IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "L", MUMBAI

BEFORE SHRI N.V.VASUDEVAN(J.M) & SHRI B.RAMAKOTAIAH (A.M)

ITA NO.3618/MUM/08 (A.Y. 2004-05)
ITA NO.3619/MUM/08(A.Y.2003-04)

Six Continents Hotels Inc. C/o. BSR & Co. KPMG House, Kamala Mills Compound, 448, Senapati Bapat Marg, Lower Parel, Mumbai – 13. PAN:AAHCS 7853B (Appellant)	Vs.	The DCIT (International Taxation), Range 2(1), 1st Floor, Scindia House, Ballard Pier, N.M.Road, Mumbai 400 038. (Respondent)

Appellant by : S/Shri Sunil M. Lala/ Zeel Jambuwala

Respondent by : Smt. Malathi R. Sridharan

ORDER

PER N.V.VASUDEVAN, J.M,

ITA No.3619/M/08 is an appeal by the assessee against the order dated 19/3/2008 of CIT(A) XXXI, Mumbai relating to assessment year 2004-05, while ITA No.3619/M/08 is also an appeal by the assessee against the order dated 24/3/2008 of CIT(A) XXXI, Mumbai relating to assessment year 2003-04.

2. In both these appeals the only issue that arises for consideration is as to whether the marketing and reservation contribution received by the assessee from Indian hotel owners is "Fee for Included Services('FIS') under Article 12(4) of the Indo-US Double Taxation Avoidance Agreement('DTAA') and therefore taxable in India.

3. The facts and circumstances under which the above issue arises for consideration are as follows:

The assessee is a non-resident, being a company incorporated in USA and is the owner of certain trademarks and service marks and operates and licenses the same under the name 'Holiday Inn'. During the relevant assessment years, various Indian hotels were licensee to the trademark 'Holiday Inn' and were operating as per the standards and terms of the respective agreements with the assessee. As per the respective license agreements such Indian Hotels were entitled to use the trade mark 'Holiday Inn' owned by the assessee. For use of the trademark, the Indian Hotels pay fee to the appellant and the said fee has been offered to tax in India as 'Royalty' as per Article 12(3)(a) of Double Taxation Avoidance Agreement between India and USA ('DTAA'), in the return filed by the assessee. Besides the above License fee, the assessee maintains a separate fund wherein it receives the marketing and reservation contribution from the hotels worldwide (including hotels in India). According to the Assessee, such funds are solely used to meet out common expenses of marketing and providing centralized reservation facilities to all its franchisee hotels worldwide. These contributions made by hotels for incurring commons expenses are not offered to tax as the same are not in the nature of income.

4. The Assessee explained the nature of Marketing contribution as a payment made by the franchisee hotels worldwide to assessee under the license agreement as their share towards the common marketing expenditure incurred by assessee for benefit of all the franchisees. The Assessee explained that marketing and advertisement expenditure is incurred by the assessee to promote its worldwide chain of hotels operating under the brand name of "Holiday Inn". This expenditure is incurred for common benefit of all the hotels and is therefore recovered from the hotels by way of 'marketing contribution'. The advantage of such common

marketing campaigns is that there is no duplication of expenses and efforts, global standards are maintained, there is economy of scale and need for marketing and advertisement expense at individual level is eliminated.

5. Reservation System provides online centralized link to all the franchisee hotels and customers and helps the hotels and the customers to avail benefit of faster bookings. According to the Assessee, this facility that is offered to the customers increases the customer base of all franchisee hotels under the Holiday Inn chain worldwide. The assessee incurs all related cost to maintain and operate the reservation system and recovers the same in the form of reservation.

6. In the return of income filed for the relevant assessment years, the assessee filed computation of income, details of statement of Royalty and Marketing & Reservations contributions received from various Indian Hotels, and notes to computation. In the notes to computation, the assessee, by relying on various judicial precedents, clarified that marketing and reservation contributions are not chargeable to tax for the following reasons:

- It is not in the nature of income and is akin to reimbursement of expenses;
- In consideration of such contribution, the assessee does not make available any technical knowledge, experience, skill, know-how or processes etc.
- Without prejudice to above, such contributions could be business profits and cannot be subjected to tax in absence of Permanent Establishment of assessee in India.

7. The AO however observed that the assessee must have developed its own secret system to be used by the franchise otherwise it would not have charged such huge amount. It was also observed that there was no evidence

of any expenditure being incurred by the assessee. He therefore assessed the amount as Royalty.

8. The CIT(A) confirmed the orders of the AO giving raise to these appeals by the assessee before the Tribunal.

9. We have heard both the parties in the matter. The Learned AR reiterated the submissions made before CIT(A) whereas the Learned DR placed reliance on the order of AO. We have perused the records and considered the matter carefully. We find that the identical issue of taxability of marketing and reservation contribution fees received by the assessee from the Indian hotels has already been considered by the tribunal in assessee's own case in A.Y.1997-98 and the tribunal vide order dated 12.5.2006 in ITA No.4341/M/2002 held that marketing and reservation fees received by the assessee was with a corresponding obligation to use it for the agreed purposes and it was not an unfettered receipt in the hands of the assessee. The tribunal accordingly held that the receipts could not be viewed as income of the assessee. The tribunal also held that the receipts could also not be charged as business profit under Article-7 of DTAA as the assessee had no PE in India. The tribunal accordingly deleted the addition made. We also note that the AO in assessee's own case in A.Y.2006-07 and 2008-09 in the scrutiny assessment under section 143(3) dated 18.11.2008 and 8.12.2010 has held that marketing and reservation contribution fees received by the assessee from Indian hotels is not chargeable in India. Under these circumstances in our view the addition has to be deleted. We accordingly hold that the marketing and reservation charges are not Royalty

or FIS and they are in the nature of business income and since the assessee does not have a PE in India, the same are not taxable in India.

9. In the result, appeals of the assessee are allowed.

Order pronounced in the open court on the 11th day of May, 2011.

Sd/- Sd/-

(B.RAMAKOTAIAH) (N.V.VASUDEVAN)
ACCOUNTANT MEMBER JUDICIAL MEMBER

Mumbai, Dated. 11th May.2011

Copy to: 1. The Appellant 2. The Respondent 3. The CIT City –concerned
4. The CIT(A)- concerned 5. The D.R"L" Bench.

(True copy) By Order

Asst. Registrar, ITAT, Mumbai Benches
MUMBAI.

Vm.

	Details	Date	Initials	Designation
1	Draft dictated on	5/5/11		Sr.PS/PS
2	Draft Placed before author	6/5/11		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			