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IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD "A" BENCH, HYDERABAD

BEFORE SHRI G.C. GUPTA, VICE PRESIDENT
AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.401/Hyd/2007 - Assessment year : 2003-04
ITA No.482/Hyd/2007 - Assessment year : 2004-05
ITA No.483/Hyd/2007 - Assessment year : 2005-06

The ACIT, Circle 15(1) Hyderabad	**Vs**	**M/s Viceroy Hotels Limited, Hyderabad**
Appellant		**Respondent**

ITA No.436/Hyd/2007 - Assessment year : 2004-05
ITA No.437/Hyd/2007 - Assessment year : 2005-06

M/s Viceroy Hotels Limited, Hyderabad	**Vs**	**The ACIT, Circle 15(1) Hyderabad**
Appellant		**Respondent**

Revenue by: Shri Amlan Tripathy
Assessee by: Shri P. Murali Mohan Rao

ORDER

Per Chandra Poojari, Accountant Member:

There are five appeals in all in this bunch. Besides the appeal of the Revenue for the assessment year 2003-04, which is directed against the order of the CIT(A)-II, Hyderabad dated 26.12.2006, there are cross appeals preferred by the assessee as well as the revenue for the assessment years 2003-04 to 2005-06, which are directed against the common order passed by the CIT(A)–II, Hyderabad dated 25.1.2007. Since common issues are

involved, these appeals were heard together and are being disposed off by this common order for the sake of convenience.

2. The only issue involved in these appeals relates to the legality and validity of the orders passed by the Assessing Officer for the years under appeals under S.201(1) and 201(1A) of the Act, treating the assessee as an 'assessee-in-default' and raising a demand of Rs.7,41,944 for the assessment year 2003-04 and of Rs.25,95,736 for assessment year 2004-05 and of Rs.73,14,584 for the assessment year 2005-06, representing the sum of tax, which according to the Assessing Officer the assessee was liable to deduct but failed to deduct, and the interest under S.201(1A) thereon.

3. Brief facts of the case are that the assessee, engaged in the business of running a Five Star Hotel in the name of "VICEROY", was being converted into Marriot Chain Hotel under the franchise granted by the International Licensing Company SARL (Marriot USA). To meet the standard for Marriot group the assessee embarked upon an expansion programme by way of adding new blocks in the hotel and also upgradation by way of bringing about interior and exterior

changes, landscaping etc. And for this purpose the assessee has entered into four separate and independent agreement with :

1. Anthony Corbett & Associates UK
2. Marriot International Design & Constructions USA
3. Bensly Design Group international Construction Company Ltd., Thailand
4. Lim Hong Lian Singapore

4. During the course of survey operation u/s 133A of the Act, conducted on the business premises of the assessee it was found that the assessee had made payments to the above non resident consultants without deducting tax at source u/s 195 of the Act. Accordingly, the assessee was called upon to show cause as to why it should not be treated as an assessee in default within the meaning of section 201(1) of the IT Act for its default to deduct tax at source. The assessee has furnished detailed explanation containing inter alia that the services rendered by the above non resident consultants constitute professional services which are outside the scope of tax in India and that the payments made for the interior designer consultancy, landscape architectural services etc. are not part of 'included services' or 'technical services' in accordance with the relevant double taxation treaty entered

into by India with the respective countries of the payees and as such withholding tax is not permissible in respect of the payments made by the assessee. Not finding merit in the explanation of the assessee, the Assessing Officer passed the impugned orders u/s 201(1) and 201(1A) read with section 195 of the IT Act dated 29.11.2005 raising a demand of Rs.7,41,944/- (which is inclusive of interest u/s 201(1A) of Rs.1,43,592/-) for the assessment year 2003-04. Similarly, for the assessment year 2004-05 the Assessing Officer raised a demand of Rs.25,95,736/- (inclusive of interest u/s 201(1A) of Rs.4,98,034/-) vide his order dated 29.11.2005 : and for the assessment year 2005-06, the Assessing Officer raised a demand of Rs.73,14,584/-- (inclusive of interest u/s 201(1A) of Rs.8,22,,839/-) vide his order dated 29.11.2005. However, for the assessment year 2005-06, the Assessing Officer passed an order dated 6.3.2006 u/s 154 of the Act whereby demand payable was determined at Rs.70,28,155/- (inclusive of interest u/s 201(1A) of Rs.8,06,310/-) , which after adjusting the amount paid on 16.2.2006 of Rs.1,62,320/- , was determined at Rs.68,65,835/-.

5. On appeal, as far as the assessment year 2003-04 is concerned, the CIT(A) vide his order dated 26.12.2006 holding that the payment made by the assessee to Marriot

International Design and Construction Services does not come within the ambit of 'fees for included service' , concluded that the Assessing Officer was not justified in treating the assessee as an assessee in default and raising a demand of Rs.7,41,944/- and accordingly, cancelled the order of the Assessing Officer passed u/s 201(1) and 201(1A) of the Act. Aggrieved by the order of the CIT(A) for this year, the Revenue preferred appeal in ITA No.401/H/2007.

6. As far as the appeals for the assessment years 2004-05 and 2005-06 are concerned, the CIT(A), on appeal, held that in so far as the payments made by the assessee to M/s Marriot International,USA and M/s Lim Hong Lian, Singapore are concerned, the Assessing Officer was not justified in treating the assessee as an assessee in default. As for the payments made to Marriot International, USA, the CIT(A) following his order for the assessment year 2003-04 dated 26.12.2006 held that the services rendered by M/s Marriot International do not come within the ambit of 'fees for included services'. As for the payments made to M/s Lim Hong Lian, Singapore, he concluded that the services are in the nature of independent personal services and for these reasons and in view of the DTAA between India and Singapore, according to which the payment made by the

assessee is taxable in the other contracting state i.e., Singapore and not in India, TDS provisions are not applicable. The CIT(A). however, upheld the action of the Assessing Officer in treating the assessee as an assessee in default with regard to payments made by it to M/s Anthony Corbett & Associates, UK. As per the payments made to M/s Bensley Design Group, Thailand the CIT(A) after a detailed discussion in Para 2.3.4 and 2.3.4A, 4B, 4C ultimately concluded as follows:

> *"Thus, in the agreements itself the payment in respect of each segment of the scope of work has been clearly defined and allocated. After going through the scope of work in the agreement he is of the view that the payment relating to construction/administration amounting to US $ 30000 is not in the nature of fees for technical services because as per the agreement this part of the join required the contractor only to attend and inspect as well as review periodically the work in progress. This part of the job does not envisage making available any technical knowledge or design, drawings, documents etc. The other three areas of work required application of technical knowledge, certain amount of technical input and also preparation of drawings and designs and making available of the same. Accordingly, the amounts being paid for conceptual design, design development and construction documents would come within the purview of fees for technical services. As regards mobilisation fees, this fee being a sort of advance payment for starting the work can be distributed under the four heads and the proportionate amount should be allocated to construction observation/administration and the proportionate amount should be excluded for the purpose of TDS for fees for technical services".*

7. Dealing with rate of tax deduction at source in Para 2.3.4D of his order the CIT(A) noted that the Assessing Officer has adopted a rate of TDS at 40% + Surcharge considering it as 'any other income'.

8. However, the CIT(A) is of the view that, if at all the income arising the non income to be taxed as 'fee for technical services' and the tax payable thereon would not exceed 20% as per the special provisions of the Act.

9. Thus, as far as the payments to Bensley Design Group, Thailand is concerned the CIT(A) held that it is only the payments which are in the nature of 'fee for technical services' are liable to deduction at source by the assessee and the Rate of tax shall not exceed 20% .

10. Aggrieved by the action of the CIT(A) in upholding partly the orders of the Assessing Officer passed u/s 201 & 201(1A) read with 195 of the Act, the assessee preferred its appeals in ITA Nos.436 & 437/H/2005, whereas contesting the relief granted by the CIT(A), the Revenue preferred its appeals in ITA Nos.401, 482 & 483/H/2007.

First we will take up the Revenue appeals in ITA Nos.401, 482 & 483/H/2007.

11. As per the Assessing Officer, during the accounting year under consideration, the assessee deductor had engaged a non-resident consultant, M/s. Marriott International Design & Construction Services, a company incorporated in USA, for rendering technical services in various fields. The company is in the business of design and construction consultancy. As no explanation was furnished by the assessee for non-deduction of tax from the payment made the Assessing Officer concluded that the assessee deductor had conceded the default. The Assessing Officer has referred to the DTAA between India and USA wherein technical services is covered under "fees for included services" which can be taxed both in the contracting state and the other contracting state. The Assessing Officer concluded that the services provided by Marriot fall under the definition of "included services" as per Article 12(4) and 12(4)(b) of the DTAA. The Assessing Officer observed that the decision relied upon by the assessee is not applicable to the facts of the case. Accordingly, the Assessing Officer held that the payment made by the assessee was liable to be taxed in India and since the assessee had failed to discharge its statutory obligation, it should be treated as an

"assessee in default" u/s. 201(1) r.w.s. 195 of the Act. Since the assessee deductor had agreed to bear the tax payable by the non-resident, the Assessing Officer grossed up amount, included in the interest u/s. 201(1A0 and raised a total demand of Rs.7,41,944/-.

12. On appeal, the CIT(A) in his order dated 26.12.2006 for the assessment year 2003-04 held that Marriot International has only reviewing the existing facilities available in Viceroy Hotel and to suggest further improvement so as to bring it to the level of an International standard. He drew conclusion that Marriot International has given the advice relating to various areas in the hotel premises. The service rendered by Marriot International is nothing but in the nature of advisory and review services so that the existing facilities available in the hotel can be elevated to the Marriot standards. He relied upon a case law Carborandum Co. Vs. CIT (108 ITR 335) (SC) and CIT Vs. Toshoku Ltd. (158 ITR 525) (SC) wherein it was held that if under an agreement between a non resident and a resident, all the services are rendered by the non resident outside India (as an agent of the resident), no part of the payment for such services would be deemed to accrue in India U/s 9(1)(i) even if the agreement gives rise to a business connection.

13. Further he observed that even if there is a business connection in India and some activities are carried out in India, the entire profit arising from that business connection will not be deemed to accrue in India. Explanation 1(a) to section 9(1)(i) expressly provides that only such part of the income as is reasonably attributable to the operation carried out in India shall be deemed to accrue in India and be taxable in India. In each case, the quantum has to be decided on the facts and circumstances of the case.

14. In view of the above, he held that provisions of section 195 are not applicable. Accordingly, he held that there is no application of provisions of section 201(1) and 201(1A) of the I.T. Act in respect of payment to Marriot International Design & Construction Services, USA in the assessment year 2003-04, 2004-05 and 2005-06. Against this finding the Revenue is in appeal before us. Further, for the assessment year 2003-04, 2004-05 and 2005-06, the Revenue is having a grievance against admission of crucial evidence in the form of agreement between Marriot International and the assessee company without giving opportunity to the Assessing Officer to examine this evidence in terms of Rule 46A of Income-tax Rules, 1962. For the

assessment year 2004-05 and 2005-06 the Revenue is also in appeal before us with regard to finding of CIT(A) that the condition of "making available of technical knowledge etc., is not satisfied in respect of US $ 30,000 payable to Bensley Design Group International Consulting Company, Thailand, though the CIT(A) having accepted that there is no specific article dealing with 'fee for technical services' in Indo-Thailand DTAA.

15. The learned DR submitted that the assessee company runs a five star hotel in the name of 'Hotel Viceroy'. This hotel was converted into a 'Marriott Chain Hotel' under a franchise granted by International Licensing Company SARL (Marriott), USA. In order to meet the standards set by Marriott Group the assessee company spent substantial amounts on civil works, interior decoration, furnishings, landscaping etc. To this effect the assessee company made payments to the following 4 parties.

5. Anthony Corbett UK
6. Marriot International Design & Constructions USA
7. Bemsly design group international Construction company Ltd. Thailand
8. Lim Hong Lian Singapore

16. He submitted that n the order passed u/s 201(1), the Assessing Officer held that an amount of Rs.23,93,407/- has been remitted to M/s Marriott International Design and Construction Services Inc. USA without deduction of tax at source. The Assessing Officer held that the remittances constitute 'fees for included services' within the meaning of Article 12 of Indo US DTAA and worked out the short deduction together with interest u/s 201 (1A) at Rs.7,41,944/- In the process, the Assessing Officer gross up the remittance vide adopting the rate of deduction at 20%. Later vide order u/s 154 passed on 6.3.2006 worked out the short deduction by adopting the tax rate of 15% + surcharge. The revised demand including interest u/s 201(A) and 220(2) was worked out at Rs.5,60,356/-.

17. He submitted that the CIT(A) after going through the agreements signed by the assessee company with Marriott International held that the payment was made for the review of existing facilities available in the Viceroy Hotel by the team from Marriott International and to suggest necessary improvements to bring it to the level of an International Hotel as per Marriott standards. The CIT(A) further held that the services rendered by the Marriott do not fit into either of the categories defined in Article 12(4)(a) or 12(4)(b) since the

services do not involve technical expertise or make available any technical know-how, plan, design, etc. According to DR the learned CIT(A) wrongly relied on the following case law:

1. The example given in MOU in the DTAA between India and USA
2. Raymond Ltd. Vs. DCIT
3. DCIT Vs. Boston consulting Group P Ltd. (280 ITR (AT) 1) (Mum.)
4. CESE Vs. DCIT (275 ITR (AT) 15, Chennai

18. He submitted that the CIT(A) wrongly concluded that no technology or technical skill was transferred to the assessee by the Marriot International. The CIT(A) erred in concluding that the Article 12(4) contemplates only 'transfer' of technology or technical skill. The words used in the Article are 'make available' of technical knowledge, experience, skill, know how etc., the CIT(A) did not appreciate that 'make available' and 'transfer' are quite distinct.

19. He submitted that the CIT(A) erred in not appreciating that the scope of services rendered by Marriot International would fit into the definition of fees for included services as per Article 12 of DTAA. From the extracts of the agreement between the assessee company and Marriott International it can be noticed that the scope of work is not

just review as sought to be made out by the CIT(A). The scope of work as extracted in the CIT(A) order includes technical review services including the following:

1. Determination of the condition, specification and status of FF & E, fixex assets supplies and inventories

2. Engineering, fee and life safety and environmental review by MIMCO, its affiliates and consultants

3. Specification of all signage changes

4. Advising VHL on the standards, aesthetics and systems necessary for the hotel to be operated as MHRS International Hotel

20. He submitted that the CIT(A) himself has mentioned that the consultant company has reviewed the present condition of the hotel and made number of suggestions in the form of a report which reads as follows:

> "A number of suggestions have been given in that report relating to improvements in the property perimeter, hotel main reception and lobby, front desk, public rest room, elevator lobby, elevator cab, hotel assembly area, hotel food and beverage, hotel recreation facilities, guest room and suite, mechanical, electrical and plumbing design, etc."

21. He also submitted that suggestions have been made by Marriot International to the assessee company for reconfiguring the car parking to the main drive way, for new drive way lighting, for landscaping etc. Extensive works were

carried out by the hotel to bring it to the Marriott's standards and it would not be incorrect to conclude that the works done was based on the review report submitted by the Marriott International. The Memorandum of Understanding dated 15.5.1989 concerning fees for included services in article 12 of DATT between India and USA describes in some detail the category of services which would come within the meaning fee for included services. In this MOU the following services are mentioned in fall in this category.

i) Engineering services including sub categories of bio engineering and aeronautical, agricultural, ceramics, chemical, civil, electrical, mechanical, metallurgical and industrial engineering

ii) Architectural services

iii) ....

22. From the above he drew inference that the scope of work undertaken by the Marriott International would fit into the category of civil, electrical and architectural services mentioned in the MOU. Since the result of the review was made available to the Assessee Company and substantial work based on the service given by Marriott International has been done in renovating the hotel and bringing into the standards required of Marriott chain, it satisfies the stipulation

of making available the technical knowledge, skill, experience, etc. Mentioned in Article 12(4)(b).

23. He submitted that the agreement entered into between the assessee company and Marriott International (MIMCO) which was relied upon by the CIT(A) was not made available to the Assessing Officer, at the time of seeking the remand report. The Assessing Officer in his order passed u/s 201(1) on 29/11/2005 has in para 3.1., extracted certain clauses from an agreement entered into between the assessee company and Marriott International Design and construction services, inc. (MIDCS). This agreement is titled as 'Interim Advisory Services Agreement' and was executed on 29.1.2003 copy of this agreement was available with the Assessing Officer. However, the agreement relied upon by the CIT(A) is titled as pre conversion technical service agreement entered into between the assessee company and Marriott International Management Company BV (MIMCO) and was executed on 9.9.2003. This agreement was not made available to the Assessing Officer and as such the CIT(A) ought not to have considered this agreement without giving an opportunity to the Assessing Officer to examine the same. Therefore, the provisions of Rule 46A(3) are not satisfied.

This agreement by the Assessing Officer subsequent to finalisation of appeal would show that the services rendered by MIMCO would definitely fit into the scope of 'fee for included services' defined in article 12(4) of Indo – US DTAA. The scope of services which are titled as 'Technical Review Services' in para 2.2. of CIT(A) have already been discussed in para 5 & 6 above. He submitted that as per para 2.3 (iii) CIT(A)'s under Article 2 of this agreement, the MIMCO will 'make provisions to provide a task force of technical personnel on the conversion date to supervise and assist the pre conversion and conversion operations. This clause proves that the services rendered by MIMCO was not limited to preparation of a review report alone as held by the CIT(A). The scope of work under this agreement is detailed in exhibit-A. The team which conducted the study included professionals such as vice president of operations, Director of design management, senior interior design director, engineering consultant and a land scope specialist which also prove that the services rendered are of technical in nature. The report which is contained in exhibit – A annexed to the agreement suggested that major changes in the infrastructure of building, civil works, electrical and plumbing designs. This report was made available to the assessee company and the

assessee company carried out extensive works based on the recommendations contained in this report. Therefore, the findings of the CIT(A) that the services rendered by the MIMCO was only to review is not based on facts. The CIT(A) has relied upon the decisions and observed that unless the services are technical in nature, it does not satisfy the provision in the article 12(4)(b) regarding transfer of technology or technical skill. The services rendered by the Marriott International squarely fit into the definition of fees for included services as defined in Article 12(4) of the Indo US DTAA. According to the DR, notwithstanding this that the reliance placed on the decision in case of M/s Raymond Ltd. and Boston Consulting Group P Ltd. are not justified since the facts before the Tribunal in these cases are quite distinguishable. The facts in the case of CESE Ltd. quoted by the CIT(A) also quite distinguishable and are not applicable to the facts of the present case. He submitted that during the assessment proceedings, the assessee had only produced 'Interim Advisory Services Agreement' dated 29.1.2003 entered into between the assessee company and Marriot International Design and Construction Services, Inc. (MIDCS) which has been duly considered by the assessing officer in his order.

24. On the other hand the learned AR submitted that the assessee had entered into agreement with the Marriot International for rendering professional services in connection with the upgradation of the Hotel. As per the agreement, Marriot was to provide advisory services for design, conversion, furnishing and equipping of the hotel including advising owners and owner's consultant on Marriott standards on the aesthetics and systems necessary for the hotel to be operated as a Marriott Hotel, and reviewing the design documents prepared by owner and owner's consultant to verify compliance with Marriot standards. The services were provided from outside the country and in view of the above; the assessee was not liable for tax deduction at source for the amount paid for such services. He relied on the judgement of Supreme Court in the case of Carborandum Co. Vs. CIT (108 ITR 355) and CIT Vs. Toshuku Ltd. (158 ITR 525) wherein it was held that if under an agreement between a non resident and a resident, all the services are rendered by the non resident outside India (as an agent of the resident) no part of the payment for such services would be deemed to accrue in India u/s 9(1)(i), even if the agreement givers right to a business connection.

25. He submitted that the payment made to M/s Marriott will not come within the purview of including services as defined in Article 12(4) of the India US Treaty. He drew our attention to the Memorandum of Understanding between India and USA in connection with the DTAA, he stated that the American Company is not making available its technical knowledge or experience to the Hyderabad Company nor is it transferring any technical plan to the Inbdian Company. It is simply giving advise to the Indian Company. He also stated that the services rendered by the American Company is part of their business activity, but there being no Permanent establishment in India that the same cannot be taxed in India. According to him, the amount received by the American Company Marriott International Design and Construction Services Inc., does not constitute fees from included services and is thus exempt from taxation in India and also exempt from the provisions of TDS. According to him the remittance made to the American Company do not fall within the scope of Article – 12(4)(a) or 12(4)(b) of the DTAA between India and USA and American company had not made available any technical knowledge or experience or transferred any technical plan to the assessee company except giving advice to the assessee company.

26. We have heard both the parties and perused the materials available on record. We have also carefully gone through the case law cited by parties. Sub Section 2 of Section 5 of the IT Act, provides that the total income of a non resident of any previous year shall, subject to the provisions of the Act, include all income, from whatever source derived, which (a) is received or is deemed to be received in India by or on behalf of such person ; or (b) accrues or arises or is deemed to accrue or arise to him in India during such year. We are concerned herewith clause b of subsection 2 of section 5. The expression "accrues or arises or deemed to accrue or arise in India empowered in Clause (b) of sub section 2 in section 9 of the Act. The relevant provisions of section 9, which need our attention, is clause (1) (i) which is extracted hereunder:

Income deemed to accrue or arise in India:

9 (1) The following incomes shall be deemed to accrue or arise in India:

i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India or through the transfers of a capital asset situate in India.

Explanation:

For the purposes of this clause:-

a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India

b) in the case of non resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export.

c) In the case of non resident, being a person engaged in the business of running a new agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India

d) In the case of on resident being –

1) an individual who is not a citizen of India or
2) a firm which does not have any partner who is a citizen of India or who is resident in India or
3) a company which does not have any shareholder who is a citizen of India or who is resident in India no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations, which are confined to the shooting of any cinematograph film in India

Explanation 2:

For the removal of doubts, it is hereby declared that 'business connection shall include aby business activity carried out through a person who acting on behalf of the non resident:

a) has and habitually exercises in India, an authority to conclude contracts on behalf of the non resident, unless his activities are limited to the purchase of goods or merchandise for the non resident or

b) has no such authority, but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the non resident or

c) habitually secures order in India, mainly or wholly for the non resident or for the non resident and other non residents controlling, controlled by, or subject to the same common control, as the non resident

Provided that such business connection shall not include any business activity carried out through a broker, gene4ral commission agent or any other agent having an independent status is acting in the ordinary course of his business.

Provided further that where such broker, general commission agent or any other agent works mainly or wholly on behalf of a non resident (herein after in this proviso referred to as the principal non resident) or on behalf of such non resident and other non residents which are controlled by the principal non resident or have a controlling interest in the principal non resident or are subject to the same common control as the principal non resident he shall not be deemed to be a broker, general commission agent or an agent of an independent status.

Further, for better understanding, it is necessary to go through the agreement signed by the assessee company with Marriott International. The relevant para of the article 2 of the agreement is reads as follows:

27. We have also carefully gone through the Article 2.2(a) of the agreement between Marriot International and Viceroy Hotel which deals with the services have to be rendered by the Marriot International; Article 2.2(a) reads as follows:

Based on limited inspection and Technical review conducted by Marriott prior to the effective date the requirements of converting the hotel to MHRS International Hotel as on the conversion date are anticipated to be set forth in the scope of works. To

the extent no otherwise completed prior to effective date, however representatives of MIMCO and its affiliates have the right to conduct further inspections of the hotel at reasonable times upon prior notice to VHL in order to ascertain additional requirements, if any, to convert the hotel in accordance with Marriott Systems standards. Such technical review services may include without limitation, the following

1) **Determination of the condition, specification and status of FF&E, fixed assets supplies and inventories**

2) **Engineering, fire and life safety and environmental review by MIMCO, its affiliates and consultants**

3) **Specification of all signage changes**

4) **Advising VHL on the standards, aesthetics and systems necessary for the hotel to be operated as MHRS international hotel**

28. Regarding pre conversion activities, it has been stated in Article 2.3. of the Agreement that MIMCO will review and approve existing concession contracts and leases for retail and lobby space within the Hotel, review and consult with VHL on VHL's proposed pre-conversion promotion and related activities etc. Even in the scope of work, attached to the agreement, a copy of the survey conducted in March 2003, by the Marriott Team has been detailed. It is stated in that report that the primary objective of the survey is to review the present condition of Viceroy Hotel and to present a scope for its conversion to Marriott Hotel. A number of suggestions have been given in that report relating to

improvements in the property perimeter, hotel main reception and lobby, front desk, public rest room, elevator lobby, elevator cab, hotel assembly area, hotel food and beverage, hotel recreation facilities, guest rooms and suite, mechanical electrical and plumbing design etc.

29. From the above, it is clear that Marriott International, the American Company was to review the existing facilities available in Viceroy Hotel at Hyderabad and to suggest further improvement so as to bring it to the level of an international hotel and to be more precise to bring it to the level of Marriott's standards. From the details furnished in the scope of work attached to the agreement, it is clear that Marriott has given the advice relating to various areas in the Hotel premises. For example, it has suggested regarding car parking to reconfigure the main drive way to provide a wider drive way with only single length of car parking space. Similarly, it has suggested providing new drive way lighting. It has also advised to provide Marriott sign on the roof top. It has advised to enhance the existing outdoor landscaping by adding additional plants to give the garden a lusher fill. Similar suggestions have been given for Hotel Assembly area, Hotel Food and Beverage, Hotel Recreation etc. Thus, from the scoped of work it appears that the services provided by

Marriott International is in the nature of advisory and review services so that the existing facilities available in the Hotel can be elevated to Marriott standards. It is necessary to go into definition of included services in Indo US treaty so as to find out whether the services rendered by Marriott fit into the definition of included services in Articles 12(4) (a) and 12(4)(b) of the Treaty.

30. We have also gone through the definition of 'included services in Indo US Treaty so as to find out whether the services rendered by Marriott will fall under the purview of included services as enumerated in article 12(4)(a) and 12(4)(b) of the Treaty:

Article 12(4) of the Indo US Treaty reads as below:

> **For the purpose of this article 'fees for included services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services;**
>
> **a) Are ancillary and subsidiary to the application and enjoyment of the right, property or information for which a payment described in paragraph 3 is received or**
>
> **b) Make available technical knowledge, experience, skill, knowhow or processes or consist of the development and transfer of a technical plan or technical design.**

31. Thus Article 12(4) emphasises on rendering any technical or consultancy services which are ancillary and subsidiary to the application or enjoyment of any right, property or information for which a payment is received or make available technical knowledge, experience, skill, know how or processes or consist of development and transfer of technical plan or technical design. The services rendered by Marriott do not fit into either of the categories defined in 12(4)(a) or 12(4)(b) since the services do not involve technical expertise nor does it make available any technical know-how plan, design etc. What is being done by Marriott is basically inspection of the hotel, reviewing the facilities, comparing the same with Marriott's standards and suggesting improvements/change wherever required to meet the Marriott standard. Generally speaking technology will be made available when the person acquiring the service is enabled to apply the technology. The fact that the provision of service may require technical input by the person providing the service does not per se mean the technical knowledge, skill etc., are made available to the person acquiring the service within the meaning of Article 12(4) (a). An example (example 7) given in the Memorandum of Understanding will further elucidate the issue. In this example, an Indian Vegetable Oil

Manufacturing firm wished to market its product worldwide for which it hired an American Marketing Consulting Firm to do a Computer Simulation of the World Market and advise the Indian company on the marketing strategy. On the issue whether the fees paid to the US Company will be for included services, it has been stated that the fees would not be for included services. The American Company is not making available to the Indian Company any technical knowledge, experience and skill nor is it transferring a technical plan or design. What is transferred to the Indian company through the service contract is commercial information. The fact that Technical skills were required by the performer of the service in order to perform commercial information service does not make the service a technical service within the meaning of Article 12(4)(b).

32. Further we find that similar issue has also been decided in the case of Raymond Limited Vs. DCIT, 86 ITD 791 (Mum) wherein the ITAT, Mumbai has dealt in detail the concept of 'make available' and have opined that the technical knowledge, experience, skill etc. must remain with the person utilising the services even after rendering of the services comes to an end. Similar view was also expressed by Hon'ble

Mumbai in the case of Dy.CIT Vs. Boston Consulting Group P Ltd. (280 ITR (AT) 1) wherein the Tribunal observed that:

> **Unless the services are technical in nature, there cannot be any question of 'technology' being contained therein which the person acquiring the services can be enabled to apply. Therefore, so far as the provisions of India Singapore Tax Treaty as also the provisions of India US Tax Treaty are concerned, payment for services not containing any technology, are required to be treated as outside the scope of 'fees for technical services".**
>
> **Rendering technical or consultant services or services make available means that technical or consultant services rendered should be of such nature that 'makes available' to the recipient technical knowledge, know-how and the like. The service should aimed at and result in transmitting the technical knowledge, etc. so that the payer of services could derive an enduring benefit and utilise the knowledge or know-how in future on its own without the aid of the service provider. By making available technical skills or know how, the recipient of service will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider. In other words, to fit into the terminology 'fees for included services', the technical knowledge and skills etc., must remain with the person receiving the services even after the particular contract comes to an end., The services offered may be the product of intense technological effort and a lot of technical knowledge and experience of the service provider would have into it. But that is not enough to fall within the description of 'fees for included services'. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in future without depending on the provider. For example, a prescription and an advise given by the doctor after examining the patient and going through the clinical reports, the service rendered by the doctor cannot said to have made available to the patient, the knowledge and expertise possessed by the doctor. On the other hand, if the same doctor teaches or trains student on the aspect of diagnosis or techniques of surgery, that will amount to making available the technical knowledge and experience of the doctor.**

In the case of Carborandum Co. Vs. CIT (1977) (108 ITR 335) (SC), a foreign company entered into an agreement with an Indian company for rendering technical and know how services to the Indian company. In lieu of those services, the foreign company was to receive from the Indian company an annual fee equal to three per cent of the net sale proceeds of the products manufactured by the Indian company every year. The question was how much of the money received by the foreign company would be taxable under the provisions of the Act. The Indian company employed personnel made available by the foreign company, who worked under the direct control of the Indian company. The Supreme Court held that the services of the foreign company in making the employees available were rendered wholly outside India and that the activities of the foreign personnel lent or deputed by the foreign company did not amount to a business activity carried on by the foreign company in India. It was further held that the fee did not accrue or arise in India nor could it be deemed to have accrued or arisen in India and that to rope in the income of the non resident under the deeming provision of section 42(1) of the 1922 Act it must be shown by the department that some of the operations were carried out in India in respect of which the income is sought to be assessed.

In the case of Addl. CIT Vs. New Consolidated Gold Fields Ltd. (1983) (143 ITR 599) (Patna), the assessee company and the foreign company entered intonan agreement under which the foreign company was to be technical adviser of the assessee company in the matter of exploration, mining and mineral dressing operations. The foreign company was to be paid a retainer's fee at the rate of $7,000 per annum in London. The Income Tax Officer treated the assessee company as the agent of the foreign company wtthin the meaning of section 163 of the income tax act and treated $7,000 payable by the assessee company to the foreign company as its income accruing in the hands of the assessee company. On appeal, the Appellate Assistant Commissioner held that even if the assessee company was to be treated as an agent within the meaning of section 163(1), there was no business connection within the meaning of section 9(1) of the Act so the income accruing to the non resident foreign company could not be assessed through as agent. That order was affirmed by the Tribunal. On a reference to the High Court of Patna, it

was held that the sum of $7,000 was not the income with the foreign company had received in India or an income which had accrued to the foreign company within the meaning of section 5(2) of the Act and that the sum paid to the foreign company at London for technical advice given from London could not be attributed to the operation carried on in India. It was further held that there was no continuity between the business of the non resident and the activity in the taxable territories in respect of the income and, therefore, there was no business connection between the foreign company and the assessee company and the income could not be deemed to accrue or arise to the foreign company in India within the meaning of section 9(1) as such, the said sum paid to the foreign company at London was not assessable in the hands of the assessee company even as agent of the foreign company.

In the case of CESE Ltd. Vs. DCIT (275 ITR (AT) 15), Hon'ble Calcutta Tribunal have held that, if the services provided was of mere reviewing and opining rather than designing and directing the project, no technical knowledge etc., is made available to the assessee. The decision was rendered in the context of Indo UK treaty, but the same can also be applied to interpretation of the phrase 'make available' appearing in Indo US Treaty. The fact of the present case is almost identical to the ones discussed above. As in the case of CESE Ltd., the present case what was being made available to the assessee company was advisory services and opinion for improvement of the existing facilities. Accordingly, in the light of the of ITAT Mumbai & Calcutta, no technology or technical skill is being transferred to the assessee company.

33. In view of the above, in our opinion, in the present case, what was made available to the assessee company was advisory services and opinion for improvement of the existing facilities. It is also noted by the assessing officer mentioned in his order that the services rendered by Marriott which includes advisory services and reviewing of the design

documents prepared by the owner or owner's consultant to verify compliance with Marriott's standards. It is thus clear that Marriott themselves are not preparing and transferring any drawing, designs, technical plan etc. They are simply reviewing, what is being done by the parties engaged for designing upgrading the Hotel. In view of this, the fees paid to Marriott International will not fall within the ambit of fees for included services. As such, a provision of section 195 is not applicable. Accordingly, there is no question of application of provisions of section 201(1) and 201(1)(A) of the IT Act.

34. Regarding payment of US $ 30,000 which is relating to construction administration/conservation, it is not in the nature of 'fees for technical services' because as per the agreement this part of the job required the contractor only to attend and inspect as well as review periodically work-in-progress. This part of job does not envisage making available any technical knowledge or design, drawings, documents, etc. Being so, as held in earlier para, we do not find any infirmity in the order of the CIT(A) on this issue also and confirm the order of the CIT(A) on this issue.

35. Further, the grievance of the revenue is that the CIT(A) admitted the crucial evidence in the form of agreement dated 9.9.2003 titled 'Pre conversion technical service agreement' between Marriot International Management Company B.V. (MIMCO) and the see company without giving an opportunity to the assessing officer to examine this evidence in terms of 46A(3) of the IT Rules. The DR submitted that the assessee had produced only 'interim advisory services agreement' dated 29.1.2003 which is entered between the assessee company and Marriot International Design & Construction Services, Inc (MIDCS) which has been duly considered by the assessing officer in his order.

36. We have also carefully considered the argument relating to violation of Rule 46A of the I.T. Rules. Admittedly, in these cases, the CIT(A) called for remand report from the assessing officer and he has submitted his remand report dated 29.11.2005 for the assessment year 2003-04. Similarly, the CIT(A) has called for remand report for the assessment year 2004-05 and 2005-06 which is evident from the Para 2.3.2A of CIT(A) order dated 25.1.2007. Being so, we cannot hold that there is any violation of 46A(3) of the IT

Rules. Accordingly, the revenue appeals in ITA No.401/H/2007, 482 & 483/H/2007 are dismissed.

37. Now we will take the assessee's appeal in ITA Nos.436 & 437/H/2007. The first common ground in ITA No.436 & 437/H/2007 is with regard to non TDS of payment to Anthony Corbett & Associates. According to the assessing officer M/s Anthony Corbett & Associates have been assigned the work of design, documentation, preparation of floor plan, lighting layouts and the lower authorities was of the opinion that this nature of work requires technical knowledge and application of technical knowledge, experience and skill and as such , it will fall within the definition of fees for technical services as per the Article 13(4) and 13(4) (c) of the DTAA between India and UK and will not fall under article 15 of the DTAA and assessee shall require to deduct TDS at the time of making payment and failure to do so, the assessee became an assessee in default in terms of section 201(1) of the Act.

38. The learned AR submitted that the services, which had been rendered by Anthony Corbett & Associates, are of advisory in nature and not of technical services as there is no transfer of technology but only installation of electrical fittings.

39. According to the learned AR, this service is covered by articles 7 and 5 of DTAAs. Under article 7 of the DTAAs, income earned by a non resident in India under the head 'business' can be taxed in India only if the non resident has a permanent establishment in India. Permanent establishment itself is defined in article 7 and it means a permanent branch or a permanent office location in India. If the business is carried on through employees and if those employees stay in India for less than 90 days in the case of UK, there will be no PE in India and the corresponding business profit of the non resident becomes non taxable. In this case, the contract between the assessee and the British company, it was specifically stated that the consultant is engaged in the business of providing professional and consultancy services in architectural lighting design for the proposed renovation and rebuilding of the hotel, as defined in appendix 'A' attached to this contract. As per section 10(6A) (a) where in the case of a foreign company deriving income by way of royalty or fees for technical services received from government or an Indian concern in pursuance of an agreement made by the foreign company with government or the Indian concern after the 31st day of March, 1976 (but before the 1st day of June, 2002) and

in any other case where the agreement relates to a matter included in the industrial policy, for the time being in force of the government of India, such agreement is in accordance with that policy, then the tax on such income is payable, under the terms lf the agreement, by an Indian concern to the Central Govt. According to the AR, there is no transfer of any technology from UK company to the assessee company and the service rendered by the UK company does not fit into the scope of Article 13(4)/13(4)(c) of DTAA between India and UK.

40. The next common ground in ITA No.436 & 437/H/2007 is with regard to non deduction of TDS on the amount paid to M/s. Bensly Design, Thailand. This company is engaged in the business of landscape architectural consultancy. The lower authorities were of the opinion that though the DTAA does not clearly spell out the taxation of fees for technical services, the amount paid by the assessee to M/s Bensly group would fall within the purview of article 22 of the Agreement which is residuary clause dealing with other income not expressly dealt in other articles of DTAA. According to lower authorities, the services rendered by Bensly group do not constitute to professional or independent personnel services under article 14 of the DTAA between India

and Kingdom of Thailand. According to assessing officer, the agreement and invoices show that the non resident is engaged for conceptual design, design development services, construction documents and construction of administration. The service rendered cover a wide spectrum of activities and constitute an integrated package of technical and management services and can neither be regarded as professional services or independent services and can neither be regarded as personnel service or independent services covered under article 14 of DTAA and the exemption or exclusion contained there under. Without prejudice to this the assessing officer has observed that even if the payments made to the non resident is treated as fees for professional services or independent activities within the meaning of article -14 of the DTAA with Kingdom of Thailand, then also such fees can be taxes under the IT Act. It is because, the exemption provided under article 14 is available only to such payments which are not borne by an enterprise or a permanent establishment situated in India. In the present case, the payment has been made by an enterprise situated in India and accordingly, the non resident company is not entitled to claim any exemption on the strength of Article 14 of the DTAA. The assessing officer also stated that the

instruction contained in CBDT circular No.333 (F.506/42/81-FTD) dated 2.4.1982 is in effect complementary to article 22 of the DTAA which provide that where there is no specific provision under the DTAA, it is the basic law which will govern the taxation of the income of the non resident. Following the aforesaid stand, the assessing officer invoked provision of section 9(1) r.w.s. 115A(1)(b)(B) of the IT Act and treated the entire fees as income chargeable to tax in India since all the expenses of the non resident were reimbursed by the assessee deductor. The assessing officer further stated that the agreement under which the technical services are rendered is neither approved by the central govt. nor does it relate to a matter included in the industrial policy and hence the deductor should have deducted tax at source at the rate of 40% surcharge as prescribed in the relevant finance Act for any other income arising to a non resident company in India and since the deductor had failed to discharge its statutory obligation, the assessee was treated as an assessee in default.

41. The learned AR submitted that, the nature of services rendered by M/s Bensly Design, Thailand is for landscape architectural consultancy.

42. According to him, the CIT(A) erred while passing the order, as there is no permanent establishment for M/s Bensly Design, Thailand in India, and no foreign employee stayed in India for more than 90 days should have exempted the business profit of the companies from taxation in India. This service covered by Article 7 and 5 of DTAAS. Under Article 7 of the DTAAS income earned by non resident in India under the head business, can be taxed in India only if the non resident has a permanent establishment in India. Permanent establishment itself is defined in article 7 and it means a permanent branch or a permanent office located in India. If the business is carried on through employees and if those employees stay in India for less than 180 days in the case of Thailand, there will be no PE in India and the corresponding business profit of the non resident becomes non taxable. The CIT(A) wrongly considered only $30,000 payment for both the assessment years put together i.e. assessment year 2004-05 and 2005-06 made to Bensly design, Thailand as fees for advisory services and considered the balance payment as fees for technical services for the assessment 2004-05 and held that the applicable rate of TDS is 20%. Since the assessee being the industry and providing the advisory services the same cannot be covered for the purpose

of taxation at the rate of 20% and the same should not be applied to the income which has been received by Bensly design, Thailand. According to the AR, as per Indo Thai Agreement signed on 22. 3.1985, there is no article in the relevant DTAA dealing with fees for technical services, there is only an article dealing with royalties, and of course, there is an article dealing with business profits. The assessing officer wrongly applied the residuary article 22 and taxed the income arising in India for the Thai company at the rate of 40% in accordance with the Finance Act 2005, first schedule part I Paragraph E. As per section 115A(1)(b)(B) of the IT Act 1961, a non resident of foreign company includes any income by way of royalty or fees for technical services received from the govt or an Indian concern in pursuance of an agreement made by the foreign company with govt or the Indian concern after 31st day of March, 1976 and where such agreement is with an Indian concern, the agreement is approved by the central govt. or where it relates to a matter included in the industrial policy, for the time being in force, of the govt. of India, the agreement is in accordance with that policy, then the tax payable shall be aggregate of the amount of income tax calculate on the income by way of fees for technical services, if any, included in the total income, at the rate of

thirty percent if such fees for technical services are received in pursuance of an agreement on or before the 31st day of May 1997 and twenty percent where such fees for technical services are received in pursuance of an agreement made after the 31st day of May, 1997. Since the assessee being the industry and providing the advisory services the same cannot be covered for the purpose of taxation at the rate of 20% and the same should not be applied to the income which has been received by foreign company.

43. Finally, the learned AR relied on the following judgements:

1. Tehnisil (Sendirain) Berhard Vs. CIT 22 ITR 551(AAR)
2. Horizontal Drilling International Vs. CIT (37 ITR 42) (AAR)
3. Software Technology Parks of India Vs. Income tax Officer TDS 3 SOT 529 (Bangalore)
4. Royal Airways Limited Vs. ADIT, International Taxation Circle 2(2) 98 ITD 259 (Del.)
5. Skycell Communications Vs. DCIT 215 ITR 53 (Mds.)
6. CIT Vs. Neyveli Lignite Corporation Ltd. 9243 ITR 459)

44. He also relied on the following circulars, wherein the CBDT clarified that when the income arising to a non resident in India is exempt from taxation there will be no need for tax deduction at source:

1. Circular No.786 dt. 7.2.2000 reproduced in 2000-241 ITR 132

2. Circular No.4 of 2002 dated 16.7.2002 reproduced in 2002 256 ITR 22

3. Circular No.10 of 2002 dated 9.10.2002 reproduced in 2002 258 ITR 9

4. Circular No.728 dated 30.10.1995 reproduced in 1995 216 ITR 141

5. Income tax Officer Vs. Sriram Bearings Ltd. 224 ITR 724 (SC)

6. CIT Vs. Visakhapatnam Port Trust 144 ITR 146 (AP)

7. ACIT Vs. Malayala Manorama Company Ltd. 1 Sot 739 (Cochin)

8. National Organic Chemical Industries Ltd. Vs. DCIT, 5 SOT 307 (Mum)

9. Royal Airways Ltd. Vs. ADIT, International Taxation Circle 2(2), 98 ITD 259 (Del.)

45. The learned DR relied on the order of the lower authorities.

46. We have heard both the parties and perused the materials available on record. In these cases, the service rendered by Anthony Corbett & Associates, UK & Bensly Design Group, Thailand is of similar nature as rendered by Marriot International Design & Construction Services, USA and we have already held while deciding the Revenue appeals in earlier Paras that the services rendered by those non residents do not fit within the ambit of 'fees for included services' as defined in Article 2 of Indo US DTAA or technical services. Similarly, in the case of services rendered by Anthony Corbett Associates, UK, is in the nature of advisory services and not of technical services as there is no transfer of technology but only installation of electrical fittings, and as such, section 195 is not applicable. Accordingly, the assessee cannot be considered as assessee in default u/s 201(1) and 201 (1A) of the IT Act. Similarly, the fees paid to M/s Bensly Design, Thailand for rendering services of landscape architectural consultancy is not covered as per the Double Taxation Avoidance Agreement since there is no article in the relevant DTAA dealing with this nature of payments. There is only one article dealing with Royalties and another dealing with business profit. Under Article 7 of the DTAA, income earned by a non resident in India under the head 'business'

can be taxed in India only if the non resident has a permanent establishment in India. Permanent establishment means branch or permanent office located in India. In this case, the business was carried on through employees and there is no record that these employees stayed in India for more than 180 days. Accordingly there is no PE in India and corresponding business profit of non resident cannot be taxed in India and provision of section 195 is not applicable. In view of this, provisions of section 201(1) and 201(1A) of the IT are not applicable. In the result, the assessee appeals in ITA Nos.436 & 437/H/2007 are allowed.

47. In the result, the appeals of the Revenue are dismissed and the assessee appeals are allowed.

Order pronounced in the Open court on 27th May, 2011

Sd/- **G.C. GUPTA** **VICE PRESIDENT**	**Sd/-** **CHANDRA POOJARI** **ACCOUNTANT MEMBER**

Dated 27th May, 2011
Copy forwarded to:

1. M/s Viceroy Hotels Ltd., Hyderabad, 1-3-1036/1, Tank Bund Road, Gandhinagar, Hyderabad
2. The ACIT, Circle 15(2), Hyderabad
3. The CIT(A) –II, Hyderabad
4. The CIT, Hyderabad
5. The DR, ITAT, Hyderabad

Np/tprao