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SITG No. 249

Commissioner of Income-tax (IT&TP)

v.

Star Rays

Testing services for diamond certification are not liable for tax deduction at source, as they do not fall under the scope of Fees for Technical Services (FTS).

15.03.2025



Facts of the Case

- ❖ The assessee, Star Rays, is a partnership firm engaged in cutting, polishing, and exporting diamonds. The assessee sent diamonds for certification to the Gemmological Institute of America (GIA) USA, which had set up a laboratory in Hong Kong (GIA Hong Kong).
- ❖ During the year, **assessee made remittances for the certification** to an offshore bank account of GIA USA in Hong Kong. However, while filling Form 15CA/15CB, the **assessee mistakenly mentioned the beneficiary as GIA Hong Kong Laboratory Ltd.**
- ❖ The AO held that **since the payment was made to GIA Hong Kong and not GIA USA**, the **benefit** of the **India-USA Double Taxation Avoidance Agreement (DTAA)** could **not be claimed** and since India does not have a DTAA with Hong Kong, the payment was deemed taxable under Indian law.
- ❖ The AO treated the assessee as a defaulter for not deducting Tax Deducted at Source (TDS) before making the payment, resulting in a demand of ₹4.43 crores under **Section 201(1) read with Section 201(1A)** of the Income Tax Act.

Assessee's Contention

- ❖ Assessee contended that since the invoices for payment of fees were issued by GIA USA, hence the service agreement was with GIA USA, not GIA Hong Kong.
- ❖ The name of the beneficiary was mistakenly mentioned as GIA Hong Kong in Form 15CA and Form 15CB. However, the actual remittances were made to GIA USA's account.
- ❖ The assessee contended that the diamond certification was **not technical service under the DTAA** since no technical knowledge or skills were transferred to the assessee.
- ❖ Hence, no TDS was required on the payments made.
- ❖ The assessee produced a TRC and Form 10F from US tax authorities, proving GIA USA's tax residency and its right to DTAA benefits.

Revenue's Contention

- ❖ Revenue contended that payments were made to GIA Hong Kong, and since no DTAA exists between India and Hong Kong, TDS should have been deducted.
- ❖ The services were rendered in Hong Kong, and the currency of payment was Hong Kong Dollars, proving that the real beneficiary was GIA Hong Kong.
- ❖ The routing of payments through GIA USA was an attempt to **circumvent Indian tax laws** and claim DTAA benefits improperly.

Legal provisions

Section 9(1)(vii) of the Act:

Income by way of fees for technical services payable by—

(a) the Government ; or

(b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ; or

(c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India

Legal provisions

India-USA DTAA

ARTICLE 12- Royalties and Fees for included services

12(4) For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :

- a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or
- b) make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.

Legal provisions

12(5). Notwithstanding paragraph 4, "fees for included services" does not include amounts paid :

- a) for services that are ancillary and subsidiary, as well as inextricably and essentially linked, to the sale of property other than a sale described in paragraph 3(a) ;
- b) for services that are ancillary and subsidiary to the rental of ships, aircraft, containers or other equipment used in connection with the operation of ships or aircraft in international traffic ;
- c) for teaching in or by educational institutions ;
- d) for services for the personal use of the individual or individuals making the payments ; or
- e) to an employee of the person making the payments or to any individual or firm of individuals (other than a company) for professional services as defined in Article 15 (Independent Personal Services).

Ruling

Hon'ble SC in the **order dated 14.02.2025** has upheld the decisions of Gujrat HC. The judgement of Gujrat HC is as under :

- ❖ The invoices for payment of fees were issued by GIA USA. The **payments** were made to **GIA USA's offshore bank account** and GIA Hong Kong had no relationship as far as the account in which the remittances were made.
- ❖ The Customer Service Agreement between the assessee and GIA USA stated that diamonds could be delivered to a **"take-in window"** in Hong Kong, but the **contractual relationship was with GIA USA.**
- ❖ Court had accepted that mentioning GIA Hong Kong as the beneficiary in statutory forms (15 CA/CB) was a **clerical error.**
- ❖ The certification **did not "make available"** any technical knowledge or skills to the assessee. Hence, the payment was not taxable as Fees for Technical Services under DTAA.

Our Comments

- ❖ Name mentioned in Form 15CB is not important to determine which DTAA is applicable, the service provider and name mentioned in service agreement is important to determine who is the service provider irrespective of the country where goods or money are transferred.
- ❖ Hence, again it is important to check the agreement of the assessee i.e. with whom the assessee has entered into agreement and in which country the service provider is a tax resident irrespective of from which office the service is being provided.
- ❖ Office of the service provider is important only in case it creates a PE (Permanent establishment) in India otherwise having a PE in any foreign country should not change the tax residency and DTAA benefit for such company.

Section/Article	Section 9 of IT Act and Article 12 of India-USA DTAA
DTAA/Country	India-USA
Court	Supreme court/ Gujarat HC
Date of decision	14.02.2025/ 31.07.2023

Note: Case law name in **Red**- in favor of the revenue, **Green**-In favor of the Assessee, **Orange** = Partial



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