

आयकर अपीलीय अधिकरण, 'एल' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI "L" BENCH

सर्वश्री राजेन्द्र, लेखा सदस्य एवं राम लाल नेगी, न्यायिक सदस्य

Before S/Sh. Rajendra, Accountant Member & Ram Lal Negi, Judicial Member

आयकर अपील सं./ITA No.7081/Mum/2005, निर्धारण वर्ष/Assessment Year-1996-97

ADIT-(IT)-3(2) Scindia House, Room No.132 1 st Floor, N.M. Road Mumbai-400 038.	Vs.	Linklaters (Formerly Linklaters & Paines)C/o., C.C. Chokshi & Co. 12, Annie Besant Road, Worli Mumbai-400 018. PAN:AABFL 2160 M
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

C.O. No.194/M/06 Arising out of आयकर अपील सं./ITA No.7081/M/2005 ,निर्धारण वर्ष/Assessment Year-1996-97

Linklaters (Formerly Linklaters & Paines)Mumbai-400 018.	Vs.	ADIT-(IT)-3(2) Mumbai-400 038.
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(प्रत्याक्षेपक /Cross Objector)

(प्रत्यर्थी / Respondent)

आयकर अपील सं./ITA No.7082-85/Mum/2005,निर्धारण वर्ष/Assessment Year-1997-98 to 2000-01

ADIT-(IT)-3(2) Scindia House, Room No.132 1 st Floor, N.M. Road Mumbai-400 038.	Vs.	Linklaters (Formerly Linklaters & Paines) Mumbai-400 018. PAN:AABFL 2160 M
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

C.O. No.195-198/M/06 निर्धारण वर्ष/Assessment Year-1997-98 to 2000-01

Linklaters (Formerly Linklaters & Paines),,Mumbai-400 018.	Vs.	ADIT-(IT)-3(2) Mumbai-400 038.
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(प्रत्याक्षेपक /Cross Objector)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : Shri Niraj Sheth

राजस्व की ओर से/ Revenue by : Shri Jasbir Chauhan-DR

सुनवाई की तारीख/ Date of Hearing : 04.02.2016

घोषणा की तारीख / Date of Pronouncement : 04.02.2016

आयकर अधिनियम, 1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

खंडपीठ के अनुसार PER BENCH-

Challenging the orders,dated 30.0.2005,of Cs.IT(A)-Mumbai the Assessing Officer's(AO.s)/ assessee have filed appeals/cross objections for the Assessment Years(A.Y.s) mentioned above. The issue involved in the appeals/Cross Objections is common, so, we are deciding the matter by passing a single order.The details of filing of returns of income,amounts of penalty levied u/s. 271(1)(c), dates of order of the AO and the FAA are tabulated as under:

Assessment Year	Dt. of Penalty order	Penalty Amount (Rs.)
1996-97	28.03.2005	92,20,383/-
1997-98	28.03.2005	1,80,59,410/-
1998-99	28.03.2005	1,23,35,563/-

1999-2000	28.03.2005	13,86,47,740/-
2000-01	28.03.2005	7,10,80,003/-

ITA No.7081/M/2005-AY-96-97

The effective Ground of appeal is about deletion of penalty levied by the AO u/s. 271(1)(c) of the Act, amounting to Rs.92.20 lacs.

2.The brief facts of the case are that the assessee firm is based in United Kingdom (UK) and is engaged in the practice of Law. It filed its return of income on 30.10.1996,declaring total income at Rs.Nil. In the return of income it was contended that the assessee was not having a Permanent Establishment (PE) in India, that no income was chargeable to tax in India.Alongwith the return of income,it also submitted,without prejudice,an income and expenditure account with a reference to fee charged to its clients as could be reasonable attributed to work performed in India.The AO completed the assessment u/s.143(3) of the Act on 25.3.99 determining the income of the assessee at Rs.25.52 crores.Aggrieved by the order of the AO the assessee preferred an appeal before the First Appellate Authority(FAA).After considering the submission of the assessee and the assessment order,the FAA held that the assessee had a PE in India, that only income relating to services rendered in India was liable to tax and not the entire income as assessed by the AO.The assessee challenged the order of the AO before the Tribunal.

Meanwhile,the AO gave effect to the order of the FAA and determined the income of the assessee at Rs.1.69 crores.He AO had initiated penalty proceedings against the assessee u/s. 271 (1)(c)of the Act for furnishing inaccurate particulars of income.In response to the notice issue for initiation of penalty,the assessee argued before the AO that it had disclosed all the particulars of its income in the return, that the AO had just taken a different view, that there were two view possible with regard to the issue involved no penalty should be levied.After considering the submission of the assessee ,the AO held that the FAA had confirmed the services performed in India were liable for taxation in India,that the assessee had furnished inaccurate particulars regarding that part of income, that department was scrutinising only 1-3% of the returns, that had the case not been selected for scrutiny no addition would have been made on account of aggressive tax planning of the assessee,that mere disclosure in the notes to the return could not mitigate the assessee's attempt to put up a wrong claim of non-taxability. He referred to the case of Vidyagauri Natvarlal (238ITR91)and held that assessee had furnished inaccurate particulars of income.Finally, he levied a penalty of Rs.92,20,383/-.

3.The assessee challenged the penalty order before the FAA.After considering the submissions of the assessee,assessment order and the penalty order the FAA held that the assessment order was based on the information /details filed by the assessee , that the AO had nowhere mentioned that the information/explanation provided by the assessee was found to be incorrect,that the assessee suo moto had filed return of income and had made adequate disclosure in the return, that he had not issued notices u/s. 142(1)/148 of the Act, that the addition to the income of the assessee was due to different interpretation of the provisions of India and UK Tax Treaty by the AO,that the legal interpretation of the Treaty advanced by the assessee was based upon OECD Commentary,that it was a debatable issue, that the assessee's claim that it did not have PE in India was supported by the certificate issued by the UK Tax authorities. The FAA referred to the cases of GD Naidu (165ITR 63),Cement Marketing Co. India Ltd. (124ITR 15); Dhoolie Tea Co.

Ltd. (231ITR 65) and Geo Sea Foods (244 ITR 44) and held that sustaining of an addition could not be a ground for levy of penalty, that the assessee had placed all material before the AO, that the claim of the assessee was rejected by him only on legal interpretation. Finally, allowing the appeal of the assessee, the FAA deleted the penalty levied by the AO u/s. 271(1)(c) of the Act.

4. During the course of hearing before us, the Departmental Representative (DR) stated that the addition upheld by the FAA was confirmed by the Tribunal, that the assessee had made a false claim, that the AO was justified in levying penalty. He relied upon the cases of Zoom Communication (P) Ltd. (327ITR 510), Escorts Finance Ltd (328ITR 44). The Authorised Representative (AR) stated that order of the Tribunal confirming the addition about Indian clients had been challenged before the Hon'ble Bombay High Court, that the High Court had admitted the appeal and a substantial question of law has been framed with regard to the issue of taxability of Indian income and existence of PE in India, that the issue was debatable and penalty u/s. 271(1)(c) could not be levied once the appeal had been admitted by the Hon'ble High Court, that the assessee had voluntarily filed the return of income and had furnished all the necessary details. He referred to the cases of Edroos Syed Mohammed Zakir (ITA/3705/Mum/2014 AY.2005-06 dated 1.1.2016); Nalin P. Shah (ITA/4780/Mum/2010 AY 2004-05 dt.18.7.14) and ICICI Bank Ltd. (ITA 4903/M/05, AY:1993-94 dt.1.1.2016). He further contended that facts under consideration were totally different from that of Zoom Communication (supra) and Escorts Finance Ltd. (supra).

5. We have heard the rival submissions and perused the material before us. We find that the assessee had filed the return of income in its own, that it had claimed that income relating to Indian clients was not taxable in India as per the provisions of DTAA, that alternatively it had submitted that a part of the income could be taxed in India, that the AO had taxed the whole income earned by the assessee, that the FAA had given a substantial relief to the assessee, that the Tribunal had confirmed the order of the FAA. It is a fact that in the statement accompanying the return of income at page-81 to 83 of the Paper Book the assessee had made full disclosure about the income earned by it as well as non taxability of side income, that at para no.10 of the statement an alternative argument had also been made. Thus, it is clear that the assessee-firm had not concealed the particulars of its income. There was difference of opinion between the AO and the assessee about the taxability of income and PE. In our opinion, confirmation of the additions, made by the AO, in the appellate proceedings and levy of penalty u/s 271 (1)(c) of the Act are totally two different things. As per the settled principle of taxation jurisprudence, confirmation of addition in appellate proceedings should not result in automatic levy of concealment penalty. The explanation filed by the assessee has to be looked into and only after that penalty can be levied. In our opinion, in the case before us, the explanation filed by the assessee was one of the plausible explanations. We have taken note of the fact that the Hon'ble Jurisdictional High Court has admitted a substantial question of law (Income tax appeal No.6834 of 2010 dt.30.4.2014), with regard to addition partly confirmed by the Tribunal and PE. In the case of ICICI Bank Ltd. (supra), the Tribunal has dealt with a situation where appeal is admitted by the Hon'ble High Court against the order of the Tribunal and levy of concealment penalty. We are reproducing the relevant portion of the said order and same reads as under:

“4.1. In the matter of Nayan Builder and Developer (supra), the Hon'ble Jurisdictional High Court has held that once a question of law is admitted by the Hon'ble High Court in quantum proceedings the issue becomes debatable and penalty u/s.271(1)(c) of the Act cannot be levied. Following the above decision, various Benches of the Tribunal have deleted the concealment

penalty where the Hon'ble High Court had admitted the question of law with regard to quantum appeals. We have gone through the orders of Advaita Estate Development Pvt. Ltd.(supra), Schrader Dunken Ltd. (supra), IndusInd Bank Ltd.(supra), Development Credit Bank Ltd.(supra). The perusal of the order lead us to the conclusion that once a substantial question of law is admitted by the Hon'ble High Court, then the penalty levied u/s. 271(1)(c) of the Act cannot survive. We have gone through the judgments of Hon'ble Gujarat High Court, relied upon by the DR wherein a contrary view has been taken and has been held that mere admission of quantum appeal by the Hon'ble Court does not mean that penalty u/s.271(1)(1)(c) cannot be levied. Judicial discipline demands that until and unless the judgment of the Hon'ble jurisdictional High court is reversed it has to be respected and followed by the Tribunal functioning under the jurisdiction of that Court. Following the judgment of the Hon'ble Bombay High Court in the case of Nayan Builder and Developer(supra), we are reversing the order of the FAA, as the Hon'ble Court has admitted a question of law in quantum proceedings and thus it has become a debatable issue. Effective ground of appeal is decided in favour of the assessee."

Respectfully following the judgment of the Hon'ble Bombay High Court in the case of Nayan Builder and Developer Pvt. Ltd.(231 taxmann 665), we uphold the order of the FAA. Effective Ground of appeal, filed by the AO is decided against him.

C.O.194/Mum/06(Assessment Year 1996-97):

6. Effective Ground of Cross objection is about quantification of the penalty levied by the AO in pursuance of the order of the FAA.

As we have decided the appeal against the AO and in favour of the assessee so, the Cross Objection is treated as infructuous.

ITA Nos. /Mum/7082-85/Mum/2005 and C.O.Nos. 195-198/Mum/2005 (AY.s1997-98 to 2000-2001):

7. The issues involved in the above mentioned four appeals and C.O.s are identical to the issues dealt by us at para No.5 and para No.6. Following the order of AY 1996-97 (ITA 7081 and CO 194/Mum/), we dismiss the appeal filed by the Assessing Officers. CO.s filed by the assessee, for all the above mentioned four AY.s are held to be infructuous.

As a result, all the appeals filed by the AO stand dismissed and CO.s filed by the assessee are treated as infructuous.

फलतः निर्धारिती अधिकारियों द्वारा दाखिल की गई अपीलें नामंजूर की जाती हैं और निर्धारिती के प्रत्याक्षेप निष्फल माने जा रहे हैं।

Order pronounced in the open court on 4th February, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 4 फरवरी, 2016 को की गई।

Sd/-

(राम लाल नेगी /Ram Lal Negi)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Date: 04.02. 2016

व.नि.स./v.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

Sd/-

(राजेन्द्र / RAJENDRA)

लेखा सदस्य / ACCOUNTANT MEMBER

2. Respondent /प्रत्यर्थी

- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, ए खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई /**ITAT, Mumbai.**