Royalty wasn't taxable at concessional rate under sec. 115A if it wasn't received in pursuance of an agreement

Summary – The Mumbai ITAT in a recent case of Six Continents Hotels, Inc., (the Assessee) held that Where there was no agreement in terms of which assessee foreign company was paid royalty, beneficial rate of tax would not apply

Facts

- The assessee was a company incorporated in United States and was a tax resident of USA. It held registered trade mark of 'Holiday Inn' and 'Crowne Plaza' and had entered into license agreements with various Indian hotels allowing them to use of those trademarks in their business.
- The consideration payable for the use of the license was in the nature of 'royalty', based on certain percentage of gross room revenue of the hotels.
- During the relevant year, the assessee received royalty income from 'T' Ltd. for use of brand name 'Crown Plaza'.
- The assessee filed its return wherein royalty income was shown as taxable at the beneficial rate of 11.33 per cent as mentioned under section 115A.
- The Assessing Officer noted that the assessee was not a party to the 'Management Agreement' as the same was between SC Hotels (Indian Company - Manager), Inter Continental Hotels (Guarantor) and 'T' Ltd. (Owner). Hence, in view of the provisions of section 115A(b)(AA), the beneficial rate was not applicable, because the section clearly provided that such a beneficial rate would be applicable if the royalty had been received in pursuance of an agreement entered into by assessee itself.
- The Commissioner (Appeals) upheld the order of Assessing Officer.
- On second appeal:

Held

- In terms of section 115A(b)(AA), the beneficial rate of tax is to be calculated on the income of royalty, if such royalty is received in pursuance of an agreement made on or after 1-6-2005. The section clearly provides that there has to be an agreement for the payment of royalty. The assessee's case is that in the 'management agreement' dated 17-1-2006, there are certain clauses, which provide that the parties will pay license fee to the owner, and therefore, it should be construed that such a payment of royalty is in pursuance of an agreement.
- Besides this, it has also been contended that such a payment can be said to be in pursuance of an oral agreement, which is evident from the intent of the parties. From the perusal of the said agreement, it is seen that the agreement is between 'SC' Hotels, which has been referred to as 'manager'; Inter Continental Hotels Group, which has been referred as 'guarantor'; and 'T' Ltd., Indian company, which has been referred as the 'owner'. The title of the said agreement is for

management of the hotels and the terms and conditions under which the manager on behalf of owner will manage the hotel.

- Here, neither the owner nor the manager has any reference to the assessee. Even the relevant clause, as referred to by the assessee, only provides that the owner will pay to 'SC' the license fees. Here again, there is no reference of the assessee. Further, nothing has been brought on record that there was any kind of correspondence or a letter between the assessee and 'T' Ltd., setting out the terms and conditions for the payment of royalty.
- Under these facts, it cannot be held that the payment of royalty has been made 'in pursuance of an agreement'. Once there is a clear cut provision under the statute, which mandates certain terms and conditions for applying a beneficial rate, then the same has to be applied in a letter and spirit. Thus, the finding of the Commissioner (Appeals) that, there is no agreement in terms of which the assessee was paid royalty is legally and factually correct, and therefore, the beneficial rate of tax will not apply is upheld. The Assessing Officer has rightly charged the tax rate of 15 per cent as given in the DTAA.
- In the result, assessee's appeal is dismissed.