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

BEFORE MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER
&
SMT. RENU JAUHRI, ACCOUNTANT MEMBER

ITA No. 4433/MUM/2023
(A.Y. 2021-22)

Gemological Institute of America, Inc. 5345, The Rober Mouawad Camplus, Armada Drive, Carlsbad, California Zip – 092008	v/s. बनाम	ACIT (International Taxation) Circle 2(3)(2)Mumbai 17th Floor, Air India Building, Nariman Point, Mumbai-400021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AADCG7962K		
Appellant/अपीलार्थी	··	**Respondent/प्रतिवादी**

Appellant by :	Shri J. D. Mistri
Respondent by :	Smt. Shaileja Rai

Date of Hearing	11.06.2024
Date of Pronouncement	06.09.2024

आदेश / O R D E R

PER RENU JAUHRI [A.M.] :-

This appeal is against the final assessment order u/s 143(3) r.w.s. 144C (13) of the Income-tax Act, 1961 [hereinafter referred to as "Act"] dated 31.10.2023 passed by the Assistant Commissioner of Income-tax (International Tax) Circle 2(3)(2), Mumbai [AO] in pursuance to the directions of the Dispute Resolution Panel, Mumbai-1 [DRP] dated 26.09.2023 for Assessment Year [A.Y.] 2021-22.

2. The assessee has raised following grounds of appeal:

"1:0 Re.: General:
1:1 The Assessing Officer/ the Dispute Resolution Panel have erred in assessing the total income of the Appellant at Rs. 3,88,18,14,395/- against the returned income of Rs. 3,32,62,29,830/- thereby determining the tax liability of Rs. 1,76,27,56,590/- against the refund claimed of Rs. 2,58,55,080/- while returning the income for the year.
1:2 The Appellant craves leave to add, alter, amend and/or substitute all or any of the foregoing grounds of appeal at or before the hearing of the appeal.
2:0 Re.: Holding that the Appellant has a 'Permanent Establishment' ("PE") in India::
2:1 The Assessing Officer / the Dispute Resolution Panel have erred in holding that the Appellant has a 'Permanent Establishment" ("PE") in India.
2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no PE in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this connection is erroneous, misconceived and not in accordance with law.
2:3 The Appellant submits that the Assessing Officer/the Dispute Resolution Panel has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the Appellant had a PE in India. Further the Assessing Officer / the Dispute Resolution Panel have also failed to consider the contrary material and evidence adduced by the Appellant.
2:4 The Appellant submits that the Assessing Officer/the Dispute Resolution Panel's stand that the Appellant has a PE in India be struck down.
3:0 Re.: Holding that the Appellant has a business connection in India:
3:1 The Assessing Officer / the Dispute Resolution Panel have erred in holding that the Appellant has a 'business connection' in India. 3:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it has no business connection in India and the stand taken by the Assessing Officer/the Dispute Resolution Panel in this regard is erroneous, misconceived and not in accordance with law.

3:3 The Appellant submits that the Assessing Officer/the Dispute Resolution Panel has erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material to hold that the Appellant had a business connection in India. Further he also failed to consider the contrary material and evidence adduced by the Appellant.

3:4 The Appellant submits that the Assessing Officer/the Dispute Resolution Panel's stand that the Appellant has a business connection in India be struck down.

Without prejudice to the foregoing

4:0 Re.: Attribution:

4:1 The Assessing Officer / the Dispute Resolution Panel have erred in holding that 50% of its receipts are attributable to the alleged PE of the Appellant in India.

4:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject no part whatsoever of its receipts are attributable to the alleged PE in India and the stand taken by the Assessing Officer/ the Dispute Resolution Panel in this regard is incorrect, illegal, arbitrary, baseless, not in accordance with law and hence ought to be struck down.

Without prejudice to the foregoing:

5:1 The Assessing Officer / the Dispute Resolution Panel have erred in holding that the 20.31% of the receipts attributable to the alleged Indian operations ought to be considered as profits of the PE taxable in India.

5:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, even if it is held that the Appellant has a PE in India no further income can be taxed in India as the alleged PE has been remunerated at an arm's length and hence the stand taken by the Assessing Officer / the Dispute Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.

5:3 The Appellant submits that the Assessing Officer be directed to accept the total income as returned.

6:0 Re.: Treating the "royalty" received during the year u/s. 44DA of the Income-tax Act, 1961:

6:1 The Assessing Officer / the Dispute Resolution Panel have erred in holding that the royalty income is "effectively connected" with the alleged PE of the Appellant in India and is therefore taxable u/s. 44DA of the Income-tax Act, 1961.

6:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject and in particular the provisions of the India-USA DTAA[1], the Assessing Officer / the Dispute Resolution Panel the "royalty" received by it during the year under consideration is not taxable u/s. 44DA of the Income-tax Act, 1961 since it does not have any PE in India and hence the stand taken by the Assessing Officer / the Dispute Resolution Panel in respect thereof is incorrect, erroneous, misconceived and illegal and hence ought to be struck down.

6:3 The Appellant submits that the Assessing Officer be directed to tax the "royalty" income in accordance with the provisions of section 9(1)(vi) of the Income-tax Act, 1961 read with Article 12 of the India-USA DTAA.

7:0 Re: Taxation of royalty income:

7:1 The Appellant submits that the amount taxable in terms of section 115A of the Income-tax Act, 1961 and Article 12(2) of the India-USA Double Taxation Avoidance Agreement ['DTAA'] should be restricted to the amount determined in accordance with the Advanced Pricing Agreement ['APA'], if any, entered into by GIA India Laboratory Private Limited with the Central Board of Direct Taxes ['CBDT'].

7:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty taxable in its hands for the year under consideration should be restricted to the amount in accordance with the APA.

7:3 The Appellant submits that the Assessing Officer be directed to consider the royalty income worked out in terms of the APA and to re-compute its total income and tax thereon accordingly.

8:0 Re: Restricting the taxation of royalty income effectively connected to the PE:

8:1 The Appellant submits that in case it is held that any part of royalty income is effectively connected to the alleged PE of the Appellant then such amount should be restricted to the amount in accordance with the APA, if any, entered into by GIA India Laboratory Private Limited with the CBDT.

8:2 The Appellant submits that considering the facts and circumstances of its case, and the law prevailing on the subject, the amount of royalty, if held to be connected to the alleged PE, should be restricted to the amount in accordance with the APA.

8:3 The Appellant submits that the Assessing Officer be directed to consider the royalty income, if any, connected to the alleged PE, to be restricted to the amount determined in accordance with the APA and to re-compute its total income and tax thereon accordingly.

9:0 Re.: Levy of interest u/s. 234A of the Income-tax Act, 1961:

9:1 The Assessing Officer has erred in levying interest u/s. 234A of the Income-tax Act, 1961 on the Appellant.

9:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject no interest u/s. 234A is leviable and the stand taken by the Assessing Officer in this regard is misconceived, incorrect, erroneous and illegal.

9:3 The Appellant submits that the Assessing Officer be directed to delete the interest u/s. 234A so levied on it and to re-compute its tax liability accordingly"

3. Brief facts are that the assessee, Gemological Institute of America Inc. (GIA), is a charity registered under the US laws. It is in the business of grading of diamonds. In India, M/s. GIA India Laboratory Pvt. Ltd. is a subsidiary of the assessee which was regarded as a Permanent Establishment [P.E.] of the assessee by the AO. The assessment was finalized, after holding that 50% of the total receipts of Rs. 547,10,44,459/- is attributable to the PE in India. On these receipts of Rs. 273,55,22,230/-, profit rate of 20.31% was applied to calculate the total business income of the assessee, attributable to the PE which works out to Rs. 55,55,84,565/-. Further, royalty receipts of Rs. 332,39,35,802/- have been shown by the assessee from GIA India. The royalty was also held to have been received from the business connection/PE and therefore taxed under the provisions of section 44DA of the Act. The total income was accordingly, assessed at Rs. 388,18,14,390/- .

4. We have heard the rival submissions at length. At the outset, it was pointed out by the Ld. AR that the issues are covered by the order of the co-ordinate benches in assessee's own case in earlier assessment years.

5. **Ground No. 1** is general in nature.

6. **Ground No. 2 and 3** relate to holding that the assessee has PE and business connection in India. This issue is covered by the order of the co-ordinate bench in immediately preceding year i.e. AY 2020-21 in **ITA No. 647/Mum/2023**. The co-ordinate bench has in turn followed the order of the AY 2010-11 on this issue. The relevant portion of the order is reproduced below:

> *13. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee in the A.Y.2010-11 and held that assessee did not have a Permanent Establishment in India. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 1138/Mum/2015 dated 21.06.2019 held as under: -*
>
> > *"9. We have carefully considered the rival submissions, perused the relevant material, including the orders of the lower authorities as well as the case laws referred at the time of hearing. Notably, the controversy before us primarily revolves around as to whether or not the subsidiary of the assessee company i.e., GIA India Lab can be construed as its PE in India. The income-tax authorities have invoked section 9 of the Act and/or Article 5 of the India-US Treaty in order to say that the assessee company has a PE in India. On the contrary, as per the assessee, the impugned receipts are in the nature of business profits, and in the absence of any PE in India, the same are not taxable in India. Factually speaking, it is evident that the on perusal of the agreements, the transaction of grading services between assessee company and GIA India Lab cannot be considered to be in the nature of a joint venture, since GIA India Lab has its own independent expertise but only due to its technology/capacity constraints, it forwards the stones to the assessee company for grading purposes; it is not an arrangement*

between two parties where each party contributes its share in order to undertake an economic activity which is subjected to joint control; in fact, the arrangement is akin to an assignment or sub-contracting of grading services to the assessee company, wherever GIA India Lab does not have the requisite expertise or technology or capacity for carrying out the grading services; further, the aforesaid arrangement has also been accepted as a mere rendering of grading services by the Transfer Pricing Officer both in the case of GIA India Lab and the assessee company. In this background, we may now proceed to decide as to whether the Indian Subsidiary GIA India Lab can be construed as a PE under any of the aspects contained in Article 5 of India-USA DTAA.

10. Firstly, we may examine whether GIA India Ltd. can be constituted as a fixed place PE of the assessee in terms of Article 5(1) of the India- USA DTAA. As per Article 5(1) of the Indo-USA DTAA, a fixed place PE arises when the foreign entity has a fixed place in India through which its business is wholly or partly carried on. In this context, the learned Counsel pointed out that a similar situation has been considered by the Hon'ble High Court of Delhi in the case of EFunds IT Solutions (supra), which has been upheld by the Hon'ble Supreme Court. In that case, it has been held that a subsidiary cannot be regarded as a 'fixed place PE' of the parent company on the ground of a close association between the Indian subsidiary and the foreign taxpayer. In that case, it was noted that because various services were being provided by E-Fund India (Indian subsidiary) to the taxpayer or that the foreign tax payer was dependent upon Indian subsidiary (eFund India) for its earnings or assignment or sub-contract of contracts to e-Fund India or e-Fund India being reimbursed on a certain cost plus basis or saving / reduction in cost by transferring business or back office operations to the Indian subsidiary or the manner and mode of the payment of royalty transactions or e-Fund India providing support for carrying on core activities being performed by the taxpayer or associated transactions, cannot be the basis to construe the Indian subsidiary as PE of the foreign tax payer. Further, before the Hon'ble Delhi High Court, the Department had contended that the foreign company had a joint venture or partnership with Indian subsidiary as the businesses of the assessee company and the Indian subsidiary were inter-linked and

closely connected (which is also contended in the case of the assessee before us) and therefore the Indian subsidiary was regarded as PE of foreign company in India. The aforesaid of the instant case, since the said services are rendered outside India and none of the employees/ personnel of the assessee company has visited India and therefore, service PE is not triggered in the case of the assessee company.

13. In terms of Article 5(4) of the India - US/DTAA, an agency PE is created where a person-other than an agent of an independent status to whom paragraph 5 applies is acting in India on behalf of an enterprise of the USA, that enterprise shall be deemed to have a permanent establishment in India, if:

> *(a) he has and habitually exercises in India an authority to conclude on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph;*
> *(b) he has no such authority but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, and some additional activities conducted in the State on behalf of the enterprise have contributed to the sale of the goods or merchandise; or*
> *(c) he habitually secures orders in India wholly or almost wholly for the enterprise.*

14. The definition excludes from the ambit of a PE any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status acts in the ordinary course of its business. The OECD Commentary deals with the concept of 'Independent Agent' in paragraphs 36 to 39. In terms of paragraph 37 of the OECD Commentary, a person will be regarded as an independent agent (i.e. it will not constitute a PE of the enterprise on whose behalf it acts) only if:

> *- He is independent of the enterprise both legally and economically, and*

- He acts in the ordinary course of his business when acting on behalf of the enterprise. In other words, Article 5(5) of the India- USA DTAA stipulates the following conditions which are required to be satisfied in order that an agent may be said to be an independent agent, i.e.,
-That he should be an agent of independent status; that, he should be acting in the ordinary course of his business; and, that his activities should not be devoted wholly or almost wholly on behalf of the foreign enterprise for whom he is acting as agent.

15. GIA India Lab is an independent/separate legal entity in India which is engaged in rendering of grading services. Further, considering the functions and the risks assumed by GIA India Lab visà-vis its business activities in India (as has been recorded in the transfer pricing study report - which functional and risk analysis has been accepted by the Transfer Pricing Officer both in the case of GIA India Lab and in the case of the assessee company), GIA India Lab is an independent entity which is rendering grading services to its clients in India. GIA India Lab also bears service risk and all client facing risks vis-à-vis the stones sent to the assessee company for grading purposes (as has been recorded in the Transfer Pricing Study Report). Hence, GIA India Lab is not acting in India on behalf of the assessee company. Further, GIA India Lab is not having any authority to conclude contracts and has neither concluded any contracts on behalf of the assessee company nor has it secured any orders for the assessee company in India. Thus, GIA India Lab cannot be regarded as 'agency PE' of the assessee company in India.

16. Before parting, we may also note the reference made by the Ld. Representative to the assessment concluded by the Assessing Officer for assessment year 2009-10. It was explained that during the assessment proceedings for assessment year 2009-10, a similar query i.e. why GIA India Lab should not be construed as PE of the assessee company in India was raised, but after considering the detailed response furnished by assessee vide reply letter dated 02 November 2012, no addition whatsoever was made, which is evident from the Assessment Order (AY 2009-10) dated 26 March 2013. Thus, in this background it was all the more incumbent upon the Revenue in this year to discharge its onus as

to why a different stand is being adopted, especially in the face of the fact that the nature and source of income in question remains the same. Therefore, on this aspect also, we are not inclined to uphold the stand of the assessing authority.

17. Before parting, we may also refer to the reliance placed by the Ld. DR on the judgment in the case of Formula One World Championship Ltd. (supra). In that case, the assessee was a U.K tax resident who obtained licence over all commercial rights in FIA Formula One World Championship. For this purpose, the assessee (foreign tax payer) entered into a contract with J.P. Sports (an Indian concern) by way of which it granted to J.P. Sports the right to host, stage and promote Formula One Grand Prix of India event at Motor racing Circuit owned by J.P. Sports. After examining all the relevant agreements, the case of the Revenue was that the Circuit located in India constituted a PE of assessee (i.e. the foreign tax payer) in India. The Hon'ble High Court concluded that since the assessee (foreign tax payer) had full access to the Circuit and could dictate as to who was authorised to access the Circuit and organising any other event on the Circuit was not permitted, the said Circuit constituted a PE of the foreign tax payer, i.e. Formula One World Championship Ltd., in India. The said decision of the Hon'ble High Court was approved by the Hon'ble Supreme Court. The aforesaid decision, in our view, stands on an entirely different fact-situation. In the present case, there is no material to show that the assessee dictates to the Indian subsidiary as to what activities it is authorised to engage in. We have also noted earlier that the Indian subsidiary is operating in an independent manner and there is nothing to show that factually speaking the Indian subsidiary constitutes a PE of the assessee in India. Thus, on account of difference in fact-situation, the reliance placed by the Ld. DR in the case of Formula One World Championship Ltd. (supra) is misplaced.

18. In view of the aforesaid discussion, in our considered view, the Assessing Officer has erred in invoking section 9 of the Act and/or Article 5 of the India-USA DTAA in order to say that the assessee company has a PE in India. Thus, assessee succeeds on this issue."

14. Further in assessee's own case in ITA.No. 975/Mum/2021 dated 17.01.2022, following the decision of the assessee for the A.Y. 2010-11, the Coordinate Bench observed as under:

> *"4. We have heard rival submissions and perused the materials available on record. The assessee is a company incorporated in USA and also a tax resident of USA. It is engaged in the business of diamond grading and preparation of diamond dossiers. The assessee filed its return of income for the A.Y.2017-18 on 30/11/2017 declaring total income of Rs.597,75,36,450/-. Later a revised return was filed on 30/11/2018 declaring total income at Rs.348,35,96,480/-. The assessee is one of the companies of GIA group, a trusted name of gems and diamond grading and gemstone identification industry and is regarded as an authority in Gemology. During the year under consideration, the assessee has rendered diamond grading services to its associated enterprises in India i.e. GIA India Laboratory Pvt. Ltd., and to third parties. The assessee pleaded that it does not have any PE in India in terms of Article 5 of the Double Taxation Avoidance Agreement (DTAA) entered into and subsisting between India and USA. The Indian Company i.e. GIA India Laboratory Pvt. Ltd., which was set up on 26/09/2007, is a subsidiary of the assessee company. This subsidiary company set up a laboratory in India and since then engaged in the activity of gem grading in India.*
> *4.1. Prior to setting up of the subsidiary, the assessee contracted with a third party "consolidator" called "International Diamond Ltd" arrangement, the consolidator coordinated the collection of diamonds from India, and the assessee graded the diamonds and issued grading reports. It was agreed between the parties to the consolidator arrangement that the cost to the consumers would be divided in the ratio of 90:10 (90 for the assessee and 10 for the consolidator). This arrangement continues to exist to date even after formation of GIA India Lab. However, the ratio w.e.f. 12 September 2011 is 88: 12 (88 for the assessee and 12 for the consolidator). It is important to appreciate that after GIA India Lab was set up, this agreement also requires that the cost to the consumer would remain the same whether diamonds were graded by GIA India Lab or through the consolidator.*

4.2. During the year under consideration, GIA India Lab graded diamonds, stones or pearls weighing from 0.15 carats to 3.99 carats. However, due to technical limitations, the diamonds or stones weighing larger than 3.99 carats or colored stones are referred to the assessee for grading which includes testing, analyzing, examining and inscribing and issuing reports. Further, in the case of capacity constraints, normal grading process are also referred to associated enterprises.
4.3 The assessee has entered into „GIA Gem Grading Services Agreement" and the subsequent Amendment Agreement with GIA India Lab (amongst other entities) for providing gem grading services vis-a-vis diamonds/stones to other group entities.

4.4 In terms of the aforesaid agreement, the entities follow a uniform pricing mechanism of 90:10 ratio for grading services i.e. as per the arrangement, GIA India Lab shall pay 90% of the service revenue collected from its customer to the assessee for its grading services, and retain 10% of service revenue for its coordinating effort. However, the pricing mechanism w.e.f. 01 April 2012 in terms of the Amendment Agreement is 88:12 ratio i.e. as per the arrangement, GIA India Lab shall pay 88% of the service revenue collected from its customer to the assessee for its grading services, and retain 12% of service revenue for its coordinating effort.
4.5. In the background of the aforesaid agreement, the Id. AO held that assessee has a PE in India viz GIA India Lab through which it carries on its business in India. Accordingly, 50% of gem grading fees received by the assessee from GIA India Lab has been held to be attributable to the Indian PE and a profit percentage of 20.31% was applied thereon to determine the total income of the assessee. The total receipts of the assessee company was determined at Rs. 789,00,91,734/- which Rs.348,35,96,482/-. Hence, includes the income royalty remaining receipts of of Rs. 440,64,95,252/- represents business receipts of the assessee. The Id. AO applied the profit ratio of 20.31% of 50% of such business receipts (Rs.440,64,95,252/-). Accordingly, the Id. AO determined the profit attributable to PE at Rs.44,74,79,593/- in the final assessment order pursuant to the directions of the Id. DRP. We find that the Id. DRP had given a categorical finding in 5.1 of its order that the contentions raised by the assessee during the year under

consideration are identical to those raised by it in earlier assessment years and there is no change of facts involved in the year under consideration vis a vis earlier years. Infact, the Id. DRP while dismissing the contentions of the assessee, had merely placed reliance on the earlier year orders of the Id. DRP. We find that this Tribunal in assessee's own case for A.Y.2010-11 in ITA No.1138/Mum/2015 dated 21/06/2019 had decided the very same issue in assessee's favour by holding that the assessee does not have any PE in India. The relevant operative portion of the said Tribunal Order is hereby reproduced as under:-

> *9. "We have carefully considered the rival submissions, perused the relevant material, including the orders of the lower authorities as well as the case laws referred at the time of hearing. Notably, the controversy before us primarily revolves around as to whether or not the subsidiary of the assessee company i.e., GIA India Lab can be construed as its PE in India. The income-tax authorities have invoked section 9 of the Act and/or Article 5 of the India-US Treaty in order to say that the assessee company has a PE in India. On the contrary, as per the assessee, the impugned receipts are in the nature of business profits, and in the absence of any PE in India, the same are not taxable in India. Factually speaking, it is evident that the on perusal of the agreements, the transaction of grading services between assessee company and GIA India Lab cannot be considered to be in the nature of a joint venture, since GIA India Lab has its own independent expertise but only due to its technology/capacity constraints, it forwards the stones to the assessee company for grading purposes; it is not an arrangement between two parties where each party contributes its share in order to undertake an economic activity which is subjected to joint control; in fact, the arrangement is akin to an assignment or sub-contracting of grading services to the assessee company, wherever GIA India Lab does not have the requisite expertise or technology or capacity for carrying out the grading services; further, the aforesaid arrangement has also been accepted as a mere rendering of grading services by the Transfer Pricing Officer both in the case of GIA India Lab*

and the assessee company. In this background, we may now proceed to decide as to whether the Indian Subsidiary GIA India Lab can be construed as a PE under any of the aspects contained in Article 5 of India-USA DTAA.

10. Firstly, we may examine whether GIA India Ltd. can be constituted as a fixed place PE of the assessee in terms of Article 5(1) of the India- USA DTAA. As per Article 5(1) of the Indo-USA DTAA, a fixed place PE arises when the foreign entity has a fixed place in India through which its business is wholly or partly carried on. In this context, the learned Counsel pointed out that a similar situation has been considered by the Hon'ble High Court of Delhi in the case of E- Funds IT Solutions (supra), which has been upheld by the Hon'ble Supreme Court. In that case, it has been held that a subsidiary cannot be regarded as a 'fixed place PE' of the parent company on the ground of a close association between the Indian subsidiary and the foreign taxpayer. In that case, it was noted that because various services were being provided by E- Fund India (Indian subsidiary) to the taxpayer or that the foreign tax payer was dependent upon Indian subsidiary (e- Fund India) for its earnings or assignment or sub-contract of contracts to e-Fund India or e-Fund India being reimbursed on a certain cost- plus basis or saving / reduction in cost by transferring business or back office operations to the Indian subsidiary or the manner and mode of the payment of royalty transactions or eFund India providing support for carrying on core activities being performed by the taxpayer or associated transactions, cannot be the basis to construe the Indian subsidiary as PE of the foreign tax payer. Further, before the Hon'ble Delhi High Court, the Department had contended that the foreign company had a joint venture or partnership with Indian subsidiary as the businesses of the assessee company and the Indian subsidiary were inter-linked and closely connected (which is also contended in the case of the assessee before us) and therefore the Indian subsidiary was regarded as PE of foreign company in India. The aforesaid argument of the Revenue was repelled since the conditions under Article 5 of the DTAA were not

met and it has been held that PE cannot be established merely because of transactions between associated enterprises or the principal sub-contracting or assigning the contract to the subsidiary.

11. Factually, in the case of the assessee company, there is no joint venture arrangement between the assessee company and GIA India Lab vis-à-vis gem grading services rendered by the assessee company to GIA India Lab since it is GIA India Lab who enters into agreement with the client and bears all the risks including credit risks, client facing risks, etc. Also, in terms of the agreement, GIA India Lab bears the risk of loss or damage to articles while in transit to and from the assessee company and also during the time when the articles are at or in the assessee company's facilities. Therefore, the economic risks of the gem grading services rendered by the assessee company vis-à-vis stones/diamonds of customers of GIA India Lab shipped to it are borne by GIA India Lab and hence, there is no joint venture arrangement whatsoever between the assessee company and GIA India Lab. In terms of Article 5(6) of the India USA DTAA, it is provided that the mere fact that a company has controlling interest in the other company does not by itself construe the other company to be its PE. Accordingly, the assessee company is not having a 'fixed place' PE in India.

12. In terms of Article 5 (1) of the India - USA DTAA, a service PE arises on the furnishing of services in India by the assessee company through employees or other personnel, but only if: activities of that nature continue in India for a period or periods aggregating to more than 90 days within any twelve-month period; or the services are performed within India for a related enterprise. Hence, a service PE is triggered if the services (other than included services as defined in Article 12 'Royalties and Fees for Included Services') are rendered by the assessee company through employees or other personnel and activities of that nature continue in India for a period or periods aggregating to more than 90 days within any twelve-month period; or the services are performed within India

for a related enterprise. The assessee company renders 'grading services' and 'management services to GIA India Lab'. In fact, 2 graders who were earlier employed with the assessee company are now employed with GIA India Lab and are on the payrolls of GIA India Lab and are working under control and supervisions of GIA India Lab and therefore, no service PE is created in India in terms of India-US DTAA. The Supreme Court has affirmed the decision of the Delhi High Court in E- Funds (supra) wherein it has been held that two employees deputed to e-Fund India fund India did not create a service PE as the entire salary cost was borne by e-fund India and they were working under control and supervision of e-fund India. In the facts of the instant case, since the said services are rendered outside India and none of the employees/ personnel of the assessee company has visited India and therefore, service PE is not triggered in the case of the assessee company.

13. In terms of Article 5(4) of the India - US/DTAA, an agency PE is created where a person-other than an agent of an independent status to whom paragraph 5 applies - is acting in India on behalf of an enterprise of the USA, that enterprise shall be deemed to have a permanent establishment in India, if:

(a) he has and habitually exercises in India an authority to conclude on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 3 which, if exercised through a fixed place of business, would not make that fixed place of business a permanent establishment under the provisions of that paragraph;

(b) he has no such authority but habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise, and some additional activities conducted in the State on behalf of the enterprise have contributed to the sale of the goods or merchandise; or

(c) he habitually secures orders in India wholly or almost wholly for the enterprise.

14. The definition excludes from the ambit of a PE any business activity carried out through a broker, general commission agent or any other agent having an independent status, if such broker, general commission agent or any other agent having an independent status acts in the ordinary course of its business. The OECD Commentary deals with the concept of 'Independent Agent' in paragraphs 36 to 39. In terms of paragraph 37 of the OECD Commentary, a person will be regarded as an independent agent (i.e. it will not constitute a PE of the enterprise on whose behalf it acts) only if:

He is independent of the enterprise both legally and economically, and

He acts in the ordinary course of his business when acting on behalf of the enterprise. In other words, Article 5(5) of the India- USA DTAA stipulates the following conditions which are required to be satisfied in order that an agent may be said to be an independent agent, i.e.,

- That he should be an agent of independent status; that, he should be acting in the ordinary course of his business; and, that his activities should not be devoted wholly or almost wholly on behalf of the foreign enterprise for whom he is acting as agent.

15. GIA India Lab is an independent/separate legal entity in India which is engaged in rendering of grading services. Further, considering the functions and the risks assumed by GIA India Lab vis-à-vis its business activities in India (as has been recorded in the transfer pricing study report – which functional and risk analysis has been accepted by the Transfer Pricing Officer both in the case of GIA India Lab and in the case of the assessee company), GIA India Lab is an independent entity which is rendering grading services to its clients in India. GIA India Lab also bears service risk and all client facing risks vis-à-vis the stones sent to the assessee company for grading purposes (as has been

recorded in the Transfer Pricing Study Report). Hence, GIA India Lab is not acting in India on behalf of the assessee company. Further, GIA India Lab is not having any authority to conclude contracts and has neither concluded any contracts on behalf of the assessee company nor has it secured any orders for the assessee company in India. Thus, GIA India Lab cannot be regarded as agency PE" of the assessee company in India.

16. Before parting, we may also note the reference made by the Ld. Representative to the assessment concluded by the Assessing Officer for assessment year 2009-10. It was explained that during the assessment proceedings for assessment year 2009- 10, a similar query i.e. why GIA India Lab should not be construed as PE of the assessee company in India was raised, but after considering the detailed response furnished by assessee vide reply letter dated 02 November 2012, no addition whatsoever was made, which is evident from the Assessment Order (AY 2009-10) dated 26 March 2013. Thus, in this background it was all the more incumbent upon the Revenue in this year to discharge its onus as to why a different stand is being adopted, especially in the face of the fact that the nature and source of income in question remains the same. Therefore, on this aspect also, we are not inclined to uphold the stand of the assessing authority.

17. Before parting, we may also refer to the reliance placed by the Ld. DR on the judgment in the case of Formula One World Championship Ltd. (supra). In that case, the assessee was a U.K tax resident who obtained licence over all commercial rights in FIA Formula One World Championship. For this purpose, the assessee (foreign tax payer) entered into a contract with J.P. Sports (an Indian concern) by way of which it granted to J.P. Sports the right to host, stage and promote Formula One Grand Prix of India event at Motor racing Circuit owned by J.P. Sports. After examining all the relevant agreements, the case of the Revenue was that the Circuit located in India constituted a

PE of assessee (i.e. the foreign tax payer) in India. The Hon'ble High Court concluded that since the assessee (foreign tax payer) had full access to the Circuit and could dictate as to who was authorised to access the Circuit and organising any other event on the Circuit was not permitted, the said Circuit constituted a PE of the foreign tax payer, i.e. Formula One World Championship Ltd., in India. The said decision of the Hon'ble High Court was approved by the Hon'ble Supreme Court. The aforesaid decision, in our view, stands on an entirely different fact-situation. In the present case, there is no material to show that the assessee dictates to the Indian subsidiary as to what activities it is authorised to engage in. We have also noted earlier that the Indian subsidiary is operating in an independent manner and there is nothing to show that factually speaking the Indian subsidiary constitutes a PE of the assessee in India. Thus, on account of difference in fact-situation, the reliance placed by the Ld. DR in the case of Formula One World Championship Ltd. (supra) is misplaced.

18. In view of the aforesaid discussion, in our considered view, the Assessing Officer has erred in invoking section 9 of the Act and/or Article 5 of the India-USA DTAA in order to say that the assessee company has a PE in India. Thus, assessee succeeds on this issue."

4.6. Similar view was expressed by this Tribunal in assessee's own case for A. Yrs. 2011-12 to 2016-17 in ITA Nos.386/Mum/2016, 1836 and 7174/Mum/2017, 53,7739 and 7740/Mum/2019 dated 30/04/2021."

4.7. In view of the fact that there is no change in the facts and circumstances of the case, during the year under consideration vis-à-vis earlier years which has been admitted both by the Id. AO as well as Id. DRP, respectfully following the aforesaid decisions of the Tribunal, we hold that the Id. AO erred in invoking section 9 of the Act and/or Article 5 of the India USA DTAA in order to say that assessee has a PE in India. Accordingly, the ground No.2 raised by the assessee is allowed."

15. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own

> *case for the A.Y. 2010-11 and 2017-18, we allow the grounds raised by the assessee. Accordingly, grounds raised by the assessee in Ground Nos. 3 & 4 are allowed."*

7. Respectfully following the decision of the co-ordinate bench, we allow these grounds in favour of the assessee and hold that the assessee did not have a PE in India.

8. **Ground No. 4 and 5** relate to the attribution of profits. On this issue also the co-ordinate bench in its order for AY 2020-21 has observed as under:

> *"16. With regard to Ground Nos. 5, 6 & 7 raised by the assessee, the same relates to alternative plea of attribution of profits and estimation of gross profit. Since, we have already allowed the Ground No.3 & 4 of the appeal holding that assessee does not have a PE in India and thus income of the assessee is not allowable to be taxed in India, the aforesaid grounds of appeal are rendered academic and infructuous."*

9. Respectfully following the order of the co-ordinate bench, this ground is treated as academic and hence infructuous since the ground No. 2 & 3 have already been allowed.

10. **Ground No. 6, 7 & 8** relate to taxing the royalties received during the year u/s 44DA of the Act.

11. The Ld. AR has submitted that the assessee has offered royalty income to tax at 10% plus applicable surcharge and cess on gross basis. If it is held that the assessee does not have a PE in India, there can be no question of the royalty being attributable to the PE in India and it would be taxable at 10% plus applicable surcharge and cess on gross basis on terms of section 9(1)(vi) of the Act.

12. We observe that this issue has also been covered in the ITAT order for AY 2020-21. The relevant portion of the order is reproduced below:

> *"21. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided by the Coordinate Bench in assessee's own case for the A.Y. 2011-12 to 2016-17, observing as under:*
>
> > *"39. In view of the discussions earlier in the order, both the additional grounds of appeal are admitted for adjudication on merits, and in the lights of the discussions in paragraph 2-21 earlier in this order, this additional ground of appeal no. 8 decided in favour of the assessee, in principle, though the matter will go back to the Assessing Officer for verifications of factual aspects with respect of these claims, l.e., with respect to verifications and quantum of actual refunds of royalties by the assessee, which have not been examined at any stage. We, therefore, deem it fit and proper to accept the claim of the assessee, in principle, but remit it back to the Assessing Officer for verification of factual elements embedded in the claim of the assessee. Ordered, accordingly. As for second additional ground of appeal, I.e. ground no. 9, this is rendered infructuous in the light of the findings earlier in the order that no part of the royalty income is to be treated as attributable to the PE, and taxed under section 44AD as such, as it has been held that there is no PE on the facts of this case."*
>
> *22. Considering the submissions and merits on the issue, we are inclined to remit this issue back to the file of Assessing Officer with a direction to verify the records submitted by the assessee on merit and as per law. Assessing Officer is further directed to determine the royalty as per the direction of APA. It is needless to say that assessee may be given a proper opportunity of being heard. Accordingly, grounds raised by the assessee in Ground Nos. 9 and 10 are allowed for statistical purpose"*

13. During the course of hearing the assessee was directed to place on record the current status of APA proposed to be entered by the GIA India Lab. It has been submitted by the Ld. AR that the negotiations are currently in progress and the agreement is yet to be signed finally. We, accordingly, restore this

matter to the file of the AO with the directions to adopt the royalty ultimately quantified in the APA which is pending to be executed between GIA India lab and the CBDT. Accordingly, these grounds are allowed for statistical purposes.

14. Ground No. 9 relates to levy interest u/s 234A of the Act. Ld. AR has submitted that the return filed on 10.03.2022 was within the due date as due date had been extended till 15.03.2022 vide circular No. 01/2022 dated 11.01.2022 issued by the CBDT. The AO is directed to verify this fact and allow relief admissible in this regard.

15. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 06.09.2024.

Sd/-	**Sd/-**
KAVITHA RAJAGOPAL	**RENU JAUHRI**
(न्यायिक सदस्य/JUDICIAL MEMBER)	**(लेखाकार सदस्य/ACCOUNTANT MEMBER**

Place: मुंबई/Mumbai
दिनांक /Date 06.09.2024
अनिकेत सिंह राजपूत/ स्टेनो
आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

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