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

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)
AND
SHRI RAJESH KUMAR (ACCOUNTANT MEMBER)

I.T.A. No.7182/Mum/2019
(Assessment year 2016-17)

Gemological Institute International, Inc., C/o GIA India Laboratory Pvt Ltd 10th Floor, Trade Centre, Bandra Kurla Complex, Bandra (E), Mumbai-400 098 PAN : AADCG6758M	vs	The Assistant Commissioner of Income-tax-(International Taxation), Circl-2(3)(2), Mumbai
APPELLANT		**RESPONDENT**

Appellant by	Shri Niraj Sheth, AR
Respondent by	Shri K.L. Kanak, DR

Date of hearing	02-09-2021
Date of pronouncement	12-10-2021

O R D E R

Per Saktijit Dey (JM)

Captioned appeal by the assessee is against the final assessment order dated 30-09-2019 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 for the assessment year 2016-17 in pursuance to directions of learned Dispute Resolution Panel (DRP).

2. In ground 1 assessee has challenged addition of Rs.10,61,365/-, being reimbursement of expenses.

3. Briefly the facts are, the assessee is a company incorporated in the United States of America (USA) and is a tax resident of that country. As stated by the assessing officer, assessee is engaged in the business of providing gem trading services and other allied and technical services. For the assessment year under dispute, assessee filed its return of income on 26-07-2016 declaring total income of Rs.41,44,650/-. In course of assessment proceedings, the assessing officer, while verifying the return of income filed by the assessee noticed that the assessee has not offered to tax an amount of Rs.10,61,365/- being travel cost. When called upon to explain, it was submitted by the assessee that the travel cost not being in the nature of fees for technical services (FTS) and purely reimbursement of expenditure incurred, is not taxable either under the provisions of the Act or under the India-USA Double Taxation Avoidance Agreement (DTAA). Further, the assessee submitted that the Tribunal has decided the issue in favour of the assessee in the preceding assessment years. However, the assessing officer was not convinced with the submissions of the assessee. He opined, payment for travel being intrinsically linked for providing training and technical services, has to be regarded as FTS. For coming to such conclusion, the assessing officer also relied upon the observations of learned DRP and Commissioner (Appeals) in assessment years 2009-10, 2010-11 and 2011-12. Thus, ultimately he held that the travel cost of Rs.10,61,365/- is taxable as FTS and accordingly brought it to tax. Though, the assessee objected to the aforesaid addition before learned DRP; however, it was unsuccessful.

4. The learned counsel for the assessee submitted, the issue stands squarely covered in favour of the assessee by the decisions of the Tribunal in the preceding assessment years.

5. Though, learned departmental representative fairly agreed that the aforesaid submissions of learned counsel for the assessee; however, he relied upon the observations of the assessing officer and learned DRP.

6. We have considered rival submissions and perused materials on record. The issue arising for consideration is, whether the travel cost received by the assessee by way of reimbursement can be regarded as FTS. As could be seen, in course of assessment proceedings, the assessee has specifically brought to the notice of the assessing officer the orders passed by the Tribunal in the preceding assessment years holding that such reimbursement of expenses is not in the nature of FTS. However, the assessing officer, while ignoring the decisions of the Tribunal has relied upon the observations of the higher departmental authorities. This, in our view, is most undesirable. Further, though, learned DRP has acknowledged that in assessment years 2009-10 and 2010-11, the Tribunal has decided the issue in favour of the assessee; however, relying upon a solitary amendment made to the agreement between the parties and distinguishing the decisions of the Tribunal in assessee's own case, learned DRP has upheld the addition made by the assessing officer. On a careful perusal of the amended clause 1.2 of the agreement as referred to by learned DRP, we do not find much difference, except, the mode and manner of quantification of the FTS. Thus, in our considered opinion, the spirit of the old clause 1.2 has not undergone any substantial change by the amendment. Be that as it may, even after the amendment to the agreement was effected from 01-04-2012, the Tribunal has consistently decided the issue in favour of the assessee from assessment years 2009-10 onwards. In the latest order passed for assessment year 2015-16 in ITA No.6381/Mum/2018 dated 19-02-2020, the Tribunal following its order in

assessee's own case in assessment year 2014-15 has deleted the addition with the following observations:-

> *"5.* We have heard the rival submissions, perused the orders of the authorities below and the case laws relied on. On a careful perusal of the order of the TPO as well as the DRP and the order of the Coordinate Bench for the earlier assessment years, we find that the issue and facts are identical to this year and the Coordinate Bench for the immediately preceding assessment year i.e. A.Y. 2014-15 in ITA.No. 6556/Mum/2017 dated 20.06.2018 held that the fee for technical services is different from the expenses incurred on third party cost and there is a clear bifurcation in the agreement between the internal cost incurred and external cost paid by the assessee on behalf of GIA India Laboratory Pvt. Ltd. The Tribunal applying the ratio of the decision of the Hon'ble Supreme Court in the case of DIT *v.* A.P. Moller Maersk [392 ITR 186] held that amount received towards reimbursement of cost cannot be taxed in the hands of the assessee. While holding so the Tribunal observed as under:
>
> "7. *We have considered rival submissions and perused materialson record. Undisputedly, the assessee has entered into* a *training and technical service agreement with GIA India on 1st November 2008, for training the employees of GIA India and providing technical services for the implementation of grading policies, procedures and processes. It is also not disputed that in pursuance of such agreement, the assessee has raised separate debit notes for fee for training and technical services and towards reimbursement of certain costs like travel expenses, meals, etc. While it is the claim of the assessee that the reimbursement of cost of travel and meals by GIA India is on actual basis without any profit element, hence, not to be included in the income, it is the stand of the Department that there isno scope for bifurcation of the amount received by the assessee under the agreement, as it has to be taxed on gross basis as fee for technical services. There is no dispute that the agreement under which the assessee has received the disputed amount is continuing from assessment year 2009-10. While deciding identical dispute in* assessee's *own case for assessment year 2009-10 and 2011-12, in ITA no.4659/Mum./2014 and ITA no.385/Mum./2016, dated 9th May 2017, the Tribunal has held as under—*
>
>> *"8. We have gone through the orders passed by the lower authorities and arguments made before us by both the sides.*
>>
>> 9. *The brief facts are that the assessee company incorporated in USA is engaged in grading and certification of diamonds. GIA India, (i.e. the company incorporated in India)*
>> *entered into an agreement with the assessee company for availing training and technical services. The terms regarding payment of fee and reimbursement of expenses read as*
>> *under-*
>>
>> *"1.2 Fees and Payment Terms for Training and Technical Services. Customer will pay Service Provider the costs incurred by the Service Provider to employ the individuals(s)*

performing the training or technical service plus a markup of six and one-half percent (6.5%). Service Provider will invoice Customer the fees due for the services and Customer will pay
such invoices within forty~five(45) days after receipt of the invoice. Such invoices may be monthly or quarterly as specified by Service Provider.
1.3. Reimbursement of Third Party Costs Customer will reimburse Service Provider for (i) fees paid by Service Provider to third party service providers, advisors and consultants in connection with or related to the performance of the services rendered under the Agreement, including without limitations accountants, attorneys, marketing consultants and agencies and information technology service providers, etc) and (ii) software, materials and items paid for by service Provider in connection with or related to the performance of the Services (collective, (i) and (ii) are referred to as "Third Party Costs"). If Third Party Costs are incurred by Service Provider for the benefit of Customer and other customers, then Service Provider will allocate the Third Party Costs between and among Customer and such other customers in a manner determined by Service Provider in its sole discretion. Service Provider will invoice Customer the third Party Costs and Customer will pay such invoices within forty-five(45) days after receipt of the invoice. Such invoices may be monthly or quarterly as specified by Service Provider."
10. Thus, from the perusal of the above, it may be noted that assessee offered to tax only the amount of fee received for providing training and technical services and amount of expenses received by way of reimbursement on cost to cost basis were not shown as taxable in the hands of the assessee. The AO was of the view that whole of the amount including the amount reimbursed aggregating to Rs. 1,26,09,523 should also be included as fees in the hands of the assessee.
11. We have carefully considered the orders passed by the lower authorities and we do not agree with the stand adopted by the lower authorities. It may be noted from the perusal of the terms of the agreement which are reproduced above that assessee was entitled to receive by way of fee only the amount incurred by way of cost to employ" the individuals plus mark-up of 6.5%. Clearly speaking, the expression cost to ,,employ" individuals is different from the expression cost incurred to ,,depute" a person. The cost of employment would clearly mean and include only internal costs as are incurred by an organisation to employ an individual in the organisation. Any cost incurred over and above that to depute the individual for a particular assignment which is not internal assignment of the assessee would be additional cost. Thus, in the case before us, costs and expenses incurred by the assessee on travel and insurance etc on the persons deputed in India for providing training and technical services to GIA India was in the nature of cost incurred over and above the cost of employment. This interpretation is further re-enforced when we read the next clause, i.e. clause 1.3 which says that GIA India shall reimburse to the assessee any expenses incurred on account of thirty party costs. The drafting of the agreement and manner of placements the clauses in the agreement clearly make out a case that FTS is different from the expenses incurred on third party costs. Thus, there is a clear bifurcation in the agreement between the internal cost

incurred by the assesses *and external cost borne or paid by the* assesses *on behalf of GIA India. In our mind, there is no confusion in this regard and the lower authorities have unnecessarily made an issue out of that.*

12. With regard to the taxability of FTS on gross basis, it has been fairly admitted by the Ld. Counsel of the assesses *that there is no dispute on the proposition that FTS has to be taxed on gross basis. However, the issue that arise here for our consideration is whether the expenses incurred on cost to cost basis will also be included in the amount of FTS. We find that this controversy has now been put to rest by Hon"ble Supreme Court by way of its latest judgment in the case of DITvsA.P, Moller Maersk 392 ITR 186(SC). Relevant part of the judgement is reproduced hereunder-*

"10. The facts which emerge on record are that the assessee is having its IT System, which is called the Maersk Net. As the assessee is in the business of shipping, chartering and related business, it has appointed agents in various countries for booking of cargo and servicing customers in those countries, preparing documentation etc. through these agents. Aforementioned three agents are appointed in India for the said purpose. All these agents of the assessee, including the three agents in India, used the Maersk Net System. This system is a facility which enables the agents to access several information like tracking of cargo of a customer, transportation schedule, customer information, documentation system and several other informations. For the sake of convenience of all these agents, a centralised system is maintained so that agents are not required to have the same system at their places to avoid unnecessary cost The system comprises of booking and communication software, hardware and a data communications network. The system is, thus, integral part of the international shipping business of the assessee and runs on a combination of mainframe and non-mainframe servers located in Denmark. Expenditure which is incurred for running this business is shared by all the agents. In this manner, the systems enable the agents to coordinate cargos and ports of call for its fleet.

11. Aforesaid are the findings of facts. It is clearly held that no technical services are provided by the assessee to the agents. Once these are accepted, by no stretch of imagination, payments made by the agents can be treated as fee for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems. It is reemphasised that neither the A O nor the CIT(A) has stated that there was any profit element embedded in the payments received by the assessee from its agents in India. Record shows that the assessee had given the calculations of the total costs and pro rata division thereof among the agents for reimbursement. Not only that, the assessee have even submitted before the Transfer Pricing Officer that these payments were reimbursement in the hands of the assessee and the reimbursement was accepted as such at arm"s length. Once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax........" (Emphasis supplied in bold)

Thus, from the above judgement it is clear that the amount received by the assessee on account of reimbursement which has been received over and above the amount of FTS cannot be included and taxed as part ofFTS. Our attention has been drawn on the Transfer Pricing Study report and Transfer Pricing orders passed in the case of GIA India from where it can be made out that no profit element has been included in the expenses reimbursed. Thus, taking into account the totality of facts and circumstances of the case, we find that addition made by the AO is contrary to facts and therefore, is directed to be deleted."

8. On a careful reading of the order of the Co-ordinate Bench reproduced herein above, it is evident that the Tribunal after analyzing the different terms of the agreement and examining the facts on record have recorded a factual finding that the agreement clearly envisages that fee for technical services is different from the expenses incurred on third party cost. Further, it has recorded a finding of fact that there is a clear bifurcation in the agreement between the internal cost incurred by the assessee and external cost borne or paid by the assessee on behalf of GIA India. Thus, on the basis of aforesaid facts, the Tribunal has applied the ratio laid down by the Hon'ble Supreme Court in case of DIT v/s A.P. Moller Maersk, 392 ITR 186 (SC) and held that the amount received towards reimbursement of cost cannot be taxed at the hands of the assessee. Therefore, the observation of the learned DRP that Tribunal has not addressed the issue is baseless.

9. *The learned Departmental Representative has not been able to convince us that there is any difference in facts as involved in the impugned assessment year and assessment years 2009-10 and 2011- 12 on the basis of which the Tribunal has decided the issue. The correctness of the decision rendered by the Tribunal is subject to judicial scrutiny before the higher Appellate Court and the aggrieved party, which is the Department in the present case, hasevery right to challenge the decision of the Tribunal before the Higher Appellate Court. However, unless and until the decision of the Tribunal is reversed or set aside by the higher Appellate Court, it is not only binding on the subordinate authorities but judicial discipline demands that it should be followed by the other Benches of the Tribunal. More so, if such decision is rendered in assessee's own case and under identical facts and circumstances. In view of the aforesaid, considering the fact that the Co-ordinate Bench has decided the disputed issue in favour of the assessee in A. Y. 2009-10 and 2011-12 as referred to above, respectfully following the same we delete the addition off. 15,43,815 made by the Assessing Officer. Ground raised is allowed."*

6. Thus, respectfully following the said decision, we delete the addition of f .49,68,*2471*- made by the Assessing Officer. This ground is allowed."

7. Thus, facts being identical, respectfully following the consistent view of the Tribunal on the disputed issue as discussed earlier, we delete the addition made by the assessing officer. This ground is allowed.

8. In ground 2, assessee has raised the issue of incorrect tax rate applied by the assessing officer on the income offered by the assessee.

9. Briefly the facts are, on the income offered in the return of income, assesseee computed tax @10% in terms of section 115A(b) of the Act as the aforesaid provision is more beneficial to the assessee compared to the tax rate of 15% under the tax treaty. In course of assessment proceedings, the assessing officer referring to note 2 of the note appended to the return of income observed that the applicable tax rate for FTS under section 115A of the Act is 26.265%. Whereas, the tax rate under the tax treaty is 15%. Accordingly, he proceeded to compute tax @15% in terms of tax treaty. In its objection before learned DRP, the assessee submitted that the assessing officer has committed a mistake by incorrectly referring to note 2 of the note appended to the return of income. It was submitted by the assessee that as per section 115A(b), the applicable tax rate is 10% as against 26.265% mentioned by the assessing officer. After considering the submissions of the assessee, learned DRP observed that the provisions of section 115A(b) would apply only if the foreign company has entered into an agreement with an Indian concern and such agreement has been approved by the Central Government or where it relates to a matter included in the industrial policy and the agreement is in accordance with that policy. Further, learned DRP observed, since the assessee failed to establish that the conditions of section 115A(1) have been satisfied, it cannot avail the benefit of section 115A(1)(b). Accordingly, learned DRP upheld the decision of assessing officer in applying the tax rate of 15%.

10. Before us, learned counsel for the assessee submitted, as per the master direction dated 01-01-2016 issued by Reserve Bank of India (RBI), prior approval

of RBI is required only if the remittance for consultancy service exceeds USD 10,00,000 per project for consultancy services procured from outside India. In this context, he drew our attention to paragraph 4.3 of the master direction. Further, drawing our attention to Foreign Exchange Management (Current Account Transaction) Rules, 2000 to the master direction, he submitted, payment received by the assessee did not fall within the prohibitory list requiring specific approval of the Central Government. Thus, he submitted, when the rules, regulations/guidelines did not require any specific approval for the payment received, it has to be construed that the remittances to the assessee are deemed to have been approved as required under section 115A of the Act and no further approval of Central Government is required. Further, he submitted, the remittances have been received through normal banking channel under the automatic route of RBI which pre-supposes approval of the regulatory authority. Thus, he submitted, the rate of tax at 10% as per section 115A(1)(b)(B), which is applicable from assessment year 2016-17 would apply to the assessee as it is more beneficial. In support of his contention, learned counsel relied upon a decision of ITAT, Ahmedabad Bench in the case of Alembic Ltd vs ITO ITA No.1202/Ahd/2014 dated 23-11-2016.

11. Per contra, learned Departmental Representative submitted, the tax rate of 10% as provided in section 115A(1)(b) would be applicable from assessment year 2017-18 and not to the impugned assessment year. Further, he submitted, the master direction referred to by the assessee speaks of 'consultancy services', whereas, the income offered by the assessee relates to 'technical services'. Therefore, the master direction would not be applicable. Further, he submitted, the provision contained in section 115A(1) has to be strictly interpreted and in

case the conditions contained therein are not satisfied, the assessee cannot get the benefit of 10% tax rate. Finally, he submitted, various arguments advanced by the assessee, by referring to mast direction and some other rules/regulations are being canvassed for the first time before the Tribunal and have never been taken before the departmental authorities. Thus, neither the assessing officer nor learned DRP had any occasion to verify assessee's claim having regard to the RBI rules, regulations/guidelines relied upon by the assessee.

12. In rejoinder, learned counsel for the assessee submitted, the tax rate of 10% under section 115(1)(b)(B) has been made applicable from 01-04-2016. Hence, it would apply to assessment year 2016-17. Further, he submitted, while the assessing officer has applied the tax rate of 15% by incorrectly mentioning note 2 to the return of income, learned DRP, while considering the issue of applicability of section 115A(1) has never allowed any opportunity to the assessee to have its say on the fulfillment of conditions of the said provision.

13. We have considered rival submissions and perused materials on record. The short issue arising for consideration is whether, the tax rate of 10% provided u/s 115A(1)(b)(B) would be applicable to the payments received by the assessee towards FTS. Apparently, the assessing officer has referred to note 2 to the note appended by the assessee to the return of income to conclude that the tax rate under the Act being 26.265% is more than the tax rate of 15% under the tax treaty; hence, the treaty provision being more beneficial would be applicable to the assessee. However, on a perusal of note 2 of the note appended to the return of income, a copy of which is at page 44 of the paper book, we find, the note reads as follows:-

> *"2. Training and Technical Fees are in nature of 'fees for technical services' as defined under section 9(l)(vii) of the Income-tax Act,1961 and taxable at the rate of 10%(plus*

Surcharge and Education cess) in terms of section 115A. As per Article 12 of the Double Tax Avoidance Agreement ('DTAA') entered into and subsisting between India and the United States of America, royalty received is taxable at the rate of 15%. Accordingly, the tax rate considered for computation is @10% taking benefit of sec 115A of Income-tax Act,1961."

14. On a reading of the aforesaid, we do not find any reference to the tax rate of 26.265% as suggested by the assessing officer. Thus, it is manifest, the assessing officer proceeded to apply the tax rate of 15% under a complete factual misconception. When the aforesaid error committed by the assessing officer was brought to the notice of learned DRP, it is observed, learned DRP has not made any observation on the same. On the contrary, learned DRP proceeded to examine whether the conditions of section 115A(1) have been fulfilled or not. Therefore, assessee's contention that learned DRP never provided an opportunity to the assessee to offer its submissions regarding fulfillment of conditions of section 115A(1) appears to be correct. Thus, in our view, to that extent, there is lack of opportunity being provided to the assessee to establish its position. Proceeding further, we find section 115A(1)(b) provides that subject to fulfillment of certain conditions, the rate of tax in respect of income received by a non resident company by way of royalty or FTS would be taxable @10%. The conditions are as under:-

I. The royalty or FTS received from the Indian concern must be in pursuance to an agreement entered between the parties and such agreement must have been approved by the Central Government; or

II. Where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement should be in accordance with such policy.

15. In this regard, assessee's contention is – the amount by way of FTS received by the assessee is little more than Rs.41 lakhs. Therefore, there is no need for any specific approval from the Central Government. On a perusal of paragraph 4.3 of the master direction dated 01-01-2016 (updated from time to time) issued by the RBI, a copy of which is at page 54 of the paper book, we find that prior approval of RBI would be necessary, if remittances exceed USD 10,00,000 per project for 'other consultancy services' procured from outside India. As per Foreign Exchange Management (Current Account Transaction) Rules, 2000, remittances in certain instances are prohibited as per schedule 2 and schedule 3. Prima facie, it appears, the amount received by way of FTS by the assessee does not come within the prohibited items. Though, there are certain conditions set out in section 115A(1); however, it has to be considered whether such conditions are mandatorily required to be fulfilled, even, in a case where specific approval is neither required nor contemplated as per the extant rules/regulations/guidelines of RBI or Central Government. In case, the Government has not laid down any guidelines or procedure for approval for the subject transaction, the assessee cannot be expected perform an impossible task. In our view, if strict and literal interpretation of a statutory provision leads to undesirable consequences and not only renders it unworkable but also causes harassment to the taxpayer, then, it has to be avoided and the provision has to be construed harmoniously to make it workable. However, it is a fact on record that all these aspects have not been examined either by the assessing officer or by learned DRP while deciding the disputed issue.

16. As regards the contention of learned departmental representative that the 10% rate would be applicable from assessment year 2017-18, we do not find any

merit in such submission. Undisputedly, by way of Finance Act, 2015, the applicable tax rate of 10% in place of 15% has been brought to the statute w.e.f. 01-04-2016. Therefore, in our view, the tax rate of 10% would be applicable from assessment year 2016-17 onwards. As regards the contention of learned Departmental Representative that the master direction of RBI speaks of consultancy services, hence, would not be applicable, we find such argument thoroughly misconceived. A reading of Explanation (a) to section 115A(1)(b)(B) makes it clear that FTS would have the same meaning as in Explanation 2 section 9(1)(vii) of the Act. As per Explanation 2 to section 9(1)(vii) of the Act, FTS would include consideration for managerial, technical or consultancy services. Thus, consultancy services would also come within the definition of FTS. It is relevant to observe, in course of hearing, learned counsel for the assessee submitted that in all other assessment years, similar payment received by the assessee has been taxed @10% as per section 115A(1)(b) of the Act. If that is so, applicability of rule of consistency also needs to be examined.

17. In view of the aforesaid, we restore the issue to the assessing officer for fresh adjudication keeping in view the discussion made herein before. The assessing officer should not only take note of the master direction of RBI and any other rules and regulations issued/framed by the RBI/Central Government but must also examine the applicability of decisions to be relied upon by the assessee. Needless to mention, before deciding the issue, the assessing officer must provide a reasonable opportunity of being heard to the assessee. With the aforesaid observations, this is ground is allowed for statistical purposes.

18. In the result, appeal is partly allowed.

Order pronounced on 12/10/2021.

Sd/- sd/-

(RAJESH KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dt : 12/10/2021
Pavanan
Copy to :

1. Appellant
2. Respondent
3. The CIT concerned
4. The CIT(A)
5. The DR, ITAT, Mumbai
6. Guard File

/True copy/ By Order

Asstt. Registrar, ITAT, Mumbai