IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No.725/SRT/2018 (AY 2015-16)

(H*earing in Virtual Court)*

The Income Tax Officer (International Taxation), Surat.	Vs	Star Rays, Shivam Chambers, Khand Bazar, Varachha Road, Surat – 395009. PAN: AAMFS 1942 B
Appellant/ Revenue		Respondent/ Assessee

Assessee by	Shri Saurabh Suparkar, Senior Advocate with Ms. Urvashi Shodhan, Advocate
Revenue by	Shri H.P.Meena – CIT-DR
Date of hearing	24/01/2022
Date of pronouncement	28/02/2022

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the Revenue is directed against the order of ld.Commissioner of Income Tax (Appeals)-13, Ahmedabad which in turn arises from the order passed under 201(1)/201(1A) dated 23.08.2017 for assessment year (A.Y.) 2015-16. The Revenue raised the following grounds of appeal:

"i) The Ld. CIT(A)-13, Ahmedabad has erred in facts and in law in holding that in view of the TRC and Form No. 10F furnished by M/s GIA Inc. USA from the tax authority of USA for the relevant year under consideration<, the assessee is entitled to the benefit of DTAA between India and USA even though such services were not rendered by the USA entity.

ii) The Ld. CIT(A)-13, Ahmedabad has erred in facts and in law in ignoring that the service was rendered by an independent corporate entity (though a subsidiary of GIA Inc. USA) namely GIA Hong Kong Laboratory Ltd.

situated at Hong Kong and the payment was merely routed through GIA Inc. USA.

iii) *The Ld. CIT(A)-13, Ahmedabad has erred in facts and in law in allowing the appeal of the assessee despite the fact that the beneficial owner of the payment is M/s GIA Hong Kong Laboratory Ltd. situated at Hong Kong and therefore the DTAA between India and USA cannot be invoked.*

iv) *The Ld. CIT(A)-13, Ahmedabad has erred in facts and in law in allowing the appeal of the assessee despite the fact that as per very disclosure on the official website of the M/s GIA Inc. USA, the currency of payment for diamond testing and certification has to be made in the currency of the laboratory where the item is submitted for testing and articles were shipped to Hong Kong and pay men t was made in Hong Kong Dollars.*

v) *The Ld. CIT(A)-13, Ahmedabad has erred in facts and in law in holding that there is no element of make available in the services rendered despite the fact that this was not the ground of disallowance by the AO.*

vi) *That the department craves leave to add or alter any further grounds of appeal."*

2. Brief facts of the case are that assessee is a partnership firm and engaged in the business of cutting and polishing of diamond and export of diamonds. The specific diamonds are certified by Gemmological Institute of America (GIA) and all exported piece by piece. During the period under consideration, the assessing officer (AO), on perusal of Form-15CA /15CB filed by assessee regarding remittance to GIA Hong Kong Laboratory, took his view that remittance made by assessee for diamond testing certification charges are in the nature of "fees for technical services" as per section 9(1)(vii)(b). There is no Double Taxation Avoidance Agreement (DTAA) /(or commonly called tax treaty) between India and Hong Kong and the tax treaty between India-

China does not extend to the Hong Kong reason. Therefore, the application for provision of section 9(1)(vii) is not limited by DTAA in the present case. Even though, the technical services rendered outside India for the payment of such services are taxable in India and that assessee was required to deduct tax at source, accordingly a show cause notice, dated 02.02.2017 was issued to show cause as to why the assessee be not treated as assessee in default.

3. The assessee filed its reply dated 06.03.2017. In its reply, the assessee stated that GIA Inc is a resident of the United States of America (USA) for the purpose of US taxation as per tax residency Certificate, with respect to diamonds testing and certification services availed by the assessee. For diamonds testing and certification services availed by assessee in Hong Kong, an invoice for the diamond testing and certification charges issued by the GIA Inc. with the payment instruction to make remittances to GIA Inc. in the off-share bank account no (Swift Bank Number HSBCHKHHHKH. Account #801-045451-001) held by GIA, Inc in Hong Kong. Hence, the GIA, Inc is the ultimate recipient of the funds for diamond testing and certification charges paid by assessee. The submission of assessee was not accepted by the AO. The AO held that as declaration made in Form-15CA and CA Certificate furnished in Form- 15CB, the beneficiary of remittance has been specified as GIA, Hong Kong Laboratory India. The AO extracted copy of Form-15CA

and 15CB in his order and by referring the contents of aforesaid forms, the AO concluded that the diamonds were shipped to Hong Kong for testing, gradation and certification. Such testing related work has been carried out at GIA Laboratory at Hong Kong this set up under the company GIA Hong Kong. The testing services were rendered by Hong Kong Laboratory. The payments were made in bank account located in Hong Kong as per condition of payment, since there exist no branch of GIA, Inc in Hong Kong; it is incontrovertible that the testing and certification related services rendered by GIA Hong Kong. The payments were merely made to GIA, Inc, America even though all services were rendered by GIA Hong Kong Laboratory at Hong Kong, thus, GIA Hong Kong Laboratory is the rightful owner of such payment which merely routed through GIA, Inc, America. The state of source is not obliged to give up the taxing rights over the passive income in the nature of Fees for Technical Services (FTS) merely because the income was paid direct to recipient of a state which with the state of source had concluded/executed DTAA. On the aforesaid observation, the AO concluded that assessee was required deduct tax on sum chargeable to tax at the rate in force. The assessee was required to deduct tax @40.024%. The assessee failed to do so, accordingly, the assessee was treated as assessee in default under section 201(1) with respect to tax amount of Rs.3.30 crore. In addition, the assessee was also held liable to pay interest @1% per month under

section 201(1A) of the Act of Rs.1.31 crore up to the passing of order thereby the AO created a demand of Rs.4.43 crore vide his order dated 23.08.2017.

4. Aggrieved by the order passed under section 201(1)/201(1A) of the Act, the assessee filed appeal before the ld. CIT(A). Before the ld.CIT(A), the assessee filed detailed written submission. The submission of assessee is extracted from page no.3 to 31 of order of ld. CIT(A). The assessee in sum and substance in its written statement submitted that assessing a partnership firm engaged in the business of cutting and polishing of diamonds. Most of the diamonds are exported. The specific diamonds are certified by GIA based on the customer's requests and are all exported piece by piece. The assessee gets the diamond testing and certification from GIA America. The assessee entered into a customer services agreement with GIA Inc USA which clearly describes the conditions "with respect to client shipments or deliveries of articles to GIA's 'take in window' in Dubai and GIA's laboratories in Hong Kong and Israel, this agreement shall be between the client and GIA USA and not with GIA's local business entity established in such countries. Any and all disputes, suits, actions, claims related to or arising out of this agreement shall be resolved exclusively pursuant to section 30 of the terms and conditions."

5. It was further submitted that the GIA Inc USA does not work of grading diamonds and issue certificates stating the properties such as colour,

credit etc, of the diamonds. The services of grading in certain cases reports for diamonds and other articles are performed from the GIA laboratories situated in the USA. GIA headquarter is Carlsbad, California and operates out of 13 countries with 11 companies, 9 laboratories and 4 research Centres worldwide. There is no "make available" of technical know-how or knowledge type of services by GIA and therefore, the remittance towards the existing and submission charges are not qualified as 'fees for technical services' / 'fees for included service' under the respective articles of the India USA DTAA. During the assessment proceedings the assessee furnished the copy of tax residency certificate (TRC) and permanent establishment (PE) certificate of GIA America. The assessee also furnished the copy of sample invoices raised by GIA USA, instructing the assessee to make payments to GIA America. It was submitted that assessing officer failed to consider the submission of the assessee and made the additions. During the period under consideration the assessee has made remittances qua diamond testing certification services to GIA. The payment has been made to the offshore bank account of GIA US in Hong Kong. The invoices are raised by the GIA USA instructing assessee to make payment to offshore bank accounts of GIA USA in Hong Kong. In case of non-payment of segregation fees, GIA US has the legal right for the production from the assessee has all

the risks and rewards of the agreement are between the assessee and GIA US. The assessee has no direct relationship with GIA Hong Kong.

6. The assessing officer invoked the provisions of section 201(1) r.w.s 201(1A) of the Income tax Act by taking view that India USA DTAA benefit is not granted as payment is made to GIA Hong Kong and there is no tax treaty with Hong Kong, the payment is deemed to be income chargeable to tax in India under section 9 of Indian Income tax Act, although the three has no PE in India and Diamond certification charges have been taken the nature of 'fees for technical services'. The assessee explained that in the present case, India USA tax treaty in perfectly relevant tax treaty since the service arguments of the assessing with GIA USA and the services provided by GIA Inc of USA. The invoices in also raised by GIA Inc USA. The physical activities of grading have been performed in USA and the entire technical report is issued about the actual grading-report by GIA Inc of USA. The intellectual property right, branding and the final deliverable that is grading report, is of GIA USA. As per India USA tax treaty, the beneficiary of a contracting state will only be taxed in other contracting state if it is a resident of other contracting state. Here GIA Inc in a resident of USA and income tax department of USA issued tax residency certificate which was submitted to the assessing officer at the time of making submission. GIA Hong Kong laboratory Ltd is a limited service provider. The customer services

agreement is between assessee and GIA USA and not with GIA Hong Kong. GIA USA Inc is the legal entity generating invoices and collecting charges as per agreement on the risk and rewards of their customer relationship between the USA and customers. In case of non-payment of segregation fees, GIA US has the legal right for getting the collection from assessee so all the risks and rewards of the agreement between assessee and GIA US Inc. and the assessee have no direct relationship with the GIA Hong Kong. Services in Hong Kong are what is referred as a "limited risk service provider." It was also submitted that the GIA US has no permanent establishment (PE) in India. The nature of transaction between assessee-company and the USA resident company are not in the nature of 'fee for included services'. Under Article 12 of tax treaty between India USA as it is not imparting any technical knowledge know-how to the assessee company. Therefore, the payment made by the assessee- company would not assume the character of business profit US resident company under Article 7 of India US tax treaty, which would be taxable in India only if the same is attributable to permanent establishment of US resident company in India. In absence of any permanent establishment of US resident company in India, the amount paid by the assessee would not be taxable in India and in business profit. It was explained that in case of assessee, GIA US, foreign enterprises does not have any permanent establishment in India; therefore, any

income accruing from business carried in India cannot be made taxable if the source of such income pertains to business outside India. The assessee also relied on certain case laws.

7. The assessee further explained that due to clerical error while filling the name of beneficiary of remittance is wrongly mentioned as "GIA Hong Kong laboratory Ltd" instead of "GIA United State of America Inc". Due to which foreign outward limit is advice also in the name of GIA Hong Kong laboratory Ltd, was mentioned, but in fact the assessee is neither entered into transaction with GIA Hong Kong laboratory nor has any remittance been made to it. The claim of assessee is evident from the invoices issued by GIA Inc of USA and certified copy of the bank's statement of GIA Inc reflecting payments received was filed. Thus, the rightful owner of the remittances made in GIA Inc of USA and in connection with the same counts under the law India USA tax treaty. On the aforesaid submission the assessee prayed for deleting the demand created consequence of order passed by assessing officer.

8. After considering the submission of the assessee, the ld. CIT(A) deleted/set-aside the order under section 201(1)/201(1A) of the Act. The ld CIT(A) held that the assessee partnership firm and in the business of cutting and polishing of diamonds and exports of diamonds. Based on the customer's specific request, the assessee gets diamond testing and certification from GIA USA. GIA INC USA is headquartered in

Carlsbad, California and operates out of 13 countries, nine laboratories and 11 campuses for research centres worldwide. The assessing officer made addition by taking view that remittance made by assessee GIA Hong Kong. This conclusion was right by assessing officer on the basis of form 15CA/15CB filed by assessee. The assessing officer also relied upon the information available on the website of GIA viz http://www.gia.edu/gem-lab-fee-shedule, wherein it is mentioned that the payments for diamonds testing and certification is to be made in the currency of laboratory where the item is submitted for services and concluded that the testing and certification related services were rendered by GIA Hong Kong laboratory. As business cheques were to be drawn on bank within the local country of laboratory where the diamonds were submitted since it was specified in the invoice raised by GIA that cheques were to be sent to GIA Hong Kong laboratory. On this observation the assessing officer denied the benefit of India US tax treaty to the assessee and invoked the provisions of section 201(1) /201(1A). The learned CIT(A) recorded that as per tax residency certificate and PE certificate GIA Inc is a resident of United States of America. The testing and grading certification for diamonds and other articles are issued from the GIA laboratory situated in USA. The GIA Inc USA does not work for grading diamonds and issues certificate stating the properties such as colour, carat and clarity of diamonds. The claim of the assessee is that

they have made remittance towards diamonds testing and certification services. And that the payments have been made to GIA Inc USA in its offshore Bank Account of Honk Kong account and not to GIA Honk Kong Laboratory as concluded by assessing officer. it was also recorded that the assessee made error in mentioning the name of beneficiary while filing entry in Form-15CA/ 15CB.

9. On the basis of his aforesaid observation the ld CIT(A) concluded that the diamonds certification are issued by GIA Inc USA are considered as standard benchmark by the trade as well as by the customers and all intellectual property rights in the certification belongs to GIA Inc. The assessee entered in agreement with GIA Inc USA, on perusal of which it can be seen that the term of agreement clearly describes the status of GIA Laboratory in Hong Kong. Further, it is clear from the agreement that Honk Hong, Dubai and Israel are the "take in window" where articles are delivered but the services agreement is between the assessee and GIA USA. Copy of grading certificate is also issued by GIA USA, but due to clerical mistake the beneficiary of the remittance was erroneously specified as GIA Honk Kong Laboratory. The assessee has furnished confirmation letter from HSBC Bank, confirming that the payments were made by assessee to GIA Inc USA in Bank Account No. 801-045451-001, owned by GIA Inc USA. The ld CIT(A) held that the assessing officer tried to establish that the nature of services rendered by the non-

resident is 'fee for technical services', however, the services rendered are not disputed by the assessee. The ld CIT(A) pin point the dispute and held that the dispute is whether the services rendered by GIA are 'fee for technical services' under tax treaty by virtue of " make available clause" under Article 12 of India USA DTAA. The benefit of treaty can be availed only by the residents of either country and tax resident certificate is an important document to avail the benefit of treaty in respect of payment made to Non-resident as par section 90(4) of the Indian Income tax Act. Further requirement is of furnishing Form-10F. The assessee had furnished copy of tax residency certificate (TRC) from USA authority from USA in Form-10F as required under section 90(4) and 90(5) of the Indian Income Tax. As per the TRC and Form-10F of non-resident company, GIA Inc USA for the relevant year under consideration, the assessee is entitled to the benefits of DTAA between India and USA.

10. On the submission of assessee that activity of grading of certification is merely the application of knowledge and experience in a professional team particular diamond set of diamonds which are offered for certification or for grading. The learned CIT(A) held that there is no parting of information concerning industrial, commercial or scientific experience by GIA when it issues the grading certificate. GIA Inc USA has the experience of grading and report certificate and there is no imparting of its experience in favour of assessee. What the assessee

receives is the report. This activity of issuing certificate cannot be said to be imparting of information by the person who possesses such information. Therefore, after considering the definition of ' fee for included services' under Article 12, is no parting of rendering of technical services either of military, technical consultancy services or industrial commercial or scientific experience. The grading report are not "make available" for the reasons that assessee, whose utilising the services will not be able to make use of technical knowledge, by itself in its business without recourse to GIA INC USA in future. The technical knowledge, experience skill etc will not remain with the assessee after rendering the services has come to an end. The transmission of the technical knowledge, experience, skill, from the personal writing services to the person utilising the same is not entered related under the agreement between the assessee and the GIA Inc USA. There is no durability or permanency of the result of the rendering of services envisaged which will remain at the disposal of the assessee. The services will not remain available to the assessee in any concrete shape such as technical knowledge, experience; skill etc. There is no transfer of either technical knowledge or skill and experience or know-how or process to the assessee. The learned CIT(A) further held that GIA Inc USA does not provide any training to the employee of the assessee nor it does share any technique or expertise connected with performance of its services or

imparted any skill to the assessee. As the services is question are not "make available" in nature and consequently do not qualified for fees for technical services under tax treaty between India and USA and allowed the grounds of appeal raised by assessee. Aggrieved, from the order of ld CIT(A), the Revenue has filed this appeal before Tribunal.

11. We have heard the submissions of Sh. Saurabh Soparkar learned Senior Advocate (ld Senior Counsel) assisted by Ms Urvashi Shodhan Advocate for assessee and Sh. H.P. Meena learned Commissioner of income tax-departmental representative (CIT-DR) for the revenue and have gone through the order of the lower authorities carefully. The ld. Senior Counsel for the assessee submits that during the relevant assessment year under consideration the assessee has made remittances qua diamond testing service for certification of diamonds to GIA Inc USA. The payment has been made to the offshore bank account of GIA US in Hong Kong on the instructions of GIA Inc USA. The ld Senior Counsel for the assessee submits that due to mistake while filling the name of beneficiary of remittance is wrongly mentioned as "GIA Hong Kong laboratory Ltd" instead of "GIA United State of America Inc". For such reasons the foreign outward limit is advice also in the name of GIA Hong Kong laboratory Ltd, was mentioned, however, the assessee is neither entered into transaction with GIA Hong Kong laboratory nor has any remittance been made to it. The invoices was issued by GIA Inc of USA and

certified copy of the bank's statement of GIA Inc reflecting payments received was filed. Therefore, the rightful owner of the remittances made in GIA Inc of USA and in connection with the same counts under the law India USA tax treaty. The ld Senior Counsel further submits that the services rendered by the GIA Inc USA in certifying the grading system are not in the nature of either fee for technical services or of make available. It was submitted that GIA Inc in a resident of USA and income tax department of USA issued tax residency certificate which was submitted to the assessing officer at the time of making submission. GIA Hong Kong laboratory Ltd is a limited service provider. The assessee has customer services agreement with GIA USA and not with GIA Hong Kong.

12. The learned Senior Counsel for the assessee submits that GIA USA Inc is the legal entity generating invoices and collecting charges as per agreement on the risk and rewards of their customer relationship between the USA and customers. In case of non-payment of segregation fees, GIA US has the legal right for getting the collection from assessee so all the risks and rewards of the agreement between assessee and GIA US Inc. The assessee has no direct relationship with the GIA Hong Kong. Further the services in Hong Kong were in the nature of a "limited risk service provider." The ld Senior Counsel submits that the GIA US has no permanent establishment (PE) in India. Further, nature of transaction

between assessee-company and the USA resident company are not in the nature of 'fee for included services'. Under Article 12 of tax treaty between India USA as it is not imparting any technical knowledge know-how to the assessee company. Thus, the payment made by the assessee-company would not assume the character of business profit US resident company under Article 7 of India US tax treaty, which would be taxable in India only if the same is attributable to permanent establishment of US resident company in India. In absence of any permanent establishment of US resident company in India, the amount paid by the assessee would not be taxable in India and in business profit. The ld CIT(A) appreciated the facts of the case and granted relief to the assessee. To support his submissions the ld Senior Counsel for the assessee relied on the following decision;

- ❖ Alabra Shiping Pte Ltd Vs ITO (Inter.tax.) [2015] 62 taxmann.com 185 (Rajkot Tribunal),
- ❖ M. T Maersk Mikage Vs DIT (Inter.tax) [2016] 72 taxmann.com 359 (Gujarat),
- ❖ CIT Vs De Beers India Minerals (P) ltd [2012] 21 taxmann.com 214 (Kar).

13. The assessee has filed following documents on record;

(i) Written submissions filed before CIT(A),
(ii) Tax residency certificate and PE Certificate of GIA Inc, USA,
(iii) Form No. 10F,
(iv) Sample invoices raised by GIA, USA,

(v) Extracts of copy right & trademark notices and customer services agreement with GIA Inc,

(vi) Client agreement with GIA Inc and assessee firm, with sample of diamonds grading reports,

(vii) Copy of additional submission filed before CITA),

(viii) Affidavit of Dilip Kumar B Mehta, Partner of Star Rays filed before CIT(A),

(ix) Copy of invoice raised by GIA, USA in the name of assessee,

(x) Bank statement of GIA USA,

(xi) Chart showing payments made GIA USA,

(xii) Confirmation of HSBC Bank stating that the bank account holder is GIA USA,

(xiii) Confirmation of GIA stating that GIA Honk Kong laboratory is wholly owned subsidiary of GIA USA.

14. On the other hand the ld CIT-DR for the revenue supported the order of assessing officer. The ld CIT-DR for the revenue further submits that the assessee remitted the payment of certification charges to the GIA Hong Kong, which is evident for Form-15CA and 15CB. The payment was made in the local currency of Hong Kong. There is no tax treaty between India and Hong Kong therefore, the assessee was liable to deduct tax at sources on the remittance made to GIA Hong Kong. The services rendered by GIA Hong Kong are in the nature of technical services.

15. We have considered the rival submissions of the parties and have gone through the orders of the lower authorities. We have also deliberated on the various case laws relied by ld CIT(A) in her order as well as relied by

ld Senior Counsel for the assessee. We have also perused all the documentary evidence filed by the assessee before Tribunal. The assessing officer treated the assessee in default under section 201(1) on the basis of details on the Form-15CA/ 15CB about the remittance by taking view that testing related work has been carried out at GIA Laboratory at Hong Kong set up under the company GIA Hong Kong. The testing services were rendered by Hong Kong Laboratory. The payments were made in bank account located in Hong Kong as per condition of payment, since there exist no branch of GIA, Inc in Hong Kong; it is incontrovertible that the testing and certification related services rendered by GIA Hong Kong. The payments were merely made to GIA, Inc, America even though all services were rendered by GIA Hong Kong Laboratory at Hong Kong, thus, GIA Hong Kong Laboratory is the rightful owner of such payment which merely routed through GIA, Inc, America. The state of source is not obliged to give up the taxing rights over the passive income in the nature of Fees for Technical Services (FTS) merely because the income was paid direct to recipient of a state which with the state of source had concluded/executed DTAA. As recorded above that before the ld CIT(A) the assessee filed detailed written synopsis and relied on certain case laws. It was also contended that the entry on Form-15CA/ 15CB were wrongly filled up and that the payment of certification charges were infact made to GIA Inc USA and

furnished certificate of HSBC Bank that the bank account wherein the remittance were made owned by GIA Inc USA. The ld CIT(A) on appreciation of facts held that There is no dispute about the services rendered by GIA to assessee. Further the diamonds certification is issued by GIA Inc USA. Certification issued by GIA USA is considered as standard benchmark by the trade as well as by the customers and all intellectual property rights in the certification belongs to GIA Inc USA. The assessee had agreement with GIA Inc USA, on perusal of which it can be seen that the term of agreement clearly describes the status of GIA Laboratory in Hong Kong. It is clear from the contents of agreement that Honk Hong, Dubai and Israel are the "take in window" where articles are delivered. However, the services agreement is between the assessee and GIA USA. Copy of grading certificate is also issued by GIA USA, but due to clerical mistake the beneficiary of the remittance was erroneously specified as GIA Honk Kong Laboratory.

16. The ld CIT(A) further held that the assessee-firm has furnished confirmation letter from HSBC Bank, confirming that the payments were made by assessee to GIA Inc USA in Bank Account No. 801-045451-001, owned by GIA Inc USA. The assessing officer tried to establish that the nature of services rendered by the non-resident is 'fee for technical services', however, the services rendered are not disputed by the assessee. The ld CIT(A) pin point the dispute and held that the dispute is whether

the services rendered by GIA are 'fee for technical services' under tax treaty by virtue of " make available clause" under Article 12 of India USA DTAA. The benefit of treaty can be availed only by the residents of either country and tax resident certificate is an important document to avail the benefit of treaty in respect of payment made to Non-resident as par section 90(4) of the Indian Income tax Act. Further requirement is of furnishing Form-10F. The assessee had furnished copy of tax residency certificate (TRC) from USA authority from USA in Form-10F as required under section 90(4) and 90(5) of the Indian Income Tax. As per the TRC and Form-10F of non-resident company, GIA Inc USA for the relevant year under consideration, the assessee is entitled to the benefits of DTAA between India and USA.

17. On the specific submission made by the assessee that activity of grading of certification is merely the application of knowledge and experience in a professional team particular diamond/ set of diamonds which are offered for certification or for grading. The learned CIT(A) held that there is no parting of information concerning industrial, commercial or scientific experience by GIA when it issues the grading certificate. GIA Inc USA has the experience of grading and report certificate and there is no imparting of its experience in favour of assessee. The assessee has only receives report of certification. This activity of issuing certificate cannot be said to be imparting of information by the person who

possesses such information. On considering the definition of ' fee for included services' under Article 12, it was observed that there is no parting of rendering of technical services either of military, technical consultancy services or industrial commercial or scientific experience. The grading report are not "make available" for the reasons that assessee, whose utilising the services will not be able to make use of technical knowledge, by itself in its business without recourse to GIA INC USA in future. The technical knowledge, experience skill etc will not remain with the assessee after rendering the services has come to an end.-

18. We find that coordinate bench of Delhi Tribunal in a recent decision Delhi Tribunal in GE Energy Management Services Inc. v. ADIT - *[2022] 135 taxmann.com 173 (Delhi - Trib.)*, while considering term "make available" and the Article 12 of India US DTAA held that when the assessee-foreign company entered into an agreement to provide offshore maintenance and support services to Power Grid Corporation of India Ltd (PGCIL). The assessee from outside India performed the entire services for software and hardware maintenance and support work through remote system monitoring, remote launching of the system, telephonic discussion or internet communication, etc. The assessing officer held that services rendered by the assessee to PGCIL were taxable as fees for included services (FIS) under section 9(1)(vii). The Dispute Resolution Panel (DRP) upheld the findings of AO. On appeal, the

Tribunal held that if Article 12(4)(a) of India –USA treaty is read along with MOU, it is clear that for a service to qualify as FIS, there should be made available technical knowledge, experience, skill, know-how or processes to the service recipient. The receiver of this service can be said to acquire the relevant skills used by the service provider only if he acquires those skills so that he can himself use them independently without getting any assistance or being dependent on the service provider in the future. In the said case, the assessee's offshore maintenance and support services to PGCIL were not geared towards making available any technical knowledge, experience, skills, know-how, or processes to PGCIL. Further, the term of the agreement was for five years and services provided by the assessee were repetitive and ongoing. It means that PGCIL could not apply the technical or skills used by the assessee for rendering such service. Given the repetitive nature of the services, it would be factually incorrect to allege that the services make available any technical knowledge, expertise, skill, know-how or processes to PGCIL. Consequently, the PGCIL would not apply technology on its own. It would continue to depend on the assessee for provision of software and hardware maintenance and support services in the future. Thus, keeping in view of the facts and circumstances of the case, receipts from PGCIL do not qualify as 'fees for included services 'under articles 12(4)(a) and 12(4)(b) of India - US DTAA.(*emphasis added by us*)

19. The Hon'ble Karnataka High Court in CIT Vs De Beers Minerals (P) Ltd (supra) held that where a Dutch company rendered technical services to the assessee, without make available any technical expertise so as to enable assessee to use those services independently in future, payment made for such services in question could not be termed as 'fee for technical service'. (*emphasis supplied*).

20. In view of the aforesaid factual and legal discussion, we do not find any infirmity or illegality in the order passed by ld CIT(A), which we affirm. No contrary facts or law was brought to our notice to take other view. In the result, the grounds of appeal raised by the revenue are dismissed.

21. In the result, the appeal filed by the revenue is dismissed.

Order announced on 28th February, 2022 in open Court and result was placed on the notice board.

Sd/-	**Sd/-**
(Dr ARJUN LAL SAINI)	**(PAWAN SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Surat
Dated: 28/02/2022 /*SGR**
Copy to:
1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR
6. Guard File

By Order

// TRUE COPY //

Sr.Pvt.Secretary, ITAT Surat

		Date	Initial	
	Draft order verbally dictated by author (JM) part of the order was prepared by author by dragon software on 27 Feb2022	24/02/2022		
	Draft placed before author	25/02/2022		
	Draft proposed & placed before the second member	28.02.2022		
	Draft discussed/approved by Second Member.	28.02.2022		
	Approved Draft comes to the Sr.PS/PS	28.02.2022		
	Kept for pronouncement on	28.02.2022		
	File sent to the Bench Clerk			
	Date on which file goes to the AR			
	Date on which file goes to the Head Clerk.			
	Date of dispatch of Order.			
	Draft dictation sheets are attached			