

**BEFORE THE AUTHORITY FOR ADVANCE RULINGS  
NEW DELHI**

**24<sup>th</sup> Day of May, 2018**

**A.A.R.No 1010 of 2010**

**PRESENT**

**Mr. R.S. Shukla, In-charge Chairman  
Mr. Ashutosh Chandra, Member (Revenue)**

- Name and address of the Applicant : FRS Hotel Group(Lux) S.a.r.l.  
(Now FRHI Hotels & Resorts S.a.r.l.)  
16 Avenue Pasteur,  
L-2310 R.C.S.  
Luxembourg B 110245
- Present for the Applicant : Mr. Nageswar Rao, Advocate  
Mr.Purushottam Anand, Adv.  
Ms. Akanksha Gupta, CA
- Present for the Department : Mr. G.C. Srivastava, Advocate  
Ms. Kavita Pandey, CIT (DR),  
AAR  
Mr. Sukh Sagar Syal, CA  
Mr. Rakesh Goyal, CIT, Kolkata.

**RULING  
(By Ashutosh Chandra)**

FRS Hotel Group (Lux) S.a.r.l., (now FRHI Hotels & Resorts S.a.r.l.), the Applicant, has filed an application under Section 245Q(1) of the Income Tax Act, 1961 (the Act) on 24.11.2010 and the same was admitted on 26.07.2012. The Applicant is a Company within the FRHI Group incorporated under the laws of and Duchy of Luxembourg. It is stated that the Applicant is the Principal Operator Company of the FRHI Group outside North America

and provides services in connection with hotel management and including all services that are necessary for hotel operation, such as establishing hotel standards & policies, sales and marketing, centralized reservations, purchasing and certain other services as per the operational requirements of the hotel owners to meet the hotel brand requirements.

1.1 It is stated that M/s. Bengal Ambuja Housing Development Limited (hereinafter referred to 'BAHDL / Indian hotel owner'), developed and owns a 5 Star deluxe hotel known as Swissotel Kolkata in Rajarhat Kolkata, and has engaged the Applicant to provide certain services in different phases of hotel development and operation so that the hotel property i.e. Swissotel Kolkata can be developed and operated as per international standards similar to other Swissotel properties across the globe. For this purpose, the Applicant and the BAHDL / Indian hotel owner entered into a Centralized Services Agreement on 1<sup>st</sup> September, 2009 (in short 'CSA) under which the Applicant has agreed to provide BAHDL the following services in relation to Swissotel Kolkata:

- (a) Global Reservation Services – to facilitate reservation / booking of rooms, banquets etc. in Indian hotel property;
- (b) Centralized Services – miscellaneous support services as required by the Indian hotel owner at its option, including but not limited to global sales & marketing, finance support, human resources support, operations support, and technology support;
- (c) Corporate Design & Construction services – for providing advisory services in connection with any capital improvements proposed by the Indian Hotel owner in relation to the hotel property, including refurbishing, maintenance, repairs or other capital improvement etc.; and

- (d) Purchasing services –Assistance in purchases of goods, supplies and services as required by the Indian Hotel owner in relation to operation of the Indian hotel commensurate with the brand of the Hotel.

1.2 It is submitted that at the time of filing of application before this Authority, the Applicant sought a ruling based on the provisions of Global Reservation Services and providing assistance in purchases / procurement of goods, supplies or services to the BAHDL/ Indian Hotel Owner as per the Centralized Services Agreement dated 01.09.2009 entered into by the Applicant with BAHDL / Indian Hotel Owner but subsequently the Applicant has withdrawn to seek ruling on the second question i.e. on taxability of purchase services on the plea that the Applicant does not contemplate to provide such services to the Hotel owner. Further it is stated by the Applicant that the provision of Purchasing Services in the Centralized Service Agreement is a standard clause which the Applicant typically provides in its contracts with hotel owners across the world. The Indian Hotel Owner in the present case does not require such purchasing services.

2. On the above facts, the Applicant is seeking a Ruling of this Authority only on the following question by confining itself to taxability of consideration received for global reservation services:

*“Whether on the facts and circumstances of the case, payments received by the Applicant from the Indian hotel owner for provision of global reservation services (‘GRS’) would be chargeable to tax in India as ‘Fees for Technical Services’ or ‘Royalty’ under the provisions of section 9(1)(vi) / 9(1)(vii) of the Income tax Act, 1961 (“the Act”) read with provisions of Article 12 of the Double Taxation Avoidance Agreement between India and Luxembourg?”*

2.1 In its application filed before this Authority, the Applicant had annexed only one agreement, i.e. the Centralized Services Agreement dated 01.09.2009. At the time of hearing on the admissibility of this application, the

Revenue had urged that the CSA contains references to certain other agreements entered into between the Applicant and BAHDL. It was submitted by the Revenue that in order to bring out the *modus operandi* of the Applicant and also to determine the taxability of the given transaction, it is essential that the other agreements entered into between the parties with respect to the development, operation and management of the hotel be brought on record.

2.2 Vide order dated 27.07.2011, this Authority called upon the Applicant to file such agreements. Four such agreements (in addition to the CSA, which was filed along with this application) were filed by the Applicant. Accordingly, the following five agreements form part of the record for the purpose of this Ruling:

- a) Hotel Management Agreement ('HMA')
- b) Centralized Services Agreement ('CSA')
- c) Hotel License Agreement ('HLA')
- d) Hotel Advisory Agreement ('HAA')
- e) Technical Services Agreement ('TSA')

3. The Applicant has vehemently argued that the only question raised before this Authority is regarding the taxability of Global Reservation Services ('GRS'). This service is provided under the CSA and therefore reference to any other agreement is wholly unnecessary.

4. The Revenue, on the other hand, submits that there are two categories of agreements. HMA, the 'Principal Agreement' lies in the first category, while the other four agreements, which arise from this Principal Agreement constitute 'Ancillary Services Agreements'. It is the case of the Revenue that no single Agreement can be read in isolation and without context and that it is

necessary to go into the provisions of each of these agreements before rendering a Ruling on the question raised in the application.

5. At this juncture, it is necessary to deal with this issue raised by the Applicant. The terms of these five agreements were extensively read out by both the parties. While we shall deal with these agreements in the later part of this order, at this stage, it would suffice to say that through these agreements, some very vital aspects of development, operation and management of the hotel have been handed over by BAHDL to the Applicant. Each of these agreements deals with parts of the overall functioning of the hotel. It would, therefore, be wrong to restrict ourselves to reading just one agreement without going into other agreements.

6. On merits, the Applicant has primarily made submissions as to why the income arising from providing GRS cannot be taxed in India as 'Royalty' or 'Fees for technical services' u/s. 9 of the Act read with Article 12 of the DTAA.

7. However, the Revenue in its counter submissions urged that the primary issue in this case is whether or not the Indian Hotel constituted a Permanent Establishment (PE) in India under Article 5 of the DTAA and the profits attributable to such PE, including the income from GRS ought to be taxed in India as its business profits. It was also submitted that all streams of income, including income from GRS are taxable under the Act as business income, since their 'business connection' and also their 'source' lies in the operation of the hotel in India.

8. In reply, the Applicant reiterated that the question raised in the present application is only whether the income from GRS (arising out of Centralised services agreement) can be taxed as 'royalty' or 'fees for technical services' under the Act and the DTAA. Therefore, any arguments on the existence of

PE are not to be adjudicated upon or even considered in the present proceedings. It has further been submitted that the Ruling is sought only on the provisions of the Centralised services agreement and any reference to any other agreement will be wholly inappropriate.

9. Before proceeding any further on the merits of the issue, it is necessary to first deal with this preliminary issue as to whether this Authority would be justified to give a Ruling on the existence of PE in the present application when the question is limited to the taxability of one single stream of income by way of royalty or Fee for technical services.

9.1 The powers of the Authority in dealing with the questions posed before it, are contained in Rule 12 of the Authority for Advance Rulings (Procedure) Rules 1996. This Rule provides:

*'Rule 12- Questions contained in the application.*

*12. The Applicant shall not, except by leave of the Authority, urge or be heard in support of any additional question not set forth in the application, but in deciding the application the Authority shall at its discretion consider all aspects of the questions set forth as may be necessary to pronounce a ruling on the substance of the questions posed for its consideration.'*

The aforesaid Rule is self-explanatory and explicit and it does indicate that the Authority has not only the power but the duty to look at 'all aspects of the questions set forth' which would enable to it pronounce a ruling 'on the substance of the questions posed for its consideration'.

9.2 This Authority was formed with the idea of providing certainty and finality to the taxation aspects of the issues raised before it. If the contention of the Applicant is accepted and for a certain stream of income, a Ruling is given without having any regard to other business operations and streams of income based only on certain provisions of the Act and the DTAA, while leaving the

other provisions open for regular assessment by the Income tax department, the whole exercise of approaching the Authority and getting conclusive orders will be rendered futile. It is needless to overemphasize the fact that such a compartmentalized approach would be highly unjustified as business operations by their very nature cannot be divided into one or the other sub-parts. Proceeding on the assumption that one operation has no bearing on the other would be a highly untenable proposition.

9.3 We also notice that at pages 14 and 15 of the application, where Business Income is discussed, the Applicant has itself stated that:

*“income in respect of ‘reservation services’ to be rendered by the Applicant to Indian hotel owner under the CSA executed between the Applicant and Indian hotel owner should be considered as business income not liable to tax in India under Article 7 of India-Luxembourg DTAA since these services are rendered entirely from outside India and cannot be attributed to any PE in India.”*

Having taken such a position, we do not find merit in the Applicant’s contention that the issue of the existence of PE is not a subject matter of the present application. The question posed before the Authority proceeds on the inherent assumption that there is no PE in India.

9.4 We must emphasize that a treaty, like any other agreement, must be read and given effect to as a whole. An isolated reading of some paragraphs while ignoring others would, in our opinion, lead to absurd and highly untenable inferences and conclusions.

9.5 Lastly, we must also highlight that Article 12 of the India-Luxembourg DTAA, on which the Applicant seeks a Ruling, itself provides in para 4 that where the right, property or information in respect of which royalty or fees for technical services is paid is ‘effectively connected’ to a PE, then the provisions

of Article 7 will apply. We, therefore, have no hesitation in holding that the present application does call for an adjudication on the issue of the existence of a PE. We cannot approach the question posed before us without first deliberating on the existence or otherwise of a PE in India.

9.6 We must also point out that the five agreements which form part of the record cannot be viewed on a standalone basis. The activity of the Applicant is an integrated one and it cannot be split into one or the other. We have perused and extracted, in detail, the terms of these agreements in the subsequent portion of this order. On such perusal, it emerges that the different agreements are a part of the wholesome arrangement. The Applicant has performed different functions in regard to the operation and management of the hotel in each of these agreements. It is referred to by different names such as 'Operator', 'Advisor', 'Licensor' and 'Consultant' in different agreements but viewed in totality the end result is one, i.e. operation and management of all vital aspects of the hotel. Further, these agreements contain references to each other at several places and are co-terminus with each other as well. Therefore, the Applicant's contention that the Ruling has to be restricted only to the Centralised services agreement is devoid of merit.

10. On the merits of the issue of PE, counsels for both sides have extensively read out the terms of the agreements to highlight their respective views regarding the existence or otherwise of a PE. Before coming to the relevant terms of the agreements, it would be prudent to take note of the conditions, the satisfaction whereof leads to the creation of a fixed place PE, under the terms of the relevant DTAA.

10.1 In view of the model commentaries, leading commentaries by eminent authors on the subject and judicial precedents, including the judgment of the Hon'ble Supreme Court in the case of Formula One World Championship Ltd.



v. CIT (394 ITR 80), it is now well settled that a fixed place PE arises on the fulfillment of the following three conditions-

- i) Existence of a fixed place.
- ii) The fixed place being at the disposal of the non-resident.
- iii) The non-resident carrying on its business (wholly or partly) through such fixed place.

10.2 There is no doubt that the Indian hotel, 'Swissotel Kolkata' is a fixed place. Whether such fixed place is at the disposal of the Applicant, the Revenue has highlighted various clauses from the Agreements.

10.3 In the principal agreement, i.e. the '*Hotel Management Agreement*', the Applicant is referred to as the 'Operator' and BAHDL is referred to as the 'Owner'. Some of the relevant clauses are as under:

- *Owner desires to obtain the benefit of Operator's expertise in connection with the day to day operation and management of the Hotel, all upon and subject to the terms and conditions set forth in this Agreement.*

*(Recital B)*

- *Subject to section 2.2, the initial Operating Term of this agreement shall be the period commencing on the Opening Date and ending on the tenth 10<sup>th</sup> year anniversary of the Opening Date (the 'Initial operating term').*

*(Clause 2.1)*

- *Operator and Owner may agree to extend the Operating Term for up to Four (4) additional consecutive Extension Terms. The terms and conditions of this agreement and the Ancillary Services Agreements (subject to Section 4.5 of the Addendum and unless otherwise agreed by the Parties) shall govern any Extension term.*

*(Clause 2.2)*

• Upon and subject to the terms and conditions of this Agreement, (including the limitations set forth in section 3.2 below), Owner hereby engages operator as the exclusive operator and managing agent of the Hotel during the operating term and Operator hereby accepts such engagement upon and subject to such terms and conditions. Subject only to the provisions of this Agreement, Operator shall have exclusive control, discretion and authority with respect to, and be responsible for, the Operation of the Hotel, free of interference from Owner or any Person claiming by, through or under owner. Such control, discretion and authority shall, subject to the terms of this Agreement and any express obligation or limitation set forth in the applicable annual budget, include the following:

- a) Employment of Hotel Staff.
- b) Marketing of the Hotel
- c) Hotel policies and prices.
- d) Purchasing.
- e) Operating Contracts and Equipment leases.
- f) Leases.
- g) Repairs.
- h) Extension of credit.
- i) Entertainment policies.
- j) Legal Counsel.
- k) Access- Operator and its Affiliates and their respective employees, officers, consultants and contractors shall have the right to access all parts of the Hotel to the extent and at the times deemed appropriate by Operator during the Operating Term.

(Clause 3.1)

• Operator, as managing agent for Owner, shall exercise commercially reasonable efforts to comply with all Applicable Laws affecting the Hotel and its operation...If, despite the reasonable efforts of operator to comply with applicable laws, operator receives notice that the hotel does not comply with applicable laws, operator shall promptly take such steps as are then reasonably

*required, coordinating with hotel's legal counsel and owner, as appropriate, to remedy such non-compliance with diligence.*

*(Clause 3.9)*

- *Pre-opening activities*

*'Operator' to identify, appoint, assign and train the General Manager and such other personnel as is considered necessary for the operation of the hotel.*

*f) Access to site- Owner shall afford (and shall cause the general contractor to afford) all consultants engaged by operator reasonable access to the construction site so that operator may perform its duties under this section 3.12.*

*g) Marketing- Operator and its affiliates shall develop a marketing plan for the promotion and marketing of the name and facilities of the hotel during the pre-opening period.*

*(Clause 3.12)*

- *(a) Except as set forth in section 5.3(b) below, Owner shall have the right to consult with operator with respect to the hiring, initially and with respect to any replacement, of the following hotel staff positions (the Core Executive Staff), provided, however, that the final decision as to any hiring, termination, transfer or replacement shall be that of operator (i) General manager, (ii) Comptroller/Chief Financial Officer, and (iii) Director of Sales and Marketing. Operator may change or replace the Hotel Staff at any time. Owner acknowledges further that the Brand Parent Company shall be entitled to offer positions at any of the operator hotels to all members of the hotel staff, including the core executive staff.*

*b) Owner shall have the right to refuse Operator proposal for the position of General Manager up to three consecutive times, after which Operator shall be entitled to choose at its own discretion to fill the position with any of the three candidates who were not approved by owner. Operator shall have the right to refuse owner proposal for the position of comptroller/CFO up to three*

*consecutive times and upon such refusal operator shall be entitled to propose a panel of three candidates to the position of comptroller/CFO and owner shall agree to select one of them to fill up the position of comptroller/CFO.*

(Clause 5.3)

*• Consistent with the engagement of Operator hereunder and its authority and responsibility under this Agreement with respect to the management of all aspects of Operation of the hotel, Owner shall not implement or agree to implement any change in the scope or nature of the Operation of the Hotel, contact directly the Hotel staff (other than the General Manager or the Chief Financial Officer, the latter of which will only be contacted with regard to finance accounting and tax-related matters and after informing the general manager with at least 24 hours prior notice) or otherwise interfere with operator's exercise of its rights and responsibilities.*

(Clause 12.5)

*• Notwithstanding any other provision of this Agreement, Operator may at any time and from time to time effect any direct or indirect transfers, provided that following the Transfer (i) operator remains or is an Affiliate of the pre-transfer Operator or (ii) the transferee is a successor or assignee of the operator which may result from any merger, consolidation, transfer or reorganisation of Operator or the transferee is a Person who has acquired all or substantially all of the assets of operator, provided that in the case of any Transfer, such transferee has the ability to perform its obligations under this Agreement and operate the Hotel and the other Operator Hotels in accordance with the standard.*

(Clause 17.2)

*• Notwithstanding any other provisions in this Agreement the Owner shall be entitled to transfer its right, title and interest in the hotel either directly or indirectly, so long as such transfer is made (i) to a Qualified Person, (ii) that agrees to take over the rights and obligations of this Agreement, and (iii) that is not a Competitor of the Operator; provided however, the owner shall notify the*

*Operator in writing of its intention to sell its right, title and interest in the Hotel and the operator shall be at liberty to make an offer to purchase such right, title and interest.*

(Clause 17.3)

10.4 In the 'Centralized Services Agreement', the Applicant is referred to as the 'Advisor' and BAHDL is referred to as the 'Owner'. The following clauses have been highlighted to show that the Hotel was at the disposal of the Applicant and that it exercised significant complete control over its operation.

- *Owner desires to obtain the benefit of Advisors expertise in advising and providing services to Owner with respect to sales and marketing, reservations and purchasing, and certain other aspects of the Hotel and Adviser has agreed to provide such expertise and services, all from Advisor's home offices and with staff situated outside of the Jurisdiction and upon and subject to the terms and conditions set forth in this Agreement.*

(Recital B)

- *The term of this agreement (the "Term") shall be co-terminus with the Operating Term of the Hotel management agreement (including any extensions thereof) unless sooner terminated pursuant to the terms hereof.*

(Clause 2.1)

- *Advisor shall provide, or shall cause any of its Affiliates to provide, directly or indirectly, for the Hotel and its guests the full benefit of the Global Reservation System to the extent available to other Operator Hotels.*

(Clause 5.1)

- *(a) Advisor shall review and reasonably approve any Capital improvements, including refurbishing, maintenance, repairs or other Capital improvements contemplated in any Annual Budget and capital improvements referred to in section 10.2 of the Hotel Management Agreement... Owner shall pay Advisor a fee for such services equal to 1% (or such other amount as maybe reasonably*

*agreed between the parties, such amount to be commensurate with what third party would charge for such services) of the total cost of any such refurbishing, maintenance, repairs or capital improvements plus any actual out-of-pocket expenses incurred in such review and approval.*

*(Clause 5.5)*

*• (b) Owner shall cooperate with Advisor to apply for (in the Owner's name, Adviser's name or both as may be required by the issuing authority) and maintain in effect at all times such visas, permits, licenses, approvals, authorizations and consents (from Governmental Authorities or otherwise) required for Advisor, its employees, consultants or agents to lawfully carry out its obligations under this Agreement and Applicable Laws and to allow the same to work or perform services at or for the hotel.*

*(Clause 5.6)*

*• All purchases of goods, supplies and services required in connection with the operation of the hotel ("hotel purchases") shall be made, as designated by operator, by or under the direction of a) advisor if and to the extent required to maintain consistency with Operator Hotel Standards (including Operating Equipment and Operating supplies displaying the brand and trademarks)... All Hotel purchases made by or through advisor shall be subject to the following provisions:*

*a) Advisor shall have the right to arrange any such hotel purchase, directly or indirectly, through any procuring party or, in advisor's sole discretion, directly with any vendor on a direct purchase basis in accordance with specifications and purchasing standards adopted by advisor from time to time;*

*b) Advisor shall have the right to charge owner for all such hotel purchases purchased through any procuring party, the price paid by the procuring party for such goods, supplies and services plus any purchasing fee charged by such procuring party and described in the annual budget ("purchasing fee")*

*(c) Advisor (or the brand parent company or any affiliate, as applicable) may retain rebates, sponsorship fees, discounts and similar considerations on hotel purchases made by a procuring party that is either a corporate Department of advisor of the brand parent company or an affiliate of the brand parent company, provided that all hotel purchases with respect to which such considerations are made nevertheless satisfy the compatible aggregate cost test and any discounts or rebates given to the hotel and solely in connection with the purchase made by the hotel shall be retained by the hotel for the benefit of owner.*

(Clause 6.1)

- *Notwithstanding any other provision in this agreement, the owner shall be entitled to transfer its right, title and interest in the hotel either directly or indirectly so long as such transfer is made (i) to a qualified person, (ii) that agrees to take over the rights and obligations of this agreement, and (iii) that is not a competitor to the advisor; provided however, the owner shall notify the advisor in writing of its intention to sell its right, title and interest in the hotel and the advisor shall be at liberty to make an offer to purchase such right, title and interest.*

(Clause 11.3)

10.5 In the third agreement, i.e. the 'Technical services agreement', the Applicant is referred to as the 'Consultant' and BAHDL is referred to as the 'Owner'. The following clauses have been highlighted by the Revenue to show the extent of Applicant's control over the Hotel.

- *Owner intends to engage consultant or affiliates of consultant to manage the hotel as part of the "Swissotel" system of hotels (the "brand"). Consistent the LOI, the hotel must be designed, constructed, furnished and equipped to reflect, in scope, content and detail, the physical and operational standards of the brand applicable to the hotel (the "brand standard").*

(Recital B)

- *Owner desires to engage consultant to perform certain initial consulting services with respect to the hotel, and consultant desires to accept such engagement.*

(Recital C)

- Exhibit B to the agreement lists down the services to be provided by the Applicant to the hotel owner. Following is the scope of services:

1) Basic design assistance

Consultant shall have the right and obligation to provide recommendations, advice and review the hotel's design standards.

3) Architectural space planning

Consultant shall have the right and obligation to review, provide comments on and approve the plans and specifications prepared by the design team for the room types, makes, sizes and layouts, public areas of the hotel, including but not limited to lobbying, restaurants, bars public lounges, meeting and banquet areas, executive offices, recreational facilities, fitness and spa facilities, retail shops, corridors and public restrooms, administration and service areas of the hotel including offices, kitchens, laundry and all other back of house support areas.

4) Interior design

Consultant shall have the right and obligation to meet with the interior designer and its consultants to review, provide comments on and approve to verify compliance with the brand standard, all aspects of the interior design, including interior design plans, elevations, expect and selections, materials,



finishes and colours, type and location of decorative lighting and interior design specifications.

#### 5) Technology

The consultant shall provide a direction on all low voltage cabling design, including data, telephone and Internet.

The consultant shall further provide the owner with specifications and standards on all rooms related to information technology, including the computer, phone system, wiring closets.

The consultant shall provide the owner with specifications and standards for applications including: Property Management Systems; accounting system; conference and catering system; F&B point-of-sale system; Time and attendance; and email.

The consultant shall provide a specifications and standards for hardware, including: wide area network connectivity; Internet access; local area network; telephone system.

#### 8) Construction observations and deficiencies

Consultant shall visit the project site at intervals appropriate to the stage of construction for observation of the progress and quality of the work and consultation regarding proposed solutions to design conflicts that may affect operation, and monitor installation of furniture, Fixtures and equipment, operating supplies and operating equipment.

Owner shall prepare and deliver consultant within 30 days a list of all deficiencies and construction work remaining uncorrected or incomplete which

list shall be subject to the approval of consultant who shall have the right to add additional items to such list.

10.6 Under the '*Hotel advisory agreement*' the Applicant is referred to as the '*Advisor*' and the Owner is referred to as the '*Owner*'.

- Owner desires to obtain the benefit of advisors expertise in advising and providing services to the hotel owners in connection with the supervision and direction of the hotel and advisor has agreed to provide such expertise and services.

(Recital B)

- Advisor undertakes to advise the owner in connection with the supervision and direction of the hotel as a full service Deluxe international hotel. Without limiting the generality of the foregoing and all other provisions of the agreement advisor shall advise as to:

- a) the annual budget.
- b) the details of any proposed capital improvements.
- c) the programs to be used and the operating policies and procedures to be followed.
- f) the elimination or improvement of operations problems.
- g) the training and development of personnel of the hotel.
- o) the selection, review and update of computer systems (hardware and software) for use in the hotel

(Clause 3.2)

10.7 Having carefully analysed the terms of the aforesaid agreements, we have no hesitation in holding that the Hotel is completely at the disposal of the Applicant. At the very stage of inception, i.e. the construction of the Hotel, the Applicant is called upon to oversee the design and construction of the property

to ensure that it is compliant with the brand standards of the Applicant. BAHDL is to submit progress reports of construction to the Applicant, who is to then mark out the deficiencies as it deems fit. Such deficiencies are to be rectified by BAHDL in the designated period of three months. (Technical service Agreement)

10.8 Once the hotel is constructed, its operation and management rests with the Applicant. BAHDL has undertaken that it will not interfere in the Applicant's exercise of the exclusive authority over such operation and management. Right from the employment of the hotel staff (including the managerial personnel) to taking decisions over capital improvements, every possible operational right stands vested in the Applicant. The extent of the Applicant's absolute control over the management and operation of the hotel, can best be appreciated from clause 12.5 of the Agreement, which states that the owner is barred from even contacting directly any of the hotel staff. Furthermore, the owner has bound itself to the terms of this agreement for a period of 10 years extendable by another 40 years. (Hotel management agreement)

10.9 Some of the core functions of the operation of the hotel such as sales and marketing, reservation etc. have also been outsourced to the Applicant. For providing such services, the hotel owner has undertaken to cooperate with the Applicant to arrange for visas, licenses, authorisations for the Applicant, its consultants, employees etc. to carry out such services at the hotel premises. As regards purchasing services, the Applicant has undertaken to designate a suitable vendor who would supply goods and services for the operation and management of the hotel. With regard to these services as well, the Applicant has been given complete autonomy with no interference from the owner. (Centralized services agreement)

10.10 The Applicant has further undertaken to “advise” the owner with all the critical aspects of the hotel operation such as training of staff, preparing of budget, carrying out capital improvements etc. It may be appreciated from the other agreements discussed earlier that the final decision making power with regard to these aspects of the hotel management are with the Applicant, however to the extent the owner is to be involved in carrying out these functions, he is bound to take advice from and be under the supervision of the Applicant. (Hotel advisory agreement)

10.11 The next test for the existence of PE is to determine whether the Applicant has carried on its business (partially or wholly) through the fixed place being the Indian hotel. In this regard, it is necessary to understand the exact business of the Applicant.

10.12 In its application filed before the Authority, the Applicant has stated the nature and scope of their business as under:

*‘The FRHI Holdings Ltd. and its group of companies (hereinafter referred to as ‘FRHI group’) is a leading international hotel chain engaged in development, operation and management of hotels, resorts, and branded residences. The hotel properties managed by the group are operated under the name brand names- ‘Fairmont’, ‘Raffles’ or ‘Swissotel’. Majority of the properties managed under these three brand names are owned by third party independent hotel owners and FRHI group companies provide brand license and other services in relation to operation and management of these hotel properties.’*

10.13 The Applicant is admittedly engaged in the business of operation and management of the hotels. As a result of the above agreements, the Applicant has, in substance, taken over all the important functions in relation to the operation and management of the Indian hotel. It is referred to as ‘Operator’ in the Hotel Management Agreement, as ‘Advisor’ in the Centralized Services Agreement and Hotel Advisory Agreement, ‘Licensor’ in the Hotel License Agreement and ‘Consultant’ in Technical Services Agreement. The Applicant

is performing different functions under different agreements under different names. The fact is that the Applicant irrespective of its different nomenclature in different agreements, is engaged in complete management of its business operations in India.

10.14 At this juncture, we may also refer to the Revenue streams of the Applicant. Under the 'Hotel management agreement', the Applicant has received 0.5% of the Total Revenues of the Hotel for each year (clause 9.1). Under the 'Centralised services agreement', the Applicant has received 1.50% of the Total Revenues of the Hotel as centralized sales and market fee, 0.25% of the total revenues as current accounting MIS charges and 1% of total cost of any refurbishing, maintenance, repairs or capital improvement which has been reviewed and approved by the Applicant (clause 5.3 and 5.5). Under the 'Technical services agreement', the Applicant has received a lump sum amount of USD 25,000 (clause 3). Under the 'Hotel advisory agreement', the Applicant is entitled to receive a basic fee of 1% of total revenue for the first three years which will be increased to 1.25% after the third year. Additionally, the Applicant is also entitled to an additional fee of 8% of Gross operating profit of each year (clause 7.1). Finally, under the 'Hotel license agreement', the Applicant is entitled to 0.5% of the Total revenues.

10.15 It is, therefore, apparent that the Applicant has taken over the operation and management of the Indian hotel by entering into different agreements and has earned income through all of such agreements. We are, therefore, of the confirmed view that the Indian hotel, Swissotel Kolkata, satisfies all the three tests and does constitute a fixed place PE of the Applicant with respect to these incomes. The Applicant is carrying on its entire business operations from this fixed place. The existence of a PE of the Applicant in India gets established within the meaning of Article 7 of the DTAA.

10.16 One of the contentions raised by the Applicant regarding the issue of PE was that all of these activities performed by the Applicant have been done in the capacity of agents of BAHDL. Therefore, these activities do not constitute carrying on of the Applicant's business in India and no fixed place PE can be said to exist for the Applicant.

10.17 We do not find any merit in this argument of the Applicant. Admittedly, the Applicant's business is to carry out operation and management of hotels. All these activities are being carried out as a business operation from the fixed place in India viz. Hotel Swissotel, Kolkata. The Applicant is carrying on such business operations through its senior management or employees who may be called by any name. The operator/agent/advisor is acting only for and on behalf of the Applicant as the entire risk is of the Applicant. In fact, this is the business model under which the Applicant is operating. Regard must also be had to the kind of control and autonomy given to the Applicant in these agreements. The final decision in respect of all of the important functions relating to the operation and management of the hotel is in the hands of the Applicant. The arrangements of this kind can only exist in a principal to principal agreement. The Principal-agent relationship is completely non-existent in the facts of the case.

10.18 With respect to the income from GRS, both sides have argued whether the income can be characterised as 'royalty' or 'fees for technical services' in terms of the Act and the India-Luxembourg DTAA. The Applicant's case is that the income does not fall under any of the definitions of the two terms and, therefore, cannot be characterized as such. The Revenue's case, on the other hand, is that the income arises for providing 'managerial' as well as 'technical' services, therefore it is in the nature of 'fees for technical services'. With regard to 'royalty', the Revenue contends that the income is for

the use of an 'industrial or commercial equipment' and the income therefore is also in the nature of 'royalty'.

10.19 We have considered the arguments of both sides. Since in the present case, we have held that the income of the Applicant is attributable to the fixed place PE in India, the question whether it can be characterised as 'royalty' or 'fees for technical services' becomes wholly academic. Even if the income is characterised as either of these two, by virtue of para 4 of Article 12, the income would still be taxable as 'business profits' under Article 7.

11. In view of the foregoing, the question raised before us for a Ruling is answered as under:

The payments received by the Applicant from the Indian hotel owner for provision of global reservation services ('GRS') would be chargeable to tax in India under section 9(1)(i) read with Articles 5 and 7 of the India-Luxembourg DTAA as business income and is attributable to the Applicant's permanent establishment in India. In view of this, the question whether these payments would be characterised as 'royalty' or 'fees for technical services' becomes wholly academic, and is, therefore, not considered necessary to be answered.

This Ruling is accordingly given and pronounced on this 24<sup>th</sup> day of May, 2018.

**Sd/-  
(Ashutosh Chandra)  
Member(Revenue)**

**Sd/-  
(R.S.Shukla)  
In-charge Chairman**