	Shri M.V. Rajguru, Sr.D.R

सुनवाई की तारीख / **Date of Hearing**	**:**	25.05.2018
घोषणा की तारीख **/** **Date of Pronouncement**	**:**	08.06.2018

आदेश / **O R D E R**

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-11, Mumbai, dated 03.09.2012 which in itself arises from the order passed by the A.O under Sec. 144C(3) r.w. Sec. 143(3) of the Income tax Act, 1961, dated 09.02.2012 for A.Y 2009-10. The assessee

assailing the order of the CIT(A) had raised before us the following grounds of appeal:

> *"Based on the facts and circumstances of the case, the Appellant respectfully submits that the learned Commissioner of Income-tax (Appeals) - 11, Mumbai ['CIT(A)'] has in his order dated September 3, 2012 under section 250 of the Income-tax Act, 1961 (the 'Act') erred on the following grounds (without prejudice to each other):*
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> 1. *In holding that the amounts received by the Appellant from the Indian Hotels under the Training and Computer Systems Agreement ('TCSA') are not in the nature of reimbursement of costs and hence, liable to tax under the Act*
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> 2. *In holding that conducting the training programs (i) makes available technical knowledge and (ii) is ancillary and subsidiary to the royalty agreement and hence, the amounts received for the same are chargeable to tax as fees for technical services under the Double Taxation Avoidance Agreement between India and Netherlands (the 'India-Netherlands Tax Treaty') as well as the Act.*
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> 3. *In holding that the amounts received by the Appellant on account of providing access to the international centralized reservation facility are ancillary and subsidiary to the enjoyment of the right to use the brand 'Marriott' and hence, taxable as fees for technical services under the India-Netherlands Tax Treaty as well as the Act.*
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> 4. *On the facts and the circumstances of the case and in law, the ld. CIT(A) has erred in levying interest unde Section 234B of the Act amounting to RS. 3,52,486/-.*
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> 5. *On the facts and circumstan es of the case and in law, the assessment proceedings have been abated, since the learned Assessing Officer ('Assessing Officer') has failed to pass the order giving effect to the direction in CIT(A)'s order within the period of limitation as provided by the Act.*
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> 6. *Without prejudice to the above, on the facts and circumstances of the case and in law, the A.O has erred in not granting the TDS credit as directed by the CIT(A) within the period of limitation as provided by the Act.*
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> 7. *On the facts and in the circumstances of the case and in law, the A.O has erred in adding surcharge, education cess and secondary and higher education cess to the tax on income charged as per the provisions of the India and Netherlands Tax Treaty.*
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> *The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at the time of hearing of the appeal, so as to enable the Honourable Income-tax Appellate Tribunal to decide this appeal according to the law.*
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> *For the above and other grounds and reasons which may be submitted during the course of hearing of this appeal, the Appellant requests that the appeal be allowed as prayed."*

2. Briefly stated, the facts of the case are that the assessee is a tax resident of Netherland and is a part of the Marriott group. The assessee which is engaged in conducting training programs and providing access to

various computer systems, viz. Centralized Reservation System ('CRS'), Property Management Systems and Other Systems to Marriott chain of hotels across the world had e-filed its return of income for A.Y 2009-10 on 30.10.2009, declaring total income of Rs. Nil. The case of the assessee was thereafter selected for scrutiny assessment under Sec. 143(2).

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee had entered into a Training and Computer Systems Agreements (for short 'TCSA') with M/s Viceroy Hotels Ltd., Hyderabad and M/s Chalet Hotels Ltd., Mumbai (hereinafter referred to as 'Indian Hotels') for conducting training programs of their employees and also other services. It was observed by the A.O that the assessee during the year under consideration was in receipt of consideration for the services rendered to the Indian Hotels, as under:

Particulars	Training and Computer System Reservation Receipts.
M/s Chalet Hotels Limited, Mumbai	Rs. 1,05,37,350/-
M/s Viceroy Hotels Limited, Hyderabad.	Rs. 9,98,148/-
Total	Rs. 1,15,35,498/-

4. On a query by the A.O as to why the aforesaid receipts may not be taxed in India, it was submitted by the assessee that as the consideration received from the Indian Hotels was in the nature of reimbursement of expenses incurred by the assessee and there was no mark up or profit made by the assessee on the said receipts, hence the same was not liable to be taxed. The assessee further claimed that by rendering the services it did not "make available" any technical experience, skill, knowledge, process etc to the Indian hotels. Alternatively, it was the claim of the assessee that the consideration received from the Indian hotels was its business receipts, which however in the absence of a Permanent Establishment (for short 'PE') in India could not be subjected to tax in India as per Article 7 of the India-Netherland tax treaty. However, the A.O was not persuaded to subscribe to

the said claim of the assessee for the reason that the latter despite specific directions had failed to place on record the Tax Residency Certificate (for short 'TRC') for the year under consideration. Alternatively, the A.O held a conviction that even if the assessee was to be taken as a tax resident of Netherlands, even then as per the India-Netherland tax treaty the receipts in the hands of the assessee were taxable in India. Succinctly stated, the A.O held a conviction that the consideration received by the assessee from conducting training programs for the Indian Hotels was taxable as 'Fees for technical services' (for short 'FTS') under Sec. 9(1)(vii) of the Income-tax Act, 1961 and also under Article 12 of the India-Netherlands tax treaty. Still further, the A.O was of the view that the considera ion received by the assessee from the Indian Hotels for providing access to the Computer Reservation System (for short 'CRS'), Property Management System and Other Systems was taxable as 'Royalty' under Sec. 9(1)(vi) of the Act, and as FTS as per the provisions of Article 12(5)(a) r.w Article 12(4) of the India-Netherlands tax treaty. The A.O also not being persuaded to be in agreement with the claim of the assessee that the consideration received from the Indian Hotels for conducting Training programs and CRS were in the nature of reimbursement of expenses incurred by the assessee, declined to accept the same. On the basis of his aforesaid deliberations, the A.O characterising the aforesaid receipts of Rs. 1,15,35,498/- as royalty and FTS, brought the same to tax in the hands of the assessee.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee to impress upon him that the consideration for conducting Training programs and providing access to CRS, Property Management Systems and Other Systems were towards reimbursement of expenses incurred by the assessee, hence the same were not taxable in India, was however not persuaded to accept the same. Still further, the CIT(A) after deliberating at length on the taxability of the aforesaid receipts in the hands of the assessee, held as under:

(A). AS REGARDS CONSIDERATION RECEIVED FROM ÍNDIAN HOTELS' FOR CONDUCTING TRAINING PROGRAMSTRAINING FEES:

(i). The CIT(A) observed that the Indian Hotels, viz. M/s Viceroy Hotels Ltd., Hyderabad and M/s Chalet Hotels Ltd., Mumbai had entered into respective agreements with the group company of the assessee, for permitting them to use the brand name "Marriott" under a license for royalty. The license fee so payable to the group company of the assessee was taxable as royalty. On the basis of the aforesaid facts, it was observed by the CIT(A) that the agreement execu ed between the assessee and the Indian Hotels was an integral part of the license agreement between the Indian Hotels and the group company of the assessee. The CIT(A) held a conviction that though technically the two agreements were independent of each other, but in reality they were mutually complementary. On the basis of his aforesaid deliberations it was concluded by the CIT(A) that as the consideration received by the assessee, as per the agreements, was for services that were ancillary and subsidiary to the royalty agreement hence, the same was taxable as FTS under Article 12(5)(a) of the India-Netherland tax treaty.

(B). AS REGARDS CONSIDERATION RECEIVED FROM ÍNDIAN HOTELS FOR PROVIDING ACCESSS TO CRS, PROPERTY MANAGEMENT SYSTEM AND OTHER SYSTEMS:

(i). The CIT(A) observed that as far as the access to the CRS, Property Management System and Other Systems was concerned, the same was a part of the main licensing agreement for the use of the brand name "Marriott". On the basis of the aforesaid deliberations, it was concluded by the CIT(A) that as the access to the CRS, Property Management Systems and Other Systems was ancillary and subsidiary to the enjoyment of the right to use the brand "Marriott", thus the same was taxable as FTS.

Thus, on the basis of his aforesaid observations, the CIT(A) concluded that the consideration received by the assessee from the Indian Hotels for conducting Training programs and allowing access to CRS, Property Management Systems and Other Systems were taxable as FTS.

6. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The ld. Authorised representative (for short 'A.R') for the assessee, at the very outset submitted that the consideration received by the assessee from the Indian Hotels for conducting training programs had wrongly been held by the CIT(A) as FTS. The ld. A.R in order to drive home his contention submitted that as the training provided to the management level personnel was in the nature of general managerial /leadership training, hence the same could not be brought within the sweep of 'technical services'. It was further averred by the ld. A.R that the services rendered by the assessee also did not fell within the meaning of 'Consultancy services'. The ld. A.R in support of his contention that as 'training services' are not technical in nature, hence the consideration received in lieu thereof cannot be brought to tax as FTS, relied on the following judicial pronouncements

(i). Llyods Register Indus rial Services (India) P. Ltd. vs. ACIT (2010) 36 SOT 293 (Mum).

(ii). Ershisanye Construction Group India (P) Ltd. vs. DCIT (2017) 84 taxmann.com 108 (Kol).

(iii). ACIT Vs. PCI Ltd. (2011) 12 taxmann.com 59 (Delhi)

(iv). ITO Vs. Veeda Clinic Research P. Ltd. (2011) 13 taxmann.com21 (Bang)

(v). Wockhardt Ltd. Vs. ACIT (2011) 10 taxmann.com 208 (Mum).

The ld. A.R taking support of the order of the ITAT, Bangalore in the case of ITO Vs. Veeda Clinic Research P. Ltd. (2011) 13 taxmann.com21 (Bang), submitted that in order to successfully invoke the coverage of training fees by 'make available' clause in the definition of technical services, the onus was cast upon the revenue authorities to demonstrate that these services involved transfer of technology. It was in the backdrop of the aforesaid contention submitted by the ld. A.R that though the training services

rendered by the assessee were in the nature of general managerial /leadership training services and not in the nature of technical services, but in case it was to be held otherwise and the services rendered by the assessee were to be brought within the sweep of FTS as per Article 12(5)(b), than the onus was cast upon the A.O to prove that the assessee by providing the services did 'make available' transfer of technical knowledge. The ld. A.R elaborating on the nature of services rendered by the assessee during the year submitted, that though as per the agreement it was to provide, viz. (i). certain core-training programs for management-level personnel; and (ii). other training for other employees of the above referred Indian Hotels, however during the year under consideration it had only provided certain core-training programs for management-level personnel. The ld. A.R further dwelling upon the *modus operandi* for providing the services submitted, that the assessee would arrange for trainers employed with the affiliates of Marriot group located worldwide, and they would at the invitation of the assessee visit India and provide shor training sessions. It was submitted by the ld. A.R that the assessee did not employ any of the persons/trainers who provided the training. It was further averred by the ld. A.R that the training services provided by the assessee could also not be characterised as consultancy services. The ld A.R further adverted to the reliance that was placed by the A.O on certain judicial pronouncements, viz. (i). Intertek Testing Services (2008) 307 ITR 418 (AAR); (ii). G.V.K Industries (1997) 228 ITR 564 (AP); (iii). Continental Construction Ltd. Vs. CIT (1992) 195 ITR 81 (SC); (iv). CBDT Vs. Oberoi Hotels (India) Pvt. Ltd (1998) 231 ITR 148 (SC); and (v). Dean, Goa Medical College Vs. Dr. Sudhir Kumar Solanki (2001) 7 SCC 645 to support his view that technical services included professional services. It was submitted by the ld. A.R that if the training services rendered by the assessee were to be considered as professional services, than the same would fall within the scope of Article 14 of the India-Netherland tax treaty which pertained to "Independent Personal Services", and the same would thus automatically be excluded from Article 12 dealing with "Fees for technical services". It was submitted by the ld. A.R that if the

training services rendered by the assessee were to be construed as professional services, than as the assessee satisfied neither of the two conditions contemplated in Article 14 for bringing the same to tax in the other contracting state, viz. (a). fixed base for performing of the professional activities in the contracting state; or (b). stay for a period or periods exceeding 183 days in the fiscal year, thus the same could not be subjected to tax in India. The ld. A.R submitted that the view taken by the CIT(A) that as the TCSA agreements entered into by the assessee with the Indian Hotels were an integral part of the licensing agreements and both the agreements were complementary to each other, thus the consideration received by the assessee from providing training services being "ancillary and subsidiary" to the enjoyment of rights, property or information by the Indian Hotels on the basis of the licensing agreement, could safely be held as FTS in the hands of the assessee as per Article 12(5)(a) of the India-Netherlands tax treaty, was an absolutely misconceived view. It was submitted by the ld. A.R that in order to consider a service fee as 'ancillary and subsidiary' to the application or enjoyment of some right, property or information for which a consideration described in Article 12(4) is received, the service must be related to the application or enjoyment of right, property or information. It was further averred by the ld. A.R that as the assessee 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 tax treaty, hence the training services rendered by it to the India Hotels were provided in the ordinary course of its business. Thus, it was the contention of the ld. A.R that the CIT(A) had failed to appreciate that services rendered by the assessee can only be characterised as "ancillary and subsidiary" under Article 12(5)(a), only if the assessee is in receipt of consideration by way of royalty as per Article 12(4) of the India-Netherland tax treaty. The ld. A.R further submitted that both the A.O and the CIT(A) had erred in treating the consideration received by the assessee for providing access to CRS, Property Management System and Other Systems as royalty/FTS and FTS, respectively. The ld. A.R submitted that as the consideration received by the assessee for providing access to

computer software/systems i.e a copyrighted article does not involve any transfer of copyright or use of copyright itself, hence the same could not have been taxed as royalty. Still further, it was averred by the ld. A.R that as the consideration received by the assessee for providing access to CRS, Property Management Systems and Other Systems were for standard facilities/services rendered to the Indian Hotels, thus they could not be characterised as 'technical services' and subjected to tax as FTS in the hands of the assessee. It was submitted by the ld. A.R that the CIT(A) on the basis of a non-speaking order had held the consideration received by the assessee for allowing access to CRS, Property Management Systems and Other Systems as FTS. The ld. A.R rebutting the observations of the CIT(A) submitted that as the assessee was not in receipt of any amount as royalty in respect of any right, property or information as provided in Article 12(4) from the Indian Hotels, thus the services rendered by the assessee to the Indian Hotels by allowing access to the CRS, Property Management System and Other Systems services/facilities could not be characterised as "ancillary and subsidiary" for enjoyment of any such right, property or information, and the consideration received for providing the said services could not be held as FTS under Article 12(5)(a) of the India-Netherland tax treaty. It was the claim of the ld. A.R that as the consideration for providing access to the CRS, Property Management System and Other Systems were business receipts in the hands of the assessee, however the same in the absence of a PE in India, could not be brought to tax in India as per Article 7 of the India-Netherland tax treaty. The ld. A.R in order to drive home his contention that as the consideration received by the assessee for providing access to CRS, Property Management System and Other Systems was for providing standard facilities/services and not in lieu of any tailor made services, thus the same could not be held as FTS, relied on the judgments of the Hon'ble Supreme Court in the case of CIT Vs. Kotak Securities Ltd. (2016) 383 ITR 1 (SC) and DIT Vs. A.P Moller Mersk (2017) 392 ITR 186 (SC). The ld. A.R in support of his contention that consideration received for providing access to reservation system cannot be held as FTS, relied on

certain judicial pronouncements, viz. (i). DIT Vs. Sheraton International Inc. (2009) 313 ITR 267 (Del); (ii). Bass International Holdings NV Vs. JCIT (ITA No. 4341/Mum/2002; dated. 12.05.2006; and (iii). Six Continents Hotel Inc. Vs. DCIT (2011) 11 taxmann.com 332 (Mum). The ld. A.R submitted that in all the aforesaid cases the courts/tribunal had held the receipts for providing reservation services as business receipts. The ld. A.R further assailed the validity of interest charged by the A.O under Sec. 234B of Rs. 3,52,486/-. It was submitted by the ld. A.R that now when a duty was cast upon the payer to deduct and pay tax at source, then on the payers failure to do so interest under Sec. 234B could not be imposed on the payee assessee. The ld. A.R in support of his aforesaid contention relied on the judgment of the Hon'ble High Court of Bombay in the case of DIT (Intl. Taxation) Vs. NGC Network Asia LLC (2009) 313 ITR 187 (Bom). Lastly, the ld. A.R submitted that the A.O had erred in raising the tax rate provided in the India-Netherland tax treaty by a further amount of surcharge, education cess and secondary and higher education cess. The ld. A.R in support of his aforesaid contention drew our attention to certain judicial pronouncements.

7. Per contra, the ld. Departmental representative (for short 'D.R') relied on the order of the CIT(A). The ld. D.R in support of his contention that the consideration received by the assessee from the Indian Hotels for conducting training programs and allowing access to CRS, Property Management System and Other Systems were liable to assessed as FTS under Article 12 of the India-Netherlands tax treaty, relied on the order passed by a coordinate bench of the Tribunal in the case of a group entity of the assessee i.e Marriot International Inc. Vs. DDIT (Intl. Taxation), 4(1), Mumbai (2015) 170 TTJ 305 (Mum). The ld. D.R fairly conceded that the issue that the tax rate provided in the India-Netherland tax treaty could not have been further enhanced by surcharge, education cess and secondary and higher education cess, was covered by the orders of the coordinate benches of the Tribunal in the favour of the assessee. The ld. D.R also conceded that the issue that no interest under Sec. 234B could have been levied on the assessee payee where the payer who was under an obligation

to deduct and deposit the tax at source had failed to do so, was covered by the judgment of the Hon'ble High Court of Bombay in the case of DIT (Intl. Taxation) Vs. NGC Network Asia LLC (2009) 313 ITR 187 (Bom).

8. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. Before proceeding further, we may herein observe that the assessee had filed before us an application dated 31.01.2018 seeking admission of certain documents as additional evidence under Rule 29 of the Appellate Tribunal rules, 1963. However, we are of the considered view that as the assessee had failed to show that the lower authorities had adjudicated the case without affording reasonable opportunity to the assessee to adduce the said documents, thus the same cannot be admitted. We thus, decline to admit the documents filed by the assessee before us as additional evidence.

9. We shall now advert to the contentions advanced by the ld. A.R to drive home his contention that the consideration received by the assessee from the Indian Hotels for conducting training and providing access to CRS, Property Management System and Other Systems, having been received by way of reimbursement of expense, were thus not liable to be subjected to tax in the hands of the assessee in India. We are of the considered view that as the assessee had failed to substantiate on the basis of any clinching evidence that the consideration received for the services rendered by it to the Indian Hotels were in the nature of reimbursement of expenses incurred by the assessee and there was no mark up or profit made by rendering the said services, therefore, its claim that the same not being in the nature of income was not liable to be taxed in India cannot be accepted. We thus reject the aforesaid claim of the assessee. The **Ground of appeal No. 1** is dismissed.

10. We shall now advert to the claim of the assessee that the consideration received for conducting training programs had wrongly been held by the CIT(A) as FTS in its hands. The assessee had assailed the observations of the CIT(A), viz. (i). the training programs conducted by the assesses did "make available" technical knowledge; and (ii). that as the

conducting of training programs by the assessee was "ancillary and subsidiary" to the royalty agreement, hence the consideration received therefrom was liable to be assessed as FTS under Article 12(5)(a) of the India-Netherland tax treaty. We find that as per the agreement entered into between the assessee and the Indian Hotels the assessee was to provide (i). certain core-training programs for management level personnel; and (ii). other training for other employees of the above referred Indian Hotels. However, during the year under consideration the assessee had only provided certain core-training programs for management level personnel. We are of the considered view that the claim of the assessee before the lower authorities that as the training services provided to the management level personnel were in the nature of general managerial/leadership training and the same did neither involve 'make available' or transfer of any technology to the personnel, had neither been dislodged before the lower authorities, nor anything has been placed on record before us by the ld. D.R, which could persuade us to hold otherwise. We ind ourselves to be in agreement with the view taken by the ITAT, Bangalore in the case of ITO Vs. Veeda Clinic Research P. Ltd. (2011) 13 taxmann.com21 (Bang), that in order to successfully invoke the coverage of training fees by 'make available' clause in the definition of technical services, the onus is on the revenue authorities to demonstrate that the services do involve transfer of technology. We have further perused the case laws relied upon by the ld. A.R to impress upon us to return a finding that the consideration received by the assessee from providing training services being in the nature of managerial/leadership training, thus could not have been assessed as FTS in the hands of the assessee, as under:

(i). Llyods Register Industrial Services (India) P. Ltd. vs. ACIT (2010) 36 SOT 293 (Mum):

The Tribunal observed that the expenses incurred by the assessee which was engaged in the business of survey of ships, on the training of its employees who would inspect various mechanical and electrical equipments in the ship and ultimately issued a fitness certificate, could not be held as payments made for technical services. The Tribunal while concluding as hereinabove, observed that the employees by taking training from the Principal company had acquired only inputs to enable them to perform their work with desired state of efficiency.

(ii). Ershisanye Construction Group India (P) Ltd. vs. DCIT (2017) 84 taxmann.com 108 (Kol):

The Tribunal had observed that payments which were made by a Chinese company in respect of training of Chinese engineers of the assessee in english language would not constitute FTS.

(iii). ACIT Vs. PCI Ltd. (2011) 12 taxmann.com 59 (Delhi):

The High Court observed that payments made by the assessee to a non-resident party for training its personnel or customers to explain to the proposed buyers the salient features of the products imported by the assessee in India and to impart training to the customers to use the equipments cannot be held to be FTS.

(iv). ITO Vs. Veeda Clinic Research P. Ltd. (2011) 13 taxmann.com21 (Bang):

Where training services to the employees of the assessee company was general in nature, not involving any transfer of technology, the fees for providing such services was not taxable as FTS as per Article 13 of India-U.K tax treaty.

(v). Wockhardt Ltd. Vs. ACIT (2011) 10 taxmann.com 208 (Mum):

The services rendered by the employees of a non resident company being in the nature of sharing management experiences and business strategies could not be termed as technical services.

We have deliberated at length on the aforesaid judicial pronouncements in the backdrop of the facts involved in the case of the assessee before us, and are of the considered view that the consideration received by the assessee for the managerial/leadership training provided to the employees of the Indian Hotels cannot be held as FTS.

11. We have further deliberated on the reliance placed by the CIT(A) on the judgment of the Hon ble Supreme Court in the case of CBDT Vs. Oberoi Hotels (India) Pvt Ltd (1998) 231 ITR 148 (SC), wherein it was observed that 'technical services' included 'professional services'. Still further, we find that the A.O also had relied on certain judgments/orders,viz. (i). Intertek Testing Services (2008) 307 ITR 418 (AAR); (ii). G.V.K Industries (1997) 228 ITR 564 (AP); (iii). Continental Construction Ltd. Vs. CIT (1992) 195 ITR 81 (SC); (iv). CBDT Vs. Oberoi Hotels (India) Pvt. Ltd (1998) 231 ITR 148 (SC); and (v). Dean, Goa Medical College Vs. Dr. Sudhir Kumar Solanki (2001) 7 SCC 645, to support his view that 'technical services' included 'professional services'. We find substantial force in the contention of the ld. A.R that in case training services rendered by the assessee to the Indian Hotels were to be construed as professional services, than the same would fall within the

sweep of Article 14 of the India-Netherland tax treaty, which exclusively pertained to "Independent Personal Services" and would automatically be excluded from Article 12 dealing with "Fees for technical services". Still further, a perusal of Article 14 reveals that the same could be assessed in the contracting state i.e India, subject to satisfaction by the assessee of either of the two conditions therein provided, viz. (a). fixed base for performing of the professional activities in the contracting state; or (b). stay for a period or periods exceeding 183 days in the fiscal year.

12. We shall now advert to the observations of the CIT(A) that as the Training and Computer systems agreements (for short 'TCSA') entered into by the assessee with the Indian Hotels, viz. M/s Viceroy Hotels Ltd., Hyderabad and M/s Chalet Hotels Ltd., Mumbai were an integral part of the licensing/royalty agreement, thus both the agreements were complementary to each other. The CIT(A) was of the view that as the training services rendered by the assessee were "ancillary and subsidiary" to the enjoyment of the rights, property or information pursuant to the royalty agreement, thus the consideration received by the assessee from rendering such services could safely be held as FTS as per Article 12(5)(a) of the India-Netherland tax treaty. We have deliberated at length on Article 12(5)(a) of the tax treaty, which reads as under:

> *"Article 12(5): For the purposes of this Article, "fees for technical services" means payment 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 4 of this Article is receives; or"*

We find that for invoking Article 12(5)(a) and holding the consideration received by an assessee from certain "ancillary and subsidiary" technical or consultancy services rendered for the application or enjoyment of the right, property or information as FTS, presupposes receipt by the assessee of a consideration towards royalty as provided in Article 12(4) of the tax treaty. We are of the considered view that as the assessee was not the owner of any

brand or trademark for which any royalty would have been received by it under Article 12(4) of the India-Netherland tax treaty, hence the services provided to the Indian Hotels were in the ordinary course of its business, and could not be brought within the sweep of "ancillary and subsidiary" services as provided in Article 12(5)(a) of the India-Netherland tax treaty. We thus, are of a strong conviction that the CIT(A) loosing sight of the fact that as the assessee was not in receipt of any royalty as per Article 12(4) of the India-Netherland tax treaty, hence had failed to appreciate that the training services rendered by it could not have been held to be "ancillary and subsidiary" services under Article 12(5)(a). We thus, are of the view that the consideration received by the assessee for providing training services to the Indian Hotels could not be held as FTS under Article 12(5)(a) of the India-Netherland tax treaty. We are of the considered view that in terms of our aforesaid observations, as neither the training services rendered by the assessee to the Indian Hotels could be held to be technical services, nor the same could have been characterised as "ancillary and subsidiary" services as per Article 12(5)(a), hence the consideration received by the assessee for rendering the training services could not be held as FTS in its hands. We thus, not being persuaded to subscribe to the view taken by the CIT(A) that the consideration received for providing training services to the Indian Hotels was chargeable as FTS in the hands of the assessee, set aside his order. The **Ground of appeal No. 2** is allowed in terms of our aforesaid observations.

13. We shall now advert to the assailing of the order of the CIT(A) by the assessee, on the ground that he had erred in holding that the amounts received by the assessee for providing access to the international CRS, Property Management Systems and Other Systems was ancillary and subsidiary to the enjoyment of the right "Marriott" and hence, taxable as FTS under the India-Netherland tax treaty, as well as under the Act. We find that since inception, it has been the claim of the assessee that as the providing of access to CRS, Property Management Systems and Other Systems to the Indian Hotels, were standard facilities/services, thus they

could not be characterised as 'technical services' and the consideration received in lieu thereof be subjected to tax as FTS receipts. We find from a perusal of the agreement entered into between the assessee and the Indian Hotels that the assessee had made available the CRS, Property Management Systems and Other Systems for use by the Indian Hotels in their business. We find that the ld. A.R in support of his contention that the consideration received by an assessee for granting license to use its copyrighted software for the licensees own business purpose only, could not be brought to tax as royalty, had relied on the judgment of the Hon'ble High Court of Delhi in the case of DIT Vs. Infrasoft Ltd. (2013) 39 taxmann.com88 (Delhi) and host of other judicial pronouncements. However, as the CIT(A) had concluded that the consideration received by the assessee from the Indian Hotels for providing access to CRS, Property Management Systems and Other Systems was FTS in the hands of the assessee, hence we refrain from referring to and dealing with the contentions advanced by the ld. A.R in support of his claim that the same could not be held as oyalty. We find that the High Court of Delhi in the case of DIT Vs. Sheraton International Inc.(2009) 313 ITR 267 (Del) had observed that consideration received by the assessee for providing access to reservation system could not be brought to tax as FTS in the hands of the assessee We further find that the Hon'ble Supreme Court in the case of CIT vs Kotak Securities Ltd. (2016) 383 ITR 1 (SC) had in the backdrop of the facts involved in the case before it, had observed that services made available by Bombay Stock Exchange [BSE Online Trading (BOLT) System] for which transaction charges were paid by members of BSE were for common services that every member of Stock Exchange was necessarily required to avail of to carry out trading in securities in Stock Exchange, thus such services did not amount to 'technical services' provided by Stock Exchange, as the same were not services which were specifically sought for by the user or consumer. The Hon'ble Apex Court following the aforesaid view, had thereafter observed in the case of CIT (IT)-1 Vs. A.P Moller Maersk A S (2017) 392 ITR 186 (SC), that where the assessee, a foreign shipping company had set up a telecommunication system in order

to enable its agents across globe including India to perform their role more effectively, the payment received for providing such facility was not taxable as fee for technical services. We have perused the facts of the case before us and after deliberating on the same in the backdrop of the aforesaid judicial pronouncements are of the considered view that as the access to CRS, Property Management System and Other Systems provided to the Indian Hotels by the assessee were common facilities provided to the members of the Marriott chain of hotels across the world by the assessee, and were not tailor made services to suit their specific requirements, thus the said facility could not be construed as 'technical services'.

14. We shall now advert to the observations of the CIT(A) that as the consideration received by the assessee on account of providing access to CRS, Property Management Systems and Other Systems facility was ancillary and subsidiary to the enjoyment of the right to use the brand "Marriott", thus the same would be taxable as FTS under Article 12(5)(a) of the India-Netherlands tax treaty. We are of the considered view that as observed by us hereinabove, invoking of Article 12(5)(a) and holding the consideration received by an assessee from certain "ancillary and subsidiary" technical or consultancy services rendered for the application or enjoyment of the right, property or information as FTS, itself presupposes receipt by the assessee of a consideration towards royalty as provided in Article 12(4) of the tax treaty. We are of the considered view that now when the assessee was not the owner of any brand or trademark for which any royalty would have been received by it under Article 12(4) of the India-Netherland tax treaty, hence the services of providing access to CRS, Property Management System and Other Systems to the Indian Hotels were provided by it in the ordinary course of its business and could not be brought within the sweep of "ancillary and subsidiary" services under Article 12(5)(a) of the tax treaty. We thus, are of a strong conviction that the CIT(A) loosing sight of the fact that as the assessee had neither granted any right of enjoyment of the brand "Marriott" to the Indian Hotels and thus was not in receipt of any royalty as provided in Article 12(4) of the India-Netherland tax

treaty, thus the consideration received by it from the Indian Hotels for providing access to CRS, Property Management System and Other Systems, could not have been brought within the sweep of "ancillary and subsidiary" services under Article 12(5)(a). We thus, in terms of our aforesaid observations are of the considered view that as providing of access to CRS, Property Management Services and Other services could neither be held to be technical services, nor the same in terms of our aforesaid observations could have been characterised as "ancillary and subsidiary" services under Article 12(5)(a), hence the consideration received by the assessee for rendering the said services/facility could not be held as FTS in its hands. We thus, set aside the order of the CIT(A) holding that the consideration received by the assessee for providing of access to CRS, Property Management Services and Other Systems was chargeable as FTS in the hands of the assessee. The **Ground of appeal No. 3** is allowed in terms of our aforesaid observations.

15. We shall now take up the assailing by the assessee of the interest of Rs. 3,52,486/- charged by the A.O under Sec. 234B of the Act. We are persuaded to subscribe to the contention of the ld. A.R that now when a duty is cast upon the payer to deduct and pay tax at source, then on the payers failure to do so interest under Sec. 234B could not be imposed on the payee assessee. We find that the said issue is squarely covered by the judgment of the Hon'ble High Court of Bombay in the case of DIT (Intl. Taxation) Vs. NGC Network Asia LLC (2009) 313 ITR 187 (Bom). We thus, in terms of our aforesaid observations direct the A.O to delete the interest charged under Sec. 234B in the hands of the assessee. The **Ground of appeal No. 4** is allowed.

16. We find that the assessee being aggrieved with the order passed by the A.O while giving effect to the order of the CIT(A), has sought our indulgence for redressing the same by raising the grounds of appeal nos. 5 and 6. We are afraid that as the aforesaid grievances of the assessee does not emanate from the *impugned* order of the CIT(A) before us, hence the same cannot be

adjudicated by us. The **Grounds of appeal Nos. 5 and 6** are dismissed in terms of our aforesaid observations.

17. We shall now advert to the claim of the assessee that the A.O had erred in raising the 'tax rate' provided in the India-Netherland tax treaty by a further amount of surcharge, education cess and secondary and higher education cess. The ld. A.R in support of his aforesaid contention had drawn our attention to certain judicial pronouncements. We find that the issue that the of rate of tax provided in the tax treaty cannot be enhanced by including surcharge and education cess separately, is covered by an order of a coordinate bench of the Tribunal in the case of Capgemini SA vs. DCIT (Intl. Taxation)-2(10(1), Mumbai (2016) 160 ITD 13 (Mum). We thus, in terms of our aforesaid observations direct the A.O not to enhance the rate of tax provided in the tax treaty by including surcharge and education cess separately. The **Ground of appeal No.7** is allowed.

18. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

Order pronounced in the open court on 08/06/2018.

Sd/-	Sd/-
(G.S. PANNU)	(RAVISH SOOD)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 08.06.2018
Ps. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai

6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**