

## **Reimbursement of travel exp. to NR for its employee deputed in India providing technical assistance wasn't 'FTS'**

**Summary – The Mumbai ITAT in a recent case of Gemological Institute International Inc., (the Assessee) held that Amount received by assessee as reimbursement of travel expenses of its employees deputed in India to provide technical assistance to a group concern, was not taxable as fee for technical services**

### **Facts**

- The assessee was a non-resident company incorporated in USA and during the year, it provided technical services to GIA India, which happened to be a group company of the assessee-company. The assessee had in fact entered into a training and technical service agreement with GIA India for training the employees of GIA India and providing technical services for the implementation of grading policies, procedures and processes.
- In pursuance of said agreement, the assessee raised separate debit notes for 'fee for training and technical services' rendered by it to GIA India and also on account of 'reimbursement of travel expenses, group health insurance and other minor incidental expenses' incurred by it pertaining to the aforesaid assignment. The assessee filed return wherein it excluded from its income, the amount received by way of reimbursement of aforesaid expenses for the reason that those constituted actual cost borne by the assessee, and therefore, were not in the nature of income.
- The Assessing Officer was of the view that the total amount received by the assessee from GIA India was liable to be included in the income of the assessee as fee for technical services including the aforesaid expenses reimbursed by GIA India for the reason that it constituted part of 'fees or technical services'. Therefore, addition of the same was made in the assessment order passed by him.
- The Commissioner (Appeals) upheld the order of Assessing Officer.
- On second appeal :

### **Held**

- From the perusal of the terms regarding payment of fee and reimbursement of expenses, 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 Assessing Officer was of the view that whole of the amount including the amount reimbursed should also be included as fees in the hands of the assessee.
- It may be noted from the perusal of the terms of the agreement that assessee was entitled to receive by way of fee only the amount incurred by way of cost to 'employ' the individuals plus

markup of 6.5 per cent. 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 instant case, 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 one reads 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. There is no confusion in this regard and the lower authorities have unnecessarily made an issue out of that.
- With regard to the taxability of FTS on gross basis, it has been fairly admitted by the assessee that there is no dispute on the proposition that FTS has to be taxed on gross basis. However, the issue that arises here for consideration is whether the expenses incurred on cost to cost basis will also be included in the amount of FTS. This controversy has now been put to rest by the Supreme Court by way of its latest judgment in the case of *DIT (IT) v. A.P. Moller Maersk AS* [\[2017\] 392 ITR 186/78 taxmann.com 287 \(SC\)](#).
- From the above judgment it is clear that the amount received by the assessee on account of said reimbursement which has been received over and above the amount of FTS cannot be included and taxed as part of FTS. It is apparent from transfer pricing study report and transfer pricing orders passed in the case of GIA India that no profit element has been included in the expenses reimbursed. Thus, taking into account the totality of facts and circumstances of the case, addition made by the Assessing Officer is contrary to facts and therefore, is directed to be deleted.
- In the result, the assessee's appeal is allowed.