आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल' मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL

"L" BENCH, MUMBAI

श्री बी. रामकोटय्य, लेखा सदस्य, एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं. / ITA no. 791/Mum./2008
(निर्धारण वर्ष / Assessment Year : 2004–05)

Harvard Medical International Inc.
C/o Pricewaterhousecoopers Pvt. Ltd.
252, Veer Savarkar Marg
Shivaji Park, Dadar
Mumbai 400 028

..... अपीलार्थी / Appellant

बनाम v/s

Dy. Commissioner Income Tax
International Taxation–3(1), Mumbai

..... प्रत्यर्थी / Respondent

स्थायी लेखा सं./ Permanent Account Number – AABCH2171F

आयकर अपील सं. / ITA no. 1020/Mum./2008
(निर्धारण वर्ष / Assessment Year : 2004–05)

Dy. Commissioner Income Tax
International Taxation–3(1), Mumbai

..... अपीलार्थी / Appellant

बनाम v/s

Harvard Medical International Inc.
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..... प्रत्यर्थी / Respondent

स्थायी लेखा सं./ Permanent Account Number – AABCH2171F

निर्धारिती की ओर से / Assessee by : Mr. Kanchan Kaushan a/w Mr. Dhanesh Bafna
राजस्व की ओर से / Revenue by : Mr. Mahesh Kumar

सुनवाई की तारीख / Date of Hearing – 20.12.2012	आदेश घोषणा की तारीख / Date of Order – 22.02.2013

आदेश / ORDER

प्रत्येक पीठ
PER BENCH

These cross appeals are directed against the impugned order dated 12th November 2007, passed by the learned Commissioner (Appeals)–XXXIII, Mumbai, for the quantum of assessment passed under section 143(3) of the Income Tax Act, 1961 (for short *"the Act"*), for the assessment year 2004–05. Since the grounds raised by either party are inter–connected, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order.

2. We first take up Assessee's appeal in ITA no.791/Mum./2008. The Assessee, vide grounds no.1, 2 and 3, has challenged the taxability of a sum of US$ 9,82,500 received by the Assessee from three parties namely Max India Ltd., Wockhardt Hospitals Ltd. and Sri Ramachandra Medical College & Research Institute.

3. Facts in brief:– The Assessee is a non–resident and is incorporated as Corporation under the laws of Massachusetts, U.S.A. It has been claimed that it is a non–profit educational entity which has been set–up with the following objections.

> *"Exclusively to perform internationally certain charitable and educational functions of and to carry out certain charitable and educational purposes of President and Fellows of Harvard College (Harvard) a charitable institution for higher education duly incorporated and existing under the laws of the commonwealth of Massachusetts, and otherwise to advance the charitable and educational objectives of Harvard's Medical school (the Harvard Medical School), by assisting other medical schools, to provide high quality medical training and to enhance tie quality of patient care and research by teaching training and sharing medical and*

technological know-how with scientists and health care professionals in countries which may not have ready access to such information by participating in and promoting joint medical research initiatives throughout the words by assisting medical institutions throughout the words in various related administrative and management functions, and by providing such other charitable and educational services in the medical field to and for the benefit of Harvard Medical School and such other organizations affiliated with, or related to Harvard as Harvard may designate, provided that such organizations further the educational purposes of Harvard and are organizations described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended from time to time."

4. In short, the brief areas of activities are – (i) leadership training; (ii) under graduate medical educational programme; (iii) continuing medical education; (iv) medical educational exchange programme; (v) clinical research training; and (vi) consulting services in relation to development of health system. In pursuance of its objects, the Assessee had entered into collaboration agreement with Max India Ltd., a company incorporated in India (for short *"Max"*), Wockhardt Hospitals Ltd. (for short *"WHL"*) and Sri Ramachandra Medical College & Research Institute (for short *"SRMCRI"*), wherein the Assessee was required to provide various services to these three parties. During the year, the Assessee has received following amounts:–

Name of Client	*Amount in U.S.$*
Wockhardt Hospitals Ltd.	*6,20,000*
Max India Ltd.	*50,000*
Sri Ramachandra Medical College	*3,12,500*
Total:	*9,82,500*

5. Besides this, an amount of U.S.D. 28695.39 was also received towards reimbursement of expenses. The amount so received was claimed not taxable in India in the absence of Permanent Establishment (for short *"P.E"*) in terms of Article–5 r/w Article–7 of Indo–U.S. DTAA. Without prejudice, it was also claimed that the receipts in question were neither in the nature of *"Fees"* for Included Service under Article 12(4)(b) nor as *"Royalty"*.

6. Before the Assessing Officer, it was submitted that the Assessee has provided health care related services to Max and WHL in pursuance of terms and conditions of the respect service agreements and detail submissions were made with regard to its claim of non–taxability in India. The submissions of the Assessee have been incorporated by the Assessing Officer from Pages–3 to 11 of the assessment order. The Assessing Officer rejected the Assessee's contentions on the ground that, from the reading of memorandum of agreement entered with them it is seen that the Assessee has given its rights over the three parties to use their copyright items, deliverables, name, logos, etc. with limited restrictions and the part of it will fall within the purview of *"Royalties"*, as given in Article–12(3) and part of it will fall within the meaning of FIS, as given in Article–12(4). The reimbursement of expenditure was also held to be taxable as per the specified rates given in Article–12. Thus, after applying the provisions of Rule–10 of Income–tax Rules, 1962, he apportioned 90% as income from royalty and 10% as income from FIS. Thus, an addition of ₹ 4,59,35,280, was made after converting the same in INR.

7. Before the learned Commissioner (Appeals), the Assessee referred to various clauses of the agreement entered into by the Assessee with MAX, WHL and SRMCRI and submitted that none of the services provided fall within the realm of *"Royalty"* or *"FIS"*. The nature of such services rendered by these parties were illustrated as under:–

Services Rendered by HMI to WHL

A. Consultancy and Education and Training Services

Consulting in relating to health care projects

Provide ongoing consultation / advice to WHL's corporate leadership and staff

Advise on aligning systems to address insurance needs to enable WHL's pro–active approach in health care.

Education & Training Programs in relation to System-wide Core Competencies

- *Educational programs to WHL nurse manager/educator.*
- *Conduct workshops and undertake continuing medical and nursing education programs for WHL staff.*
- *Training through health care specially programs to hospital managers and/or clinicions.*

Facility specific deliverables (New Cardiac Hospital and New Women's Hospital)

- *Conduct assessment to evaluate and make recommendations on operational and educational needs and priorities for hospital stall*
- *Conduct site specific IT assessment to evaluate needs, priorities and training required.*
- *Provide quality management education and training, assessments and audits*
- *Monitoring the operational efficiency and overall progress of the project*
- *Provide site specific health care quality improvement education and training*

B. <u>Services in relation to Wockhardt Awards</u>

- *Advise and assist WHL in developing the nomination and selection process of Awardees for the Wockhardt Awards*
- *Manage the nomination process and the selection of the appropriate Awardees*
- *Provide professional development programs and opportunities for academic interaction to the Awardees*
- *Provide international platform to the Awardees by way of invitations for delivering a scientific address.*

<u>Services rendered by HMI to MAX</u>

- *Reviewing concept, design, service profile and layout of new hospitals*

<u>Services rendered by HMI to SRMCI</u>

- *Assess annual educational program needs of SRMCI.*

- *Provide monthly continuing medical education videoconferences with Harvard University faculty.*
- *Coordinate and manage the clinical clerkships and student exchanges for students and trainees*
- *Provide training and educational workshops in curriculum development and in medical education leadership*
- *Provide e–learning support*
- *Assist in development and select programs in education, clinical care and research*
- *Jointly sponsor international professional development and continuing medical education events and programs of HMI.*

8. Further, the Assessee also made detail submissions as to how provisions of Article–12(3) and (4) will not be applicable. The learned Commissioner (Appeals), after discussing various clauses of the agreement, held that, in the appeal for the assessment year 2002–03 and 2003–04, the learned Commissioner (Appeals) has held that insofar as the payment received from Max is concerned, the entire amount should be treated as FIS and should be taxed @ 15%. With regard to receipts from WHL is concerned, relying upon the earlier year's order passed by the learned Commissioner (Appeals), he held that 50% of the receipts should be treated as payment attributable to teaching as an educational institution and the same cannot be considered as FIS and the remaining 50% has to be taxed as royalty. Further, with regard to SRMCRI, the payment of 60% will not come under FIS, whereas 40% will come under royalty. Therefore, he directed the Assessing Officer to delete the addition to the extent of 60% and taxed 40% of the receipt as royalty. Regarding reimbursement of expenditure, he held that since he has already held that the amount received from WHL is not taxable as FIS, therefore, reimbursement of expenditure will also to be not taxable, hence, the same was deleted.

9. Before us, the learned Counsel, Mr. Kanchan Kaushal, submitted that the payment received from Max and WHL was a subject matter of consideration before the Tribunal in the assessment years 2002–03 and

2003–04 and in case of Max, it was also there in assessment year 2000–01. The Tribunal, after discussing the entire agreement entered with both the parties and the nature of services rendered, held that the same is not taxable. He referred to the relevant paragraphs and findings of the Tribunal given in different years.

10. Learned Departmental Representative, on the other hand, submitted that insofar as Max and WHL are concerned, the agreements which were there in the earlier years, is also applicable in this year and, accordingly, he fairly agreed that the issue is quite similar to the issue raised in the earlier years. He, however, submitted that the reasoning given by the Assessing Officer as well as by the learned Commissioner (Appeals) should be affirmed.

11. We have carefully considered the rival contentions, perused the orders of the authorities below and the decisions of the Tribunal in Assessee's case rendered in earlier assessment years. With regard to the payment received from Max, we find that the Tribunal has dealt with this issue in the following manner:–

> *Assessment Year – 2000–01*
>
> *"14. We have already set out the nature of services to be rendered by the assessee to Max India Ltd. A perusal of the clauses of Agreement dated 1.3.1999 between the assessee and Max India Ltd. clearly shows that they are purely in the nature of advisory services. Nothing is made available to Max India Ltd. by the assessee. As to whether or not giving advisory services can be considered to be making available included services, example No. 7 given in the MOU between India and USA on the DTAA throws some more light on the understanding of the Government s of India and the USA on the subject. This example is as follows :-*
>
> > *"Facts : the India vegetable oil manufacturing firm has mastered the science of producing cholesterol free oil and wishes to market this product worldwide. It hires an American Marketing consultancy firm to do computer simulation of the world market for such oil and to advise it on marketing strategies. Are the fees paid to the US company for included services?*
> >
> > *Analysis : the fees would not be for included services. The American company is providing a consultancy which involves the use of substantial technical skill and*

> *expertise. It is, however, making available to the Indian company any technical experience, knowledge or skill etc. 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 the commercial information does not make the service a technical service within meaning of para (4)(b).”*

This example, set out in the MOU between the Indian and US governments, also makes it clear that consideration for advisory services rendered cannot be treated as fees for included services under Article 12(4)(b).

15. We will now deal with the decisions referred to by learned CIT(A) in support of his conclusions. The decision in the case of Advance Ruling Petition No. P-6 of (1995) 234 ITR 371 was a case where admittedly there was a situation where technology was made available. So also in the case of Advance Ruling P.NO. 13 of 1995 228 ITR 487. The decision in the case of CESC Ltd. (supra) actually supports the plea of the assessee. For the reasons set out above, we are of the view that learned CIT(A) indeed erred in holding that the monies received by the assessee from Max India Ltd. constitute ‘fees for included services’ within the meaning of Article 12(4) of the India-US treaty, and are accordingly liable to be taxed in India. Since, the assessee does not have any permanent establishment in India, the incomes so arising to them in India cannot be taxed under Article 7 as ‘business profits’ either. Therefore, we direct the Assessing Officer to delete the impugned additions.

<u>Assessment Year – 2002–03</u>

25. This appeal is directed against the order dated 31.3.2005 of learned CIT(A)-XXXIII, Mumbai relating to A.Y. 2001-02. The only issue that arises for consideration in the appeal by the assessee is with regard to taxability of receipt by the assessee during the previous year from Max India Limited. While deciding the appeal of the assessee for A.Y. 2000-01, we have already held that receipt by the assessee from max is not in the nature of FIS and the same cannot be brought to tax in India. For the reasons stated therein, we hold that receipt during the previous year by the assessee from Max cannot be brought to tax in India. Appeal of the assessee is accordingly allowed.

<u>Assessment Year – 2002–03</u>

13. The learned D.R. submitted before us that once the Assessee gives material in the form of standard operating procedures, technical advice etc., it makes available to Max knowledge, experience, skill, know-how and in this regard brought to our notice certain clauses of the Agreement. In this regard our attention was drawn to Exhibit-A of the agreement dt.1.3.2000. He laid emphasis on the fact that there was reference to objective of ensuring that Max enjoys continued

status as an HMI Associated Institution. We have given a careful consideration to the above submission of the learned D.R. and are of the view that the same is without any merit. Exhibit A referred to by the learned D.R. is plan envisaged in difference phases. All the phases only refers to advise given by the Assessee to max to achieve excellence in hospital management like medical equipment to be used, number of medical staff required, on-site training required etc. These services do not make available any technical knowledge, experience, skill, know-how, as explained in the decisions referred to in the order of the Tribunal in Assessee's case for AY 00-01 and 01-02. We therefore reject the contentions of the learned D.R. before us and respectfully following the decision of the Tribunal in Assesses's own case for AY 00-01 and 01-02, hold that learned CIT(A) indeed erred in holding that the monies received by the assessee from Max India Ltd. constitute 'fees for included services' within the meaning of Article 12(4) of the India-US treaty, and are accordingly liable to be taxed in India. Since, the assessee does not have any permanent establishment in India, the incomes so arising to them in India cannot be taxed under Article 7 as 'business profits' either. Therefore, we direct the Assessing Officer to delete the impugned additions. The relevant grounds of cross objection of the Assessee are allowed.

12. Insofar as the payment received from WHL is concerned, we find that this issue has also been dealt with by the Tribunal in assessment years 2002–03 and 2003–04 in the following manner:–

Assessment Year 2002–03

"17. We have considered the rival submissions. We are of the view that the consideration received by the assessee can neither be said to be royalty nor FIS. The payment in question was purely for the purpose of advising, recommending and assisting in relation to healthcare projects. It was also for conducting education and training programmes. It was also for the purpose of review and giving feed back of various aspects and new cardiac hospital to be set up, recommendation on planned patient care delivery system. In page 15A to 15D of the CIT(A)'s order a summary of the activities undertaken by the assessee for WHL have been given. A perusal of the same shows that the consideration received by the assessee cannot be said to be royalty as they were not a payment for use of order, the right to use any copy right, trademark or industrial, commercial or scientific experience. Similarly the assessee did not make available any technical knowledge, experience, skill knowhow or process. The decision of the Delhi Bench of the ITAT in the case of Sheraton International Inc.(supra) supports the plea of the assessee that where the agreement between the parties provides that there was no economic consideration for right to use the name it cannot be said that any payment can be called royalty. So also the consideration paid in a lumpsum cannot be split as a part being in the nature of royalty and any part being in the nature of FIS as laid down in the case of

Motorola Inc.(supra). The payment cannot be said to be FIS for the reason that nothing is made available by the Assessee to WHL and in this regard, the observations while deciding payments received by the Assessee from MAX would be equally applicable to the payments received from WHL also. We are of the view that the entire payment received by the assessee from WHL is in the nature of business profits and since the assessee does not have a PE in India the same cannot be brought to tax in India. Consequently, Ground No.2 & 3 of the Cross Objection of the assessee are allowed."

Assessment Year – 2003–04

"28. ITA No.1559/M/07 is an appeal by the revenue against the order dated 26/10/2006 of CIT(A) 33, Mumbai relating to A.Y 2003-04 and C.O No.146/M/07 is a cross objection by the assessee against the very same order of the CIT(A). The ground raised by the revenue in its appeal and Ground No.1 to 3 raised by the assessee in its Cross Objection are identical to the Grounds 1 & 2 raised by the revenue in its appeal ITA 1558/M/07 and Ground No.1 to 3 in the Cross Objection No.145/M/07 raised by the assessee in this Cross Objection for A.Y 2002-03. For the reasons given while deciding identical grounds in A.Y 2002-03, we dismiss the grounds raised by the revenue and allow Ground No.1 to 3 raised by the assessee in its Cross Objection. Both the parties agreed that the facts and circumstances prevailing in both the A.Ys are identical. Ground No.4 raised by the assessee in Cross Objection No.146/M/07 relating to charging of interest is academic and does not require any adjudication."

13. Consistent with the aforesaid view taken by the Tribunal in Assessee's own case, we hold that the payments received from Max does not constitute FIS within the meaning of Article 12(4), as nothing is made available by the Assessee to Max and also the Assessee does not have any P.E. in India, therefore, the income so arising to the Assessee in India cannot be taxed under Article–7 as *"Business Profit"*.

14. In case of WHL also, we hold that it is neither taxable as FIS nor as royalty and also the Assessee does not have any P.E. in India and, therefore, the payment received by it cannot be taxed in India. Accordingly, consistent with the view taken in earlier years in Assessee's own case, we allow grounds no.1 and 2, raised by the Assessee.

15. Now, coming to the payment received from SRMCRI, the learned Departmental Representative contended that even though the Assessing Officer and the learned Commissioner (Appeals) have held that the

agreement entered with the Assessee and SRMCRI are similar to WHL, however, there is remarkable difference, which is evident from the fact that in case of Max, the consideration received is for rendering of services as noted by the Tribunal in the earlier years. There was no use of logo or trade mark and nothing was to be paid for such usage. Even in case of WHL, the payment was purely for rendering of services and no consideration has been earmarked for use of logo and trade mark. In both the agreements, there is a specific finding that there is no economic consideration for usage of logo and trade mark. Whereas in case of SRMCRI, apart from agreement for services, there was also a case for usage of name of *"Harvard Medical International Association Institute"*, i.e., the name of the Assessee and, therefore, there was a use of logo / trade name. The basic part of the deliverables was the usage of status of the name of the Assessee. He referred to the attachment "A" and "B" to memorandum of agreement between SRMCRI and the Assessee and submitted that once there is a usage of name, it is clear cut case of usage of logo and hence, the payment has to be treated as royalty. The other clauses of deliverables and services are mere incidental, the dominant object of the agreement has to be seen and this aspect has neither been considered by the learned Commissioner (Appeals) nor by the Assessing Officer, therefore, the entire amount in case of SRMCRI should be held as *"Royalty"*. In support of his contentions, he strongly relied upon the decision of the Tribunal in Sheraton International Inc. v/s Deputy Director of Income-tax, [2007] 107 ITD 0120 (Mum.). Further reliance was also placed on the decision of AAR in case of Mersen India Pvt. Ltd. AAR no.1074/2010, order dated 16th April 2012 and drew our attention to Para–18 and 19 that if one of the terms of agreement falls within the parameters of services as given in Article, the same has to be treated as dominant object and is to be taxed in India. The sum and substance of his submissions were that if the main purpose of the agreement is for usage of logo or trade name, the same is to be taxed as royalty even if there are incidental services not falling within the meaning of FIS. With regard to the learned Commissioner (Appeals)'s observation that the Assessee is providing teaching services is not correct, as the teaching and

training are two different activities and in case of SRMCRI, it is a case of training and, therefore, does not fall within the purview of the word *"Teaching"* as given in Article–12(5)(c). Alternatively, the learned Departmental Representative submitted that in case it does not fall within the purview of *"Royalty"*, it falls within the purview of FTS since the agreement is for education and training and not for education and teaching.

16. In the rejoinder, the learned Counsel submitted that the learned Departmental Representative cannot take contrary stand as one taken by the Assessing Officer / learned Commissioner (Appeals), because both the authorities have categorically held that the services rendered in pursuance to the agreement entered with SRMCRI are similar to that of Max and WHL. He pointed out relevant observations of the Assessing Officer as well as the learned Commissioner (Appeals). Regarding non–applicability of earlier years' Tribunal order with regard to the agreement of SRMCRI, he submitted that in case of SRMCRI also, there is no separate economic consideration earmarked for use of name and logo. In fact, similar clauses are there in the case of Max as well as WHL. The agreement in essence is that of service contract and not an agreement for use of name and logo. Regarding decision of Sheraton International Inc. (supra), cited by the learned Departmental Representative in support of the contentions that dominant purpose of the agreement has to be seen which was for the use of logo and not for rendering services, he submitted that attachment "A" referred to by the learned Departmental Representative has not much significance as it merely states current status of Harvard Medical International Association Institute (supra). The said clause is also available in the agreements with WHL and Max. In support of this, he has filed a copy of the agreement with that of Max and WHL. The Commissioner (Appeals) in Annexure-I to the order has given detail description of the services rendered which clarifies the dominant purpose which was for rendering of services as given in the agreement and use of name was only incidental. The essence of the agreement and the dominant purpose has also been dealt with by the Tribunal in the entire years.

17. We have carefully considered the rival contentions, perused the findings of the Assessing Officer and the learned Commissioner (Appeals). The contentions of the learned Departmental Representative before us is that in case of SRMCRI, the main purpose of the agreement was the use of logo or name of the Assessee and, therefore, the same should fall within the ambit of *"Royalty"*. It is seen that the learned Commissioner (Appeals), in annexure to the appellate order, has highlighted various programmes conducted by the Assessee for SRMCRI which is mainly orientation of various teaching on medical and health related issues via video conference. Even as per the agreement, dominant purpose is for providing education and training programmes and the use of the Assessee's name is only incidental for carrying out such teaching and training activities. It is further seen that similar usage of name is there in the agreement with WHL and Max. The Tribunal in Assessee's own case for assessment years 2002–03 and 2003–04 have considered exactly the similar contention as has been raised by the learned Departmental Representative as in those years, the Assessing Officer's case was that use of the name *"Harvard"* amounts to use of logo and, therefore, 90% of the payment is attributable to right to use the logo. This aspect of the matter has been dealt with in Paras–8 and 9, of the appellate order which, for the sake of ready reference, is reproduced below:–

> *"8. The consideration payable for services to be rendered by the Assessee to WHL has been set out in clause–2 of the Agreement. Clause–3, of the Agreement provides for use of the name of the Assessee by WHL. The relevant portions thereof are as follows:–*
>
> *3. USE OF NAMES; INTELLECTUAL PROPERTY:-*
>
> *(a) Subject to the terms of this MOA, and for the duration thereof WHL, the Existing Cardiac Hospital and the Existing Kidney Hospital, and, when developed, the Propose Cardiac Hospital and the Proposed Women's Hospital, each may refer to itself as receiving education and training services from HMI and designate themselves as a "Harvard Medical International Associated Institution." WHL's and such Facilities' use of such name will be in accordance with the restrictions set forth below, and such other reasonable restrictions intended to protect the goodwill in the name as HMI may impose from time to time. Any other use of the name "Harvard" and the associated logos and designs*

(alone or as part of another name) in connection with this MOA, the Services, WHL or any Facility shall be permitted only during the term of this MOA and only upon the written approval of and in accordance with restrictions agreed to by, HMI.

(b)The use of the names and logos of WHL and the Facilities by HMI shall be subject lo the terms of this MOA, and for the duration thereof, HMI may use the name of WHL by referring to its relationship with WHL in factual statements to the effect that HMI is providing the services hereunder WHL, HMI's use of such name will be in accordance with the restrictions set forth below.

(c) All materials delivered to WHL by or o behalf of HMI in connection /with providing Services, together with all copyright, trademark, trade dress, trade secret, patent, and other proprietary rights therein ("Intellectual Property") shall belong exclusively to HMI. During the term of this MOA, HMI hereby grants to WHL and the Facilities rights to use the whole (not individual pieces alone) of such Intellectual Property (other than the name "Harvard", or any of its logos and designs, which is governed by the provisions of Section 3(a) above), free to any royalty or any related economic consideration. Notwithstanding the foregoing, HMI shall, also retain all rights to use the intellectual Property, subject to the terms of this MOA.

9. Case of the Assessing Officer:

According to the AO, the Assessee by virtue of the aforesaid agreements gave a right to use copy righted items, deliverables, name, logo etc. The intellectual property rights in the materials delivered by the Assessee to Max and WHL remained exclusive property of the Assessee. According to the AO the use of the name Harward carries immense value as it is associated with quality. The Assessee had duly protected its intellectual property rights to its name and its logo in the agreement and has given only limited rights to MAX and WHL to use them. Thus the consideration received by the Assessee to the extent of 90% can be attributed to the right to use the logo and therefore 90% of the payments received by the Assessee has to be construed as Royalty. The remaining 10% was to be considered as FIS. The sums received by the Assessee as aforesaid were accordingly brought to tax by the AO."

18. Similar terms given in Exhibit "A" in case of Max which was contended by the learned Departmental Representative in the earlier year also has also been taken note of by the Tribunal in Para–13, which has been rejected by the Tribunal. The Tribunal, in Paras–15 to 17, has dealt with the similar arguments of the learned Departmental Representative in the following manner:–

"15. We have already seen the nature of services rendered by the Assessee to WHL. From a perusal of the nature of services rendered by the assessee to the WHL it is clear that nothing is made available by the assessee to WHL. The emphasis of the ld. D.R before us was that the use of the name Harward Medical International Inc., given in clause (3) of the agreement dated 14/12/2000 is the essence of the agreement and all the other services rendered are only incidental. According to him it is only the use of the assessee's name and logo that gives benefit to WHL and, therefore, the provisions of Article 12(3)(a) and Article 12(4)(a) will make it either a royalty or a fees for included services. In this regard it was also submitted by the ld. D.R that the assessee in clause 5 of the agreement has agreed not to establish any alliance similar to the one entered into with WHL. This clause according to the ld. D.R also shows that it is only the right to use the logo and name of the assessee was the prime consideration for the payment of consideration to the assessee by WHL.

16. The ld. Counsel for the assessee in this regard submitted that the right to use the logo and name of the assessee by WHL was only incidental. In this regard he drew our attention to clause 3(c) of the agreement dated 14/12/2000, wherein it has been made clear that there are no economic consideration for right to use the name or logo of the assessee. Our attention was also drawn to the decision of Hon'ble Delhi Bench of the ITAT in the case of Sheraton International Inc. vs. DDIT, 107 ITD 120 (Del), wherein it was held that where main purpose of the agreement was to render services and use of trademark or trade name was only incidental then the entire payment or even a part of it cannot be considered as royalty. The Tribunal also held that where the agreement between the parties specifically provide use of trademark free of cost, no part of the consideration paid for services rendered can be treated as royalty. The aforesaid decision was also confirmed by the Hon'ble Delhi High Court reported in (2009) TIOL-57-HC-Del- IT. Our attention was also drawn to the decision of the Special Bench of the ITAT in the case of Motorola Inc. vs. DCIT , 95 ITD 269(Del)(SB), wherein it was held that where a lumpsum consideration was paid it was not open to the Income Tax Authorities to split the same and treat a part of the same as royalty.

17. We have considered the rival submissions. We are of the view that the consideration received by the assessee can neither be said to be royalty nor FIS. The payment in question was purely for the purpose of advising, recommending and assisting in relation to healthcare projects. It was also for conducting education and training programmes. It was also for the purpose of review and giving feed back of various aspects and new cardiac hospital to be set up, recommendation on planned patient care delivery system. In page 15A to 15D of the CIT(A)'s order a summary of the activities undertaken by the assessee for WHL have been given. A perusal of the same shows that the consideration received by the assessee cannot be said to be royalty as they were not a payment for use of

> *order, the right to use any copy right, trademark or industrial, commercial or scientific experience. Similarly the assessee did not make available any technical knowledge, experience, skill knowhow or process. The decision of the Delhi Bench of the ITAT in the case of Sheraton International Inc.(supra) supports the plea of the assessee that where the agreement between the parties provides that there was no economic consideration for right to use the name it cannot be said that any payment can be called royalty. So also the consideration paid in a lumpsum cannot be split as a part being in the nature of royalty and any part being in the nature of FIS as laid down in the case of Motorola Inc.(supra). The payment cannot be said to be FIS for the reason that nothing is made available by the Assessee to WHL and in this regard, the observations while deciding payments received by the Assessee from MAX would be equally applicable to the payments received from WHL also. We are of the view that the entire payment received by the assessee from WHL is in the nature of business profits and since the assessee does not have a PE in India the same cannot be brought to tax in India. Consequently, Ground No.2 & 3 of the Cross Objection of the assessee are allowed."*

19. Thus, we find that this issue has been taken into consideration by the Tribunal in the assessment years 2002–03 and 2003–04. Even the learned Commissioner (Appeals) has given a categorical finding that the agreement with SMRCRI is similar to that of WHL and Max which, in our opinion, is absolutely correct. Hence, such a finding of the learned Commissioner (Appeals) given with regard to the payment received from SRMCRI is similar to that of Max and WHL will also apply in the case of payment received from SRMCRI and, therefore, the findings of the Tribunal in the earlier years will also squarely apply here in the case of SRMCRI. Thus, respectfully following the earlier years' precedence, which is also applicable with regard to the payment made to SRMCRI, we hold that the same is not taxable in India either as *"Royalty"* or as *"FIS"*. Accordingly, we set aside the impugned order passed by the learned Commissioner (Appeals) and allow ground no.3, raised by the Assessee.

20. Ground no.4, is an alternative ground that the amount received from three parties cannot be regarded as business profit in the absence of P.E. in India in terms of Article–5.

21. Since we have already decided the issue in favour of the Assessee that the payment received is not taxable as *"FIS"* or *"Royalty"* in India, therefore, ground no.4, is treated as academic.

22. परिणामतः निर्धारिती की अपील स्वीकृत मानी जाती है ।

22. In the result, Assessee's appeal treated as allowed.

We not take up Revenue's appeal ITA no. 1020/Mum./2008, vide which following grounds have been raised:–

> *1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in directing the Assessing Officer to treat 50% of the fees received from Wochkhardt Hospital Ltd as non taxable representing teaching in or by educational institution and balance 50% as Royalty, as against 90% as Royalty and 10% as fees for included services taken by the Assessing Officer.*
>
> *2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in directing the Assessing Officer to delete the addition of Fees of US$ 35000 under the Wockhard Awards Agreement with WHL' by holding that WHL has not gained any "Technical Knowledge" from the services done by the assessee and it cannot be assessed as "fees for included services.*
>
> *3. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in directing the Assessing Officer to take 40% as "Royalty" and delete 60% of the addition of 'Fees of US $ 312500 from SRMCI' by holding that 60% of the payment will not come under 'fees for included services whereas 40% will come under "Royalty".*
>
> *4. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in directing to delete the addition made by the Assessing Officer of reimbursement of expenses of US $ 28695.39 by holding that reimbursement of expenses are connected with teaching by the assessee and therefore, the payment is not taxable as the reimbursement of expenditure also will take the same colour and hence it is not taxable.*
>
> *5. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in holding that no interest is leviable under section 234B of the Act and directed the Assessing Officer to delete the same."*

23. The issue arising out of ground no.1, is covered by the decision given by us in ground no.1, raised by the Assessee in its appeal in ITA no.791/ Mum./2008. Consistent with the view taken therein, this ground is treated as

dismissed, as we have already held that the payment received from WHL is neither taxable as *"FIS"* nor as *"Royalty"*.

24. In ground no.2, the Revenue has challenged deletion of addition of payment of fees of US$ 35,000 under the Wackhardt Awards agreement.

25. The Assessee has received payment of US$ 35,000 for services rendered in terms of new Wockhardt Award's agreement entered into by the Assessee with WHL. The Assessee had submitted that Wockhardt Awards are established in order to recognise individuals who have made significant contributions in clinical care, medical research and teaching in medical specialities such as cardiology, neurology, oncology, etc. Under the agreement, the Assessee is required to render services such as advising and assessing WHL in the nomination and selection process for the awardee for the Wockhardt Award. The payment was received for managing and structuring the academic component of the award for the awardees. It was contended that the same is not taxable in India since these services mainly involved providing the awardees of WHL awards and help in selecting the awardees and also selection of possible programmes to offer to the awardees. Therefore, there is no make available of any knowledge, experience or skill to WHL. The learned Commissioner (Appeals), after carefully analysing the nature of service rendered in this aspect, in Paras–8 and 8.1, has held that the Assessee is not doing any services which comes within the definition of FIS.

26. We have heard the rival contentions and perused the relevant findings of the Assessing Officer and the learned Commissioner (Appeals). We find that the Assessee for the purpose of Wockhardt award the Assessee is assisting in the selection of the awardees in the various medical specialties and is mainly providing structuring and managing of the Wockhardt selection committee to help them to select potential award nominees, providing selection criteria and invitation to the awardees to deliver scientific address at approximate clinical forums. The nature of services under this agreement have been enumerated as under:–

"The services to be provided by the appellant is listed in Attachment A of the agreement and it is extracted below:

Services to be provided by HMI"

A In the 1st 3rd and 5th and every subsequent odd numbered Contract Year HMI will provide WHL the academic component of the Awards.

HMI will provide each awardees the following HMI related award components:

Title of an HMI visiting Faculty for the Award period.

Invitation to the awardee to deliver one scientific address at an appropriate HMI or HMS clinical forum iii Boston during the award period.

• Participation in an intensive HMI or HMS professional development program of up to 5 days to be selected from among a selection of possible programme that HMI will offer the Awardee within the award period.

• Eligibility to participate in a PM' programme that PM! may implement in other countries outside India based on HMI needs, as a future HMI program faculty, with all the benefits normally available to HMI program faculty.

B In the 2nd 4th and 6th and every subsequent even numbered contract year HMI will provide WHL the following services.

i) Structure and managing the Wockhardt awards selection committee. HMI will structure and oversee a selection committee to at potential award nominee and make the final selection of the recipients of the Wockhardt Awards The selection committee will consist of up to four (4) senior HMI representatives and upto three (3) represent at lye from among previous Wockhardt Award awardees. The chairman of the committee will be the president of Harward Medical International. The fetal size of the selection committee will not exceed seven (7) members The Committee will meet twice per Award period, once in Boston and once in Mumbai, the first meeting to be held by the 18TH month of the Award period to vet and shortlist nominees and the second meeting to be held by the 22nd month of the Award period to select the final five awardees.

ii) Developing nomination land selection criteria. HMI will develop the nomination selection criteria and selection process of the Wackhardt Awards, to be updated annually to provide the framework on which candidates will be nominated and selected on a biannual basis.

> *Broadly, nominations and selections will be made for candidates who have demonstrated national excellence in medical research and innovation, teaching and delivery of clinical care in their specialty. The selection committee will have all the final rights on the selection process and will have the right to charge the selection process if it so deems fir.*
>
> *iii) Vetting nominees and selecting potential awardees. The selection committee under HIM'ss supervision will have the responsibility of vetting nominees, and reeking the final selection of the five awardees. The selection committee will have final authority or all decisions related to the selection of Wockhardt Awardees."*

27. Thus, from a plain reading of the above clauses, it is seen that the Assessee is not doing any service which falls within the definition of *"FIS"* as contemplated in Para–4 of Article–12. We agree with the findings of the learned Commissioner (Appeals) that these are merely facilitation services with regard to the selection of awareness for Wockhardt Awards and WHL has not given any technical knowledge from such services, therefore, the learned Commissioner (Appeals) has rightly deleted the said addition. Accordingly, ground no.2, raised by the Revenue is dismissed.

28. The issue arising out of ground no.3, has been decided by us vide ground no.3, in Assessee's appeal in ITA no.791/Mum./2008, and consistent with the view taken therein that the payment made to SRIMCRI is neither taxable as *"Royalty"* nor as *"FIS"*. Therefore, ground no.3, raised by the Revenue stands dismissed.

29. Ground no.4, relates to deletion of reimbursement of expenses.

30. The Assessee has received reimbursement of expenses in US$ 28695.39 from WHL. The learned Commissioner (Appeals) has held that the reimbursement of expenses is connected to teaching by the Assessee and he has already held that the payment made by WHL is not taxable as *"FIS"*, therefore, the reimbursement of expenses also cannot be taxed.

31. While deciding the Assessee's appeal, we have already held that the payment received in view of various services is neither taxable as *"Royalty"*

nor *"FIS"*, therefore, the reimbursement of expenses also cannot be held to be taxable. Accordingly, ground no.4, raised by the Revenue stands dismissed.

32. Ground no.5, relates to levy of interest under section 234B of the Act.

33. The learned Counsel for the assessee submitted that the entire amount was subjected to TDS, therefore, there is no liability on the Assessee to pay advance tax under section 208. Therefore, the provisions of section 234B cannot be invoked.

34. Both the parties agree before us that this issue is covered by various decisions as has been referred to by the learned Commissioner (Appeals). In view thereof, we hold that the learned Commissioner (Appeals) has rightly deleted the levy of interest under section 234B. Consequently, ground no.5, raised by the Revenue is dismissed.

35. परिणामतः राजस्व की अपील खारिज की जाती है ।

35. In the result, Revenue's appeal is dismissed.

36. निर्णयों के सारांशस्वरूप, राजस्व की अपील खारिज की जाती है एवं निर्धारिती की अपील स्वीकृत मानी जाती है ।

36. To sum up, assessee's appeal is treated as allowed and Revenue's appeal is treated as dismissed.

आदेश की धोषणा खुले न्यायालय में दिनांकः 22nd February 2013 को की गई।
Order pronounced in the open Court on 22nd February 2013

Sd/-	**Sd/-**
बी. रामकोटय्य	**अमित शुक्ला**
लेखा सदस्य	**न्यायिक सदस्य**
B. RAMAKOTAIAH	**AMIT SHUKLA**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई MUMBAI, दिनांक DATED: 22nd February 2013

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

(1) निर्धारिती / The Assessee;
(2) राजस्व / The Revenue;
(3) आयकर आयुक्त(अपील)/ The CIT(A);
(4) आयकर आयुक्त / The CIT, Mumbai City concerned;
(5) विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / The DR, ITAT, Mumbai;
(6) गार्ड फाईल / Guard file.

सत्यापित प्रति / True Copy
आदेशानुसार / By Order

प्रदीप जे. चौधरी / Pradeep J. Chowdhury
वरिष्ठ निजी सचिव / Sr. Private Secretary

उप / सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai