IN THE INCOME TAX APPELLATE TRIBUNAL

"L" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI N.K PRADHAN, ACCOUNTANT MEMBER

ITA no.1540/Mum/2016
(Assessment Year :2012–13)

Linklaters LLP
C/o Deloitte Haskins & Sells LLP
Tower–3, 27–32 Floor, Indiabulls
Finance Centre, Elphinstone
Mill Compound, Senapati Bapat Marg
Elphinstone (West), Mumbai 400 013
PAN – AABCL5182G

……. Appellant

v/s

Dy. Commissioner of Income Tax (I.T)
Circle–3(1)(2), Mumbai

……. Respondent

Assessee by : Shri S.E. Dastur a/w
Shri Niraj Sheth
Revenue by : Shri Samuel Darse

Date of Hearing – 04.06.2018	Date of Order – 29.08.2018

O R D E R

PER SAKTIJIT DEY, J.M.

Aforesaid appeal by the assessee is directed against assessment order dated 19th January 2016, passed under section 143(3) r/w 144C(13) of the Income Tax Act, 1961 (for short *"the Act"*) for the assessment year 2012–13, in pursuance to the directions of the Dispute Resolution Panel (DRP).

2. Grounds no.1 to 4 are general in nature, hence, do not need specific adjudication.

3. Grounds no.5, 6 and 7, are on the core issue of taxability of an amount of ₹ 32,32,05,687, as fees for technical services as per section 9(1)(vii) of the Act. Since, these grounds are interrelated, they are taken up for disposal together.

4. Brief facts relating to these issues are, the assessee is a limited liability partnership firm and is a tax resident of United Kingdom (UK). As stated by the Assessing Officer, the assessee offers legal consultancy through its clients all over the world including India. For the assessment year under dispute, the assessee filed its return of income on 28th November 2011, declaring total income of ₹ 2,22,49,504. During the assessment proceedings, the Assessing Officer after verifying the return of income and other information called for, found that in the relevant previous year the assessee has provided legal services to various clients and the work relating to such services was partly performed in India and partly outside India. He also noted that the assessee has provided services to M/s. Linklaters Allen and Gledhil Pte. Ltd. which in turn provided services to their client which has Indian connection. In course of the assessment proceedings, though, the assessee contended that it does not have a

fixed place Permanent Establishment (PE) in India, however, the Assessing Officer rejected such contention of the assessee on the reasoning that assessee's employees / personnel werelocated and rendered services in India for more than 90 days in aggregate during any 12month period beginning from 1st April 2011 to January 2012. Thus, he held that the assessee had a Permanent Establishment in India in assessment year 2012–13 as per Article–5(2)(k)(ii) of the India-UK Double Taxation Avoidance Agreement (DTAA). Having held so, the Assessing Officer observed that since the assessee as per the tax law of UK is a fiscally transparent entity, hence, not liable to tax, the assessee cannot be treated as a resident of UK. Therefore, it is not entitled to the benefits of India-UK DTAA. Thus, he proceeded to tax the income received from services in India as well as outside India by treating as income deemed to accrue or arise in India under the provisions of Income Tax Act, 1961. Without prejudice to the aforesaid conclusion, the Assessing Officer observed that the income received by the assessee is in the nature of fees for technical services (FTS) as per section 9(1)(vii) of the Act and as well as fees for included services as per India-UK DTAA. The Assessing Officer observed, since the assessee is not entitled to the benefit of India- UK DTAA it has to be taxed as FTS under the provisions of the Act. Accordingly, he brought to tax the amount of ₹32,32,05,687 after allowing expenditure @ 5% on ad–hoc

basis. Accordingly, he passed the draft assessment order. Against the draft assessment order the assessee raised objections before the DRP.

5. The DRP following its order in assessee's case for assessment year 2011–12, rejected the objections of the assessee and directed the Assessing Officer to finalize the assessment. Accordingly, the Assessing Officer passed the impugned assessment order.

6. Shri S.E. Dastur, learned Sr. Counsel appearing for the assessee submitted that while deciding identical issue in assessment year 2011–12, the Tribunal has held that the assessee is entitled to the benefit of India–UK DTAA and since the provisions of DTAA are more beneficial as per section 90(2) of the Act, the provisions of DTAA would be applicable to the assessee. In this context, he drew our attention to the observations of the Tribunal while deciding assessee's appeal for assessment year 2011–12 in ITA no.1690/Mum./2015, dated 31st January 2017. The learned Sr. Counsel submitted, having held so, the Tribunal also proceeded to hold that the income received by the assessee would not fall in the category of FTS as per Article–13 of India–UK DTAA. Thus, the Tribunal held that since the income is not taxable under the DTAA, it cannot be brought to tax as FTS under section 9(1)(vii) of the Act. Thus, he submitted, in view of the

aforesaid decision of the Tribunal the disputed amount is not taxable in India.

7. The learned Departmental Representative, though, relied upon the observations of the Assessing Officer and the DRP, however, he fairly submitted that the issues raised in grounds no.6 and 7, have been decided in favour of the assessee by the Tribunal in assessment year 2011–12, and in view of such decision the Tribunal did not decide the issue raised in ground no.5.

8. We have considered rival submissions and perused materials on record. Undisputedly, the Assessing Officer relying upon his observations in the preceding assessment year held that the assessee is not entitled to the benefit of India–UK DTAA as it is not required to pay tax in UK. Further, the Assessing Officer also held that the income received by the assessee is otherwise taxable as FTS both under section 9(1)(vii) of the Act as well as under the DTAA. However, the Tribunal, while deciding the issue ofapplicability of India–UK DTAA to the assessee in assessee's own case for assessment year 2011–12, has held in the following manner:–

> *"10. Similarly, in other years, the Tribunal has followed its earlier order andheld that M/s. Linklaters is eligible for the benefits of India-UK DTAA solong as entire profits of the partnership firm are taxed in UK, whether inthe taxable income is determined in relation to personal characteristics ofthe partners or in the hands of the firm directly. In the year before us,there is no dispute on*

> *facts that ultimately tax has been paid either by thesaid firm or by its partners in UK. No distinction has been pointed out bythe Ld. CIT-DR on facts or law. Under these circumstances, respectfullyfollowing the orders of the Tribunal in Linklaters's case for earlier years,we hold that the assessee is entitled to claim benefits of India UK- DTAA.Therefore, Grounds 8 to 8.4 are allowed."*

9. Thus, in view of the aforesaid decision of the Co–ordinate Bench in assessee's own case, we hold that the assessee is entitled to claim benefit under India–UK DTAA. As regards the nature of income received by the assessee, whether is FTS? and its taxability under the Act in India, the Co–ordinate Bench while deciding the issue in assessee's own case for assessment year 2011–12 in the order referred to above, has ultimately concluded as under:–

> *"32. Thus, in view of the facts brought before us, and in view of the legalposition as explained in many judgements as discussed above, we are notin a position to agree with the view taken by the Revenue and thus holdthat the income of the assessee would not fall in the category of "Fee forTechnical Services" as envisaged in Article 13 of India-UK DTAA. Further,since this amount is not taxable under DTAA as FTS, it cannot be broughtto tax as FTS as per provisions of section 9 of the Income Tax Act, 1961, inview of section 90(2) of the Act, as discussed above. Thus, with theseobservations, Grounds 9 to 9.6 are allowed."*

10. Facts being identical, following the aforesaid decision of the Co–ordinate Bench, we hold that the income received by the assessee not being in the nature of FTS as envisaged under Article–13 of the India–UK DTAA, cannot be brought to tax by applying the provisions of section 9(1)(vii) of the Act, since, the assessee is entitled to claim the

benefit of India–UK DTAA. In view of the aforesaid, grounds no.6 and 7 are allowed and the issues raised in ground no.5 having become redundant will not require adjudication.

11. In ground no.8.1, the assessee has challenged the decision of the Departmental Authorities in holding that the assessee has a PE in India as per Article–5(2)(k)(i) of the India–UK DTAA. As could be seen, the Assessing Officer while framing the draft assessment order held that, since,the assessee through its employees or other personnel has rendered services in India for a period aggregating more than 90 days within the period beginning from 1st April 2011 to 31st January 2012, ithas to be considered that it has PE in India.

12. The learned Sr. Counsel for the assessee, at the outset, fairly submitted that this issue was not raised either before the Assessing Officer or the DRP and is being raised for the first time before the Tribunal. Hence, he submitted, the ground may be treated as an additional ground. Proceeding further, the learned Sr. Counsel submitted, the term *"any 12 month period"* as mentioned in Article–5(2)(k)(i) of the India–UK DTAA has not been defined therein. He submitted, the 12 month period has different connotation in different countries, hence, it has to be construed keeping in view the provisions of domestic law of the country where it is sought to be taxed. He

submitted, in India the 12 month period would mean the previous year as defined under section 3 of the Act which in other words means the financial year or the chargeable accounting period. The learned Sr. Counsel drawing our attention to a list containing the number of days employees or personnel of the assessee rendered services in India, a copy of which is at Page–37 of the paper book, submitted that in the financial year 2011–12, the total number of days the employees or personnel of the assessee stayed in India for rendering services aggregated to 77 days. Therefore, as per Article 5(2)(k)(i) of India–UK DTAA the assessee did not had a PE in India. The learned Sr. Counsel submitted, the factual aspect of the issue can be verified by the Assessing Officer.

13. The learned Departmental Representative vehemently opposing the ground raised by the assessee submitted that the assessee never raised this issue either before the Assessing Officer or the DRP. Therefore, he submitted, as the issue has been raised for the first time before the Tribunal, it should be restored to the Assessing Officer for examining assessee's claim.

14. We have considered rival submissions and perused materials on record. Undisputedly, the issue raised in this ground was never agitated by the assessee either before the Assessing Officer or before

the DRP. Thus, this ground raised by the assessee has to be treated as an additional ground. However, considering the fact that the issue raised in this ground is a purely legal issue, since, it involves interpretation of Article 5(2)(k)(i) of the India–UK DTAA, we are inclined to admit this ground. Reverting back to the issue raised in this ground, it is observed that the Assessing Officer referring to Article 5(2)(k)(i)of the India–UK DTAA has concluded that the assessee had a PE in India, since, its employees or personnel have rendered services in India for a period of 90 days or more within any 12 month period. Notably, the expression *"any 12 month period"* as used in Article 5(2)(k)(i) of the India–UK DTAA has not been defined anywhere in the DTAA. Therefore, we have to find the meaning of the said expression by taking aid of the provisions of the Income Tax Act, 1961, since, the income is sought to be taxed in India. Section 5 of the Act which defines scope of total income refers to the total income of any previous year of a person who is a resident. Similarly, section 6 of the Act postulates that an individual or a HUF or a company or any other person can be considered to be a resident in India in any previous year if it satisfies the condition mentioned therein. Thus, for the purpose of being considered as a resident in India a reference has been made to the previous year. Section 4 of the Act, which is the charging section, mandates that a person shall be charged to income tax in respect of

the total income of the previous year. The expression "*previous year*" has been defined under section 3 of the Act to mean the financial year immediately preceding the assessment year. Thus, as per the provisions of domestic law, the 12 month period would mean the previous year or the financial year which is the unit for which the income of a person is taxable. If the provisions of Article 5(2)(k)(i)of the India–UK DTAA is read harmoniously with the provisions of the Act referred to above, it will be fair and reasonable to conclude that the expression "any 12 month period" mentioned in Article 5(2)(k)(i)of the India–U.K. DTAA has to be construed to mean the previous year or financial year as per section 3 of the Act, since, the income is sought to be taxed in India. Therefore, it has to be seen whether the employees or personnel of the assessee have rendered services in India for a period aggregating to 90 days or more in financial year 2011–12 to constitute a PE. As per the chart submitted by the assessee at Page–37 of the paper book, it is claimed that the employees and personnel of the assessee were situated in India for rendering services for a period aggregating to 77 days. Since, the aforesaid factual aspect has not been verified by the Departmental Authorities as the assessee did not raise this issue before them, we are inclined to restore the issue to the Assessing Officer for adjudication keeping in view of our observations herein above and only

after due opportunity of being heard to the assessee. This ground is allowed for statistical purposes.

15. In ground no.8.2, the assessee has challenged the decision of the Departmental Authorities in holding that by applying the principle of force of attraction embedded in Article–7 of India–UK DTAA all income of the assessee including the income earned outside India has to be taxed in India.

16. The learned Sr. Counsel for the assessee submitted that the issue has been decided in favour of the assessee by the Tribunal in assessment year 2011–12 by holding that only income related to service rendered in India is liable to tax in India. In this context, he drew our attention to the appeal order of the Tribunal for assessment year 2011–12, wherein the Tribunal following its earlier decision in assessment year 1998–99 restored the issue to the Assessing Officer. The learned Sr. Counsel submitted, subsequently, the assessee filed a misc. application before the Tribunal insofar as it relates to the taxability of income earned outside India and the Tribunal while disposing off the misc. application vide M.A. no.238/Mum./2017, dated 12th March 2018 has allowed the claim of the assessee. He drew our attention to relevant observations of the Tribunal.

17. The learned Departmental Representative agreed that the issue is covered by the decision of the Tribunal.

18. We have considered rival submissions and perused materials on record. Undisputedly, while dealing with identical issue in assessee's own case for assessment year 2011–12, in ITA no.1690/Mum./2015, dated 31st January 2017, the Tribunal has restored the issue to the Assessing Officer for fresh adjudication. However, subsequently, the Tribunal in M.A. no.238/Mum./2017, dated 12th March 2018, has modified the appeal order by directing the Assessing Officer to delete the addition made towards income received from services rendered outside India. In view of the aforesaid, we hold that the income derived by the assessee from services rendered outside India is not taxable in India. This ground is allowed.

19. In view of our decision in grounds no.8.1 and 8.2, grounds no. 8.3, 8.4 and 8.5 are not required to be adjudicated upon.

20. In ground no.9, the assessee has challenged the decision of the Departmental Authorities in holding that the income earned by the assessee is taxable under Article–15 of the India–UK DTAA.

21. The learned Sr. Counsel, at the outset, submitted that the issue is covered by the decision of the Tribunal in assessee's own case for assessment year 2011–12 (supra).

22. The learned Departmental Representative fairly agreed with the aforesaid submissions of the learned Sr. Counsel.

23. Having considered rival submissions, we find that while deciding identical issue in assessee's own case for assessment year 2011–12, the Tribunal has held as under:–

> *"35. We have gone through the orders passed by the lower authorities andalso Article 15 of India-UK DTAA. It is noted by us that Article 15 of DTAAdeals with taxability of independent personal services. This Article startswith the words "Income derived by an individual.....in respect ofprofessional services or other independent activities of similarcharacter....."It is noted by us that Article 15 shall be applicable fordetermining taxable income in the hands of individual and not otherpersons. The assessee is certainly not an Individual. Thus this Articlecannot be made applicable on the assessee being not an individual.Similar issue had come up before the Tribunal in the aforesaid case of M/sLinklaters (for AY 1995-96) wherein the Tribunal held at para 106 of theorder that Article 15 shall be applicable only when services are renderedby an individual. Thus, respectfully following the order of the Tribunal it isheld that impugned amount of fee received by the assessee would not beliable to be taxed under Article 15 of India-UK DTAA. Thus, Grounds 10 to10.5 are allowed in favour of the assessee."*

24. Facts being identical, respectfully following the aforesaid decision of the Co–ordinate Bench, we hold that the income received by the assessee will not be taxable under Article–15 of India–UK DTAA. This ground is allowed.

25. In ground no.10, the assessee has challenged the decision of the Departmental Authorities in treating the reimbursement of expenses as part of the gross receipts.

26. At the outset, the learned Sr. Counsel for the assessee submitted that the issue is covered by the decision of the Tribunal in assessee's own case for assessment year 2011–12 (supra). The learned Departmental Representative fairly agreed with the aforesaid submission of the learned Sr. Counsel for the assessee.

27. Having considered rival submissions we find that while deciding identical issue in assessee's own case for assessment year 2011–12 supra, the Tribunal has held as under:–

> *"40. We have gone through the orders passed by the lower authoritiesand orders passed in earlier years by the Tribunal in case of Linklaters.The perusal of chart containing details of the expenses clearly shows thatall these items are in the nature of expenses. These are apparently notitems of revenue. These are mostly expenses of routine nature incurredby the assessee in the normal course of business. It is also noted that thisissue has already been decided by the Tribunal in case of Linklaters in theaforesaid judgments. It is noted that Tribunal in AY. 1995-96 held asunder:-*
>
> *"131. We have noted that while Assessing Officer notedassessee's claim that the reimbursements of expenses are inrespect of actual expenditure incurred by the assessee, onbehalf of clients, and have no element of mark up or income, hetreated 50 per cent of such reimbursements of expenditure asincome on the ground that "the assessee has not been ableto produce all such bills/invoices and considering the factsthese bills do not, in any case, have any supporting evidences"and thus brought to tax an amount of Rs. 2,12,23,219, theCIT(A) upheld the action of the Assessing Officer to the extentof 15 per cent of the total amount of reimbursement. TheCIT(A) also held that the reimbursements of expenses receivedby the assessee constitute income of the assessee. It is alsoimportant to bear in mind the fact that the CIT(A) confirmed thedisallowance of 15 per cent of reimbursement of expenses onthe ground that (a) the appellant was not able to produce allsupporting evidences in respect of expenditure incurred; and(b) it may be difficult to bifurcate the expenses between disbursements related to services rendered in India andservices*

rendered outside India. While the Assessing Officer isnot in appeal against the disallowance so restricted by theCIT(A), the assessee is not satisfied by the part relief given by theCIT(A) and is in second appeal before us."

132. Learned counsel has taken us through meticulous documentation in respect of reimbursements of expenses, andalso produced before us samples of supporting evidences inrespect of each claim of reimbursement of expenses. He hasalso extensively referred to the prevailing regulation in the UnitedKingdom which ensure strict control over possible inflation of suchreimbursement claims, as also to the internal control mechanism inrespect of these claims. He submits that all requisitions of theauthorities below, in respect of supporting evidences for suchclaims, have been duly complied with, and the CIT(A) hasconfirmed the partial disallowance only on surmises andconjectures. He urges us to delete the disallowance confirmed bythe CIT (A) and hold that the reimbursements of expensesreceived by the assessee, particularly on the facts of the case,cannot be treated as income in the hands of the assessee.Learned Departmental Representative, on the other hand, reliesupon the orders of the authorities below and submits that theonus is on the assessee to produce all the evidences ofexpenditure and that this onus is clearly not discharged by theassesses.

133. Having heard the rival submissions and having perused thematerial on record, we are inclined to uphold the grievance ofthe assessee. The reimbursements received by the assessee arein respect of specific and actual expenses incurred by theassessee and do not involve any mark up, there is reasonablecontrol mechanism in place to ensure that these claims arenot inflated, and the assessee has furnished sufficientevidence to demonstrate the incurring of expenses. 'There isthus no good reason to make any addition to income inrespect of these reimbursements of expenses. The action of theCIT(A), as learned counsel rightly contends, is on pure surmisesand conjectures. In view of the above discussions, we directthe Assessing Officer to delete the disallowance of expensesas sustained by, the CIT(A) and hold that no part ofreimbursements of expenses received by the assessee on thefacts of this case, be treated as income of the assessee. Theassessee gets the relief accordingly."

41. It is noted from the perusal of orders passed by the lower authoritiesthat AO did not bring anything on record to show that whether anyelement of mark-up was involved in the expenses, which have beenreimbursed to the assessee. However, that is even not the case of theRevenue. Under these circumstances, it cannot just be presumed thatincome element was involved in the

> *reimbursement of expenses.Therefore, respectfully following the orders of the Tribunal of earlieryears, these grounds are allowed and decided in favour of the assessee.The AO is directed to delete the disallowance made in this regard. As aresult, these grounds are allowed."*

28. Facts being identical, respectfully following the aforesaid decision of the Co–ordinate Bench, we delete the disallowance made by the Assessing Officer. Ground raised is allowed.

29. Ground no.11 is on the issue of applicability of proper rate of tax if the income is taxed under the Act as fees for technical services.

30. Considering the fact that while deciding grounds no.5, 6 and 7, we have held that the income earned by the assessee is not to be treated as FTSunder Article–13 of the India–UK DTAA, this ground has become redundant, hence, not required to be adjudicated.

31. In grounds no.12 and 13, assessee has challenged levy of interest under section 234B and 234C of the Act.

32. At the outset, the learned Sr. Counsel for the assessee submitted that identical issue has been decided in favour of the assessee in assessment year 2011–12 (supra).

33. The learned Departmental Representative agreed with the aforesaid submissions of the learned Sr. Counsel.

34. Having considered rival submissions, we find that identical issue was decided in favour of the assessee in assessment year 2011–12 (supra) holding as under:–

> *"52. Ground 15 deals with levy of interest u/s 234B. During the courseof hearing it was submitted that this issue has already been concluded infavour of the assessee because of judgment of Hon'ble Bombay High Courtin the case of NGC Network 313 ITR 187 (Bom) as well as decision of theTribunal in case of Linklaters in earlier years.*
>
> *53. Per contra, the Ld. CIT-DR fairly submitted that this issue as on dateis covered in favour of the assessee because of judgement of Hon'bleBombay High Court and decision of the Tribunal in assessee's own case inearlier years.*
>
> *54. We have gone through the orders passed by the lower authorities.It is noted that this issue has already been decided by the Hon'ble BombayHigh Court in the case of NGC Network (supra). The Tribunal hasconsistently followed the said judgment and held that interest u/s 234B isnot leviable in the case of Linklaters, on the facts and circumstances of thecase. Since no distinction has been made on facts or on law, respectfullyfollowing the order of the Tribunal for earlier years, we hold that interestu/s 234B is not leviable in the case of the assessee. This ground isallowed."*

35. Respectfully following the aforesaid decision of the Co–ordinate Bench, we hold that interest under sections 234B and 234C of the Act are not chargeable against the assessee. Grounds raised are allowed.

36. Ground no.14, is premature at this stage, hence,is not required to be adjudicated upon.

37. Ground no.15, being general in nature, no adjudication is required.

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

Order pronounced in the open Court on 29.08.2018

Sd/-	**Sd/-**
N.K. PRADHAN	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 29.08.2018

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai