



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

BEFORE SHRI R.C.SHARMA, AM

&

SHRI AMARJIT SINGH, JM

ITA No.2310/Mum/2017

(Assessment Year :2010-11)

M/s. Gemological Institute International Inc., 10 th Floor, Trade Centre Bandra Kurla Complex, Bandra (E) Mumbai – 400 031	Vs.	DCIT (IT) CIR 2(3)(2) Air India Building Nariman Point, Mumbai – 400 021
PAN/GIR No. AADCG6758M		
(Appellant)	..	(Respondent)

Assessee by	Shri J.D. Mishy / Shri Niraj Sheth
Revenue by	Shri Samuel Darse
Date of Hearing	09/10/2018
Date of Pronouncement	20/11/2018

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT(A)-1, Mumbai dated 21/11/2016 for A.Y.2010-11 in the matter of order passed u/s.143(3) r.w.s. 144C of the IT Act.

2. The following grounds have been taken by the assessee:-

1 : 0 Re : Validity of re-assessment proceedings

1 : 1 The Assessing Officer / Dispute Resolution Panel has erred in re-opening the Appellant's assessment u/s. 148 of the Income-tax Act, 1961.

1:2 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject the re-opening u/s. 148 of the Income-tax Act, 1961 was in excess of jurisdiction and is also otherwise bad in law.

1:3 The Appellant submits that the proceedings u/s. 148 of the Act were not in accordance with law and consequently ought to be struck down.

Without prejudice to the foregoing;

2: 0 Re.: Treating the reimbursement of the travel expenses as income for the year- Rs. 65.44.883/-

2 : 1 The Assessing Officer / the Dispute Resolution Panel has erred in confirming the treatment of travel amounts reimbursed to the Appellant by GIA India Laboratory P. Ltd., as the income of the Appellant for the year.

2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the travel expenses reimbursed to it cannot be treated as its income and the stand taken by the Assessing Officer / the Dispute Resolution Panel in this regard is illegal, incorrect, erroneous and misconceived.

2 : 3 The Appellant submits the Assessing Officer be directed to delete the addition so made by him and to re-compute its total income accordingly.

3 : 0 Re.: General:

Appellant craves leave to add, alter, amend, substitute and / or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.

3. Rival contentions have been heard and record perused.
4. At the outset, learned AR placed on record the order of the Tribunal in assessee's own case for the A.Y.2009-10, 2011-12 and 2014-15, wherein issue raised in the appeal have been decided by the Tribunal in assessee's favour.
5. We had carefully gone through the grounds of appeal raised by the assessee and found that exactly similar issue was raised in the earlier years and the Tribunal vide its order dated 20/06/2018 for the A.Y.2014-15 have decided the issue with regard to taxability of reimbursement of

travel expenses which was treated by DRP as income of the assessee, after having the following observation:-

“3. Brief facts are, the assessee an American Company is engaged in the business of providing gem grading services and other allied and technical services. For the assessment year under dispute, the assessee filed its return of income on 29th November 2014, declaring total income of Rs.1,29,27,970. During the assessment proceedings, the Assessing Officer while examining the details of income shown by the assessee in the return of income and notes appended thereto found that the assessee, though, has received an amount of Rs.15,43,815, towards travel cost, however, the amount has not been offered to income stating that it is in the nature of reimbursement of travel and meals cost without any profit element, hence, not liable to tax. In support of such claim, the assessee had also relied upon certain judicial precedents. The Assessing Officer not being convinced with the claim of the assessee issued a show cause notice directing the assessee to explain why the amount received towards reimbursement of cost should not be taxed as was done in the earlier assessment years. Though, the assessee through elaborate submissions justified its claim, however, the Assessing Officer rejecting the submissions of the assessee held that the amount claimed to have been received towards reimbursement of cost is in the nature of income of the assessee, hence, taxable. Accordingly, he framed the draft assessment order bringing to tax the amount of Rs.15,43,815. Against such addition proposed in the draft assessment order, the assessee raised objections before the DRP.

4. In course of hearing before the DRP, the assessee while justifying its claim also brought to the notice of DRP that identical dispute arising in assessment year 2009-10 and 2011-12 was decided in favour of the assessee by the Tribunal. The DRP, though, took note of the order passed by the Tribunal in assessee's own case for assessment year 2009-10 and 2011-12, however, it observed that the Tribunal has not addressed the issue as to whether the gross amount relatable to services rendered by the assessee can be bifurcated for purpose of computing tax on gross basis. The DRP observed, while arriving at its decision, in respect of non-taxability of reimbursement of cost the Tribunal has not dealt with the issue as to whether the amount is clearly in the nature of reimbursement or not. Referring to certain judicial precedents, DRP observed that when the assessee itself admits that the amount of fee for technical services are liable to tax in India on a gross basis as per [Article-12](#) of the India-USA Double Taxation Avoidance Agreement (DTAA), if during the course of rendering such services certain costs have been incurred which have been reimbursed, it has to be included in the receipts of the assessee as taxability of such

receipts has to be considered on a gross basis. According to the DRP, it is not material whether a portion of the cost does not have an income element. Thus, ultimately, the DRP upheld the addition made by the Assessing Officer in the draft assessment order and directed the Assessing Officer to finalize the same.

5. The learned Sr. Counsel, Shri J.D. Mistry, appearing for the assessee submitted that the agreement in pursuance to which services were rendered by the assessee was executed on 1st November 2008, and was continuing for the subsequent years including the impugned assessment year. He submitted, in terms of the agreement the assessee has received consideration towards rendering of services. He submitted, in addition to the fees received for rendering of services the assessee has also received reimbursement of cost relating to travel and meals on actual basis without any profit element. He submitted, though, the service agreement is single, however, the fees to be received towards services rendered and amount to be received towards reimbursement of cost have been specifically demarcated and provided for in the agreement. Therefore, there is a clear bifurcation of the amount to be received towards services rendered and reimbursement of cost. He submitted, while deciding identical issue in assessment year 2009-10 and 2011-12, the Tribunal after going through the terms of the agreement has held that the reimbursement of cost cannot be considered to be part of fee for technical services, hence, is not taxable. He submitted, facts being identical, the decision of the Tribunal in assessee's own case for preceding assessment years would be binding.

6. The learned CIT (DR), Shri Samuel Darse, though, agreed that in the preceding assessment years, the Tribunal has decided the issue in favour of the assessee, however, strongly relying upon the observations of the Assessing Officer and the DRP, he submitted that the Tribunal while deciding the issue in the preceding assessment years has not correctly appreciated the facts. He submitted, when there is a single agreement between the assessee and Indian company and when the receipts under the said agreement is to be taxed on gross basis, there is no scope for bifurcating the amount received towards fee for technical service and reimbursement of cost. Therefore, he submitted, the Tribunal having not appreciated the facts correctly the decision rendered in the preceding assessment years need not be followed.

7. We have considered rival submissions and perused materials on record. Undisputedly, the assessee has entered into a training and technical service agreement with GIA India on 1 st 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 is no 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 9 th 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 third 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 assessee and external cost borne or paid by the assessee 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 assessee 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 DIT vs A.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 re- emphasised that neither the AO 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 of FTS. 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, has every 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 of Rs.15,43,815 made by the Assessing Officer. Ground raised is allowed.

10. In ground no.2, the assessee has challenged levy of surcharge and education cess.

11. In view of our decision in ground no.1 in deleting the addition made by the Assessing Officer, this ground has become infructuous, hence, dismissed.

12. In the result, assessee's appeal is partly allowed.

6. We had carefully gone through the order of the Tribunal and found that same agreement continued during the year under consideration, therefore, respectfully following the order of the Tribunal in assessee's own case for the very same issue, we do not find any justification for taxing the travelling expenses reimbursed to assessee by its AE.

7. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this 20/11/2018

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 20/11/2018

Karuna Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai