IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 77 of 2023

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COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION AND TRANSFER PRICING)

Versus

STAR RAYS

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Appearance:
MR.VARUN K.PATEL, SENIOR STANDING COUNSEL for the Appellant(s) No. 1
MR B S SOPARKAR(6851) for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE BIREN VAISHNAV**
and
HONOURABLE MR. JUSTICE DEVAN M. DESAI

Date : 31/07/2023

ORAL ORDER
(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1 Draft Amendment adding substantial questions of law granted.

2 This Tax Appeal at the hands of the Revenue has been filed challenging the orders dated 31.8.2018 passed by the Commissioner Of Income Tax (Appeals) and the order dated 28.02.2022 passed by the Income Tax Appellate Tribunal, Surat Bench in I.T.A Nos.725/SRT/2018 for the Assessment Year 2015-2016.

3 The Tax Appeal at the hands of the Revenue raises the following substantial questions of law:

> *"(a) Whether in the facts and circumstances of the case, the learned ITAT has erred in law and on facts in holding that in view of the Tax Residency Certificate (TRC) and Form No. 10F furnished by M/s GIA Inc. USA from the tax authority of USA for the relevant year under consideration, the assessee is entitled to the benefit of Double Taxation Avoidance Agreement (DTAA) between India and USA even though such services were not rendered by the USA entity?*
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> *(b) Whether in the facts and circumstances of the case, the learned ITAT has erred in law and on facts in ignoring that the service was rendered by an independent corporate entity (though a subsidiary of GIA Inc. USA) namely GIA Hong Kong Laboratory Ltd. Situated at Hong Kong and the payment was merely routed through GIA Inc. USA?*
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> *(c) Whether in the facts and circumstances of the case, the learned ITAT has erred in law and on facts in deciding the issue in favour of the assessee ignoring the fact that the beneficial owner of the payment is M/s GIA Hong Kong Laboratory Ltd. Situated at Hong Kong and therefore the DTAA between India and USA cannot be invoked?*
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> *(d) Whether in the facts and circumstances of the case, the learned ITAT has erred in law and on facts in deciding the issue in favour of the assessee ignoring the fact that as per very disclosure on the official website of the M/s GIA Inc. USA, the currency of payment for diamond testing and certification has to be made in the currency of the laboratory where the item is submitted for testing and articles were shipped to Hong Kong and*

payment was made in Hong Kong Dollars?

(e) Whether in the facts and circumstances of the case, the learned ITAT has erred in law and on facts in holding to the effect that services provided to the assessee in the present case are not "make available" in nature and consequently do not qualify as fees for technical service (FTS) under DTAA between India and USA?

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(g) Whether in the facts and circumstances of the case and in law, the impugned order of the learned ITAT is erroneous, illegal and perverse as the learned ITAT has allowed the assessee the benefit of Double Taxation Avoidance Agreement (DTAA) between India and USA, even though the services were rendered by GIA Hong Kong Laboratory Ltd., an independent corporate entity situated at Hong Kong and the payments thereof were also made at Hong Kong in Hong Kong Dollars showing the said Hong Kong Entity as beneficiary in statutory Forms, etc.?

(h) Whether in the facts and circumstances of the case, the learned ITAT has erred in accepting the case of the assessee about clerical mistake in declaring the name of beneficiary in statutory Form No. 15CA (self declaration) and 15CB (CA Certificate) under Rule 37BB of the Income Tax Rules, 1962 and also in instructions for payment issued by the assessee to the Banker and payment advices issued by the Bank without any supporting evidence or without there being anything to show the corrections are made or intended to be made in those statutory Forms and payment instructions / advices?"

4 Facts in brief are as under:

4.1 The assesee is a partnership firm and engaged in the business of cutting and polishing diamonds and export of diamonds.

4.2 On specific requirements by buyers, diamonds are sent for certification by Gemmological Institute of America (GIA for short). The assessee entered into a customer services agreement with the GIA Inc USA which clearly describes a condition as under:

> *"With respect to client shipments or deliveries of articles to GIA's "take in window" inDubai and GIA's laboratories in Hong Kong and Israel,this agreement shall be between the client and GIA USA and not with GIA's local business entity established in such countries.Any and all disputes,suits,cations,claims related to or arising out of this agreement shall be resolved exclusively pursuant to section 30 of the terms and conditions"*

4.3 GIA set up a laboratory at Hong Kong under a separate company called GIA Hong Kong Laboratory Ltd. According to the assessee, it had no direct relationship or any agreement with the GIA Hong Kong Laboratory, Hong Kong.

4.4 It is the case of the assessee that during the year it wanted certain diamond to be certified by GIA USA. For this purpose it sent certain diamonds to Hong Kong for certification by GIA, USA. The invoices were raised by the GIA, USA instructing the assessee to make payment to offshore bank accounts of GIA, USA in Hong Kong. The assessee has also made the payment for the same GIA accounts of GIA, USA in Hong Kong. The payment has been made to its offshore Bank Account of HSBC Account No.801-045451-001 owned by GIA, USA.

4.5 The assessee committed an error in mentioning the name of beneficiary while filling entry in Form 15CA/15CB. It mentioned in the form that the remittance advice issued by the Bank of India is also in the name of GIA Hong Kong Laboratory Ltd. The assessing officer, therefore, held that the assessee has made payment to GIA Hong Kong Laboratory and not GIA USA and therefore cannot claim the treaty benefit between India-USA, as also between India-China. That the assessee also ought to have deducted TDS before making payment to

GIA Hong Kong and having failed to do so, the assessee is in default and therefore must pay Rs.4.43 crores under Sections 201(1) read with Section 201(1A) of the Income Tax Act.

5 Mr.Varun Patel, learned Senior Standing Counsel for the revenue would take us through the Assessment Order and submit as under:

5.1 The self-declarations made in Form 15CA and the CA certificates furnished in Form 15CB clearly admitted that the beneficiary of the remittance has been specified as GIA Hong Kong Laboratory. In support of this submission, Mr.Patel, learned Senior Standing Counsel, would rely on the extracts reproduced in the assessment order showing remittances to GIA Hong Kong. That the advices issued also mentioned the remittee as GIA Hong Kong.

5.2 Relying on the findings of the A.O, he would submit that since the payments were made in Hong Kong dollars it was clear that the services were rendered at GIA Hong

Kong Laboratory and the payment related details on the website demonstrated these facts about remittances to the Hong Kong Laboratory.

5.3 The inevitable conclusion therefore in the submission of the learned Senior Standing Counsel for the Revenue was that the diamonds had been shipped to Hong Kong for certification and such testing related work was carried out at Hong Kong Laboratory and the payments were made in Hong Kong. All the services were therefore rendered by GIA Hong Kong and the payments were merely routed through GIA USA and therefore the AO was right in his findings that the it was evident that obtaining the benefit of India US DTAA and circumventing the application of domestic law was the only purpose for which the payments were routed through the books of account of GIA USA. The assessing officer was therefore right in holding that the assessee cannot claim the benefit of the USA DTAA agreement as the rightful owner of the fee for technical services was GIA Hong Kong and since there was no DTAA with Hong

Kong, the tax liability on the remittances made towards the diamond testing and certification charges have to be determined in accordance with the Income Tax Act, 1961.

6 Mr.B.S.Soparkar, learned Counsel appearing on Caveat for the respondent assessee would make the following submissions:

6.1 Mr.Soparkar, learned Counsel, would submit that the certification of diamonds is from GIA USA. For such purposes, a customer service agreement has been entered into which clearly establishes that the agreement is with the GIA USA and not with the local laboratory. The certification is done by the US entity and there is “no make available” of technical services, know-how or knowledge exchange and therefore the remittances are not qualified as “fees for technical services”

6.2 It was only through an error that while filling Form 15CA and CB did the remittances were shown as Hong Kong. In fact, Mr.Soparkar, learned counsel, would rely

on the details of the form and submit that it clearly showed that the remittances were made in the offshore Bank Account of the GIA USA entity and the moneys were therefore not received by the Hong Kong entity but as deposits were made in the accounts of the USA entity it was clearly covered under the India USA DTAA.

6.3 Mr.Soparkar, learned Counsel, would therefore submit that the AO was in error in not granting the benefit of the USA DTAA treaty although the invoicing/agreement was with GIA Inc. USA and the payments were made in the offshore Bank Account of GIA Inc. USA and not GIA Hong Kong. Mr.Soparkar, learned Counsel, would submit that the AO was misconceived in invoking the provisions of Sections 201(1) read with Section 201(1A) although the payee has no PE in India and the said payment cannot be deemed to be income chargeable to tax in India.

6.4 Mr.Soparkar, learned Counsel, would also rely upon the decision of the Karnataka High Court in the case of

Flipkart Internet (P) Ltd. versus Deputy Commissioner Of Income Tax (International Taxation) reported in ***[2022] 139 taxmann.com 595 (Karnataka)*** in support of his submission that the nature of engagement was in the nature of fees for technical services and not where there was a technology transfer.

7 Having considered the submissions of the respective Counsels what is apparent is that the orders of the Commissioner of Income Tax (Appeals) and the Tribunal are based on appreciation of facts in the right perspective. The factual points that are appreciated by the Tribunal in confirming the order of the Commissioner of Income Tax (Appeals) which was in favour of the assessee were as under:

1.That the invoices for payment of fees were issued by the GIA USA.

2.The remittance was in the offshore Bank account of GIA USA and the cheques were deposited in the account of the USA entity and GIA Hong Kong had

no relationship as far as the account in which the remittances were made.

3.That there was a clerical error in naming the Hong Kong agency whereas from the Bank details it is evident that the remittances in fact have been made in the accounts of the GIA USA.

4.The form evidently shows that the accounts reflected payment received in HKD in offshore bank account of GIA USA.

7.1 The appellant has submitted an affidavit which reads as under:

"1. The appellant had entered into an agreement with the Gemological Institute of of America Inc., USA (hereinafter referred to as "GIA USA") for the issuance of diamond grading certificates of the polished diamonds belonging to the appellant.
2. GIA USA is a prominent gen testing laboratory in the world and the diamond grading certificates issued by GIA USA stating the properties such as shape, carat, colour, clarity, cut, etc., of polished diamonds are considered as the standard benchmark and quality certificates by the trade as well as the consumers. All the intellectual property rights in the certificates issued by GIA belong to GIA USA.
3. With regards the transactions appellant had with GIA USA, the invoices and diamond grading certificates were issued by GIA USA in the name of

appellant and the payment consideration for the issuance of diamond grading certificates were remitted by the appellant to GIA USA in its HSBC Bank Account No. 801-045451-001 in Hong Kong.
4. However, there was a clerical error in the Form 15CA & Form 15CB wherein the beneficiary name was mistakenly mentioned as GIA Hong Kong Laboratory Limited instead of GIA USA. Consequently, this mistake had continued in the payment advice and telex copy issued by the remitting bank. And thereby, the aforesaid error had further continued while furnishing the statement of facts, which was subsequently rectified during the income tax proceedings.
5. All payments were remitted to GIA USA in its HSBC account no. 801-045451-001 as mentioned in the invoices, bank payment advice and telex copy."

7.2 Reading of the affidavit extracted by the Appellate authority indicates that since diamond grading certificates issued by GIA Inc.USA are considered as standard benchmark by the traders as well as the consumers and factually when a Customer Service Agreement has been entered into the clause reads as under:

"With respect to client shipments or deliveries of articles to GIA's "take in window" in Dubai and GIA's laboratories in Hong Kong and Israel,this agreement shall be between the client and GIA USA and not with GIA's local business entity established in such countries.Any and all disputes,suits,cations,claims related to or arising out

of this agreement shall be resolved exclusively pursuant to section 30 of the terms and conditions"

7.3 What is therefore factually appreciated by way of concurrent findings of fact by the authorities is that there is a "take in window" where articles are delivered but the service agreement is between the assessee and GIA USA. The rightful owner of the remittances as also made in the account of the USA entity is the GIA Inc. USA.

7.4 The order of the Tax Appellate Tribunal also indicates as under:

"15. We have considered the rival submissions of the parties and have gone through the orders of the lower authorities. We have also deliberated on the various case laws relied by Id CIT(A) in her order as well as relied by Id Senior Counsel for the assessee. We have also perused all the documentary evidence filed by the assessee before Tribunal. The assessing officer treated the assessee in default under section 201(1) on the basis of details on the Form-15CA / 15CB about the remittance by taking view that testing related work has been carried out at GIA Laboratory at Hong Kong set up under the company GIA Hong Kong. The testing services were rendered by Hong Kong Laboratory. The payments were made in bank account located in Hong Kong as per condition of payment, since there exist no branch of GIA, Inc in Hong Kong; it is controvertible that the testing and certification related services rendered by GIA Hong Kong. The payments were merely made

to GIA, INC, America. The state of source is not obliged to give up the taxing rights over the passive income in the nature of Fees for Technical Services (FTS) merely because the income was paid direct to recipient of a state which with the state of source had concluded / executed DTAA. As recorded above that before the Id CIT (A) the assessee filed detailed written synopsis and relied on certain case laws. It was also contended that the entry on Form-15CA / 15CB were wrongly filled up and that the payment of certification charges were in fact made to GIA Inc USA and furnished certificate of HSBC Bank that the bank account wherein the remittance were made owned by GIA Inc USA. The Id CIT(A) on appreciation of facts held that there is no dispute about the services rendered by GIA to assessee. Further the diamonds certification is issued by GIA Inc USA. Certificatin issued by GIA USA is considered as standard benchmark by the trade as well as by the customers and all intellectual property rights in the certification belongs to GIA Inc USA. The assessee had agreement with GIA Inc USA, on perusal of which it can be seen that the term of agreement clearly describes the status of GIA laboratory in Hong Kong. It is clear from the contents of agreement that Hong Kong, Dubai and Israel are the "taken in window" where articles are delivered. However, the services agreement is between the assessee and GIA USA. Copy of grading certificate is also issued by GIA USA, but due to clerical mistake the beneficiary of the remittance was erroneously specified as GIA Hong Kong Laboratory.

16. The Id CIT(A) further held that the assessee-firm has furnished confirmation letter from HSBC Bank, confirming that the payments were made by assessee to GIA Inc USA in Bank Account No. 801-045451-001, owned by GIA Inc USA. The assessing officer tried to establish that the nature of services

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

17. On the specific submission made by the assessee that activity of grading of certification is merely the application of knowledge and experience in a professional team particular diamond / set of diamonds which are offered for certification or for grading. The learned CIT(A) held that there is no parting of information concerning industrial, commercial or scientific experience by GIA when it issues the grading certificate. GIA Inc USA has the experience of grading and report certificate and there is no imparting of its experience in favour of assessee. The assessee has only receives report of certification. This activity of issuing certificate cannot be said to be imparting of information by the person who possesses such information. On considering the definition of 'fee for included services' under Article 12, it was observed that ther is no parting of rendering of technical services either of military, technical consultancy services or

> *industrial commercial or scientific experience. The grading report are not "make available" for the reasons that assessee, whose utilising the services will not be able to make use of technical knowledge, by itsel in its business without recourse to GIA Inc USA in future. The technical knowledge, experience skill etc will not remain with the assessee after rendering the services has come to an end."*

7.5 A Division Bench of this Court in the case of ***Principal Commissioner Of Income Tax,Vadodara 3 versus M/S Bell Ceramics Ltd*** in ***Tax Appeal No. 162 of 2021,*** considering the provisions of Section 260A of the Income Tax Act held that the Appeal thereunder can only be admitted if the High Court is satisfied that the case involves a substantial question of law. Paras 11 and 12 thereof read as under:

> *"11. It may be noted that the Appeal under Section 260A could be admitted only on the High Court being satisfied that the case involves a substantial question of law. The Supreme Court in the case of M. Janardhana Rao versus Joint Commissioner of Income Tax reported in (2005) 2 SCC 324, while dealing with the scope of Section 260A of the Income Tax Act, 1961, observed as under : -*
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> > *"14. Without insisting on the statement of substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Court is not empowered to generally decide the appeal under Section*

260A without adhering to the procedure prescribed under Section 260A. Further, the High Court must make every effort to distinguish between a question of law and a substantial question of law. In exercise of powers under Section 260A, the findings of fact of the Tribunal cannot be disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in Section 260A must be strictly fulfilled before an appeal can be maintained under Section 260A. Such appeal cannot be decided on merely equitable grounds.

15. An appeal under Section 260A can be only in respect of a 'substantial question of law'. The expression 'substantial question of law' has not been defined anywhere in the statute. But it has acquired a definite connotation through various judicial pronouncements. In Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning & Mfg. Co. Ltd., AIR (1962) SC 1314, this court laid down the following tests to determine whether a substantial question of law is involved. The tests are: (1) whether directly or indirectly it affects substantial rights of the parties, or (2) the question is of general public importance, or (3) whether it is an open question in the sense that issue is not settled by pronouncement of this Court or Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, and (5) it calls for a discussion for alternative view. There is no scope for interference by the High Court with a finding recorded when such finding could be treated to be a finding of fact.

12. Again the Supreme Court in case of Vijay Kumar Talwar versus Commissioner of Income Tax in (2011) 330 ITR 1 considered the issue of substantial question in context of Section 260A of the IT Act and observed as under:

> *“18. It is manifest from a bare reading of the Section that an appeal to the High Court from a decision of the Tribunal lies only when a substantial question of law is involved, and where the High Court comes to the conclusion that a substantial question of law arises from the said order, it is mandatory that such question(s) must be formulated. The expression "substantial question of law" is not defined in the Act. Nevertheless, it has acquired a definite connotation through various judicial pronouncements. In Sir Chunilal V. Mehta & Sons, Ltd. Vs. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314 a Constitution Bench of this Court, while explaining the import of the said expression, observed that:*
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> > *"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a*

> *mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.*"

19. Similarly, in Santosh Hazari Vs. Purushottam Tiwari (2001)3 SCC 179 a three judge Bench of this Court observed that:

> "*A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent,AIR 1962 SC 1314 (2001) 3 SCC 179 and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.*"

> *20. In Hero Vinoth (Minor) Vs. Seshammal (2006) 5 SCC 545, 556, this Court has observed*

that:

"The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the wellrecognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

21. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been (2006) 5 SCC 545 taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. (See: Madan Lal Vs. Mst. Gopi & Anr. (1980) 4 SCC 855; Narendra Gopal Vidyarthi Vs. Rajat Vidyarthi (2009) 3 SCC 287; Commissioner of Customs (Preventive) Vs. Vijay Dasharath Patel (2007) 4 SCC 118; Metroark Ltd. Vs. Commissioner of Central Excise, Calcutta (2004) 12 SCC 505; West Bengal Electricity Regulatory Commission Vs. CESC Ltd. (2002) 8 SCC 715)."

7.6 Apparently reading the orders under challenge would indicate that based on factual appreciation

especially the condition in the customer service agreement, the bank invoice and the Bank remittance advice a finding of fact has been arrived at that the assesse's case was protected under the India-USA DTAA and that mere rendering of services cannot be roped into FTS unless the person utilising the services is able to make use of the technical knowledge etc. Simple rendering of services as in the present case is not sufficient to qualify as FTS .

8 For the reasons as aforesaid no substantial questions of law is framed. This Court is of the opinion that the Appeal does not involve substantial questions of law and hence deserves to be dismissed. The appeal is accordingly dismissed.

(BIREN VAISHNAV, J)

(D. M. DESAI,J)

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