

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई।

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

आयकर अपील सं/ I.TA No.2297/Mum/2014

(निर्धारण वर्ष / Assessment Year:2009-10

M/s.Linklaters,

Deloitte Haskins & sells,

12,Dr.Annie Besant Road,

Worli,Mumbai 400 018.

Vs. Deputy Director of Income-

tax(International Taxation)-3(1),

Scindia House,N M Road,

Bellard Estate,Mumbai 400001.

PAN: AABFL 2160 M

(Appellant)

(Respondent)

अपीलार्थी ओर से/ Appellant by : Shri J.D.Mistry,A.R

प्रत्यर्थी की ओर से/Respondent by: Shri Michael Jerald,D.R

सुनवाई की तारीख / Date of Hearing : 18.10.2019

घोषणा की तारीख /Date of Pronouncement : 29.11.2019

आदेश / O R D E R

PER RAJESH KUMAR ACCOUNTANT MEMBER

The said appeal has been adjudicated by the Co-ordinate Bench of this Tribunal vide order dated 08.02.2017. Thereafter, M.A.No.367.Mum/2017 was filed and was decided vide order dated 01.06.2019 recalling the order dated 08.02.2017 passed in ITA No.2297/Mum/2014 to the limited extent of adjudicating the Ground No.1 raised by the assessee in the grounds of appeal which is regarding whether there was permanent establishment in India or not. Accordingly, the said appellate order is recalled and the appeal has been heard by us. The only issue for adjudication is as regards permanent establishment, which is reproduced as under:-

"1.The Id.CIT(A) erred in holding that the appellant had a permanent establishment in India under Article 5(2)(k) of the India-UK Tax Treaty for the entire year.

2. The Id.CIT(A) erred in rejecting the claim of the appellant that no income can be taxed in India since the threshold of 90 days did not exceed during the 12 months period relating to November 2008 to March 2009.

3. The Id.CIT(A) ought to have appreciated that the return of income filed by the appellant declaring income at Rs.12,543,155 was without prejudice to the claim stated in grounds No.1 & 2 above and hence the Id.CIT(A) ought to have adjudicated the plea in the course of the appellate proceedings.”

2. The facts in brief are that the assessee filed its return of income on 30.03.2010 declaring the total income of Rs.1,25,43,155/- The assessee-firm is incorporated in United Kingdom (U.K.) and offers legal consultancy to various clients world over including in India. The return of income was filed by the assessee offering to tax the income on the basis that it had services rendered in India on the lines of direction given by the Id.CIT(A) in the earlier years. However, a note was appended to the statement of total income wherein the assessee claimed that it does not have a permanent establishment during the year commencing from November, 2008 to March, 2009, since the period of 90 days has not exceeded during 12 months period during which the services were rendered by its personnel in India and therefore the assessee does not have permanent establishment in India during the year as the actual number of days for which the services were furnished or rendered were only 58 days. However, the plea of the assessee was not accepted by the AO and total income was assessed vide order dated 28.12.2011 passed u/s.143(3) of the Act. In the Appellate proceedings, the Id.CIT(A) also dismissed the appeal of assessee and held as under:-

“I have considered the AO’s order as well as the appellant AR’s submissions. Having considered both I find that before the AO, the appellant has submitted the working with regard to the number of days of services furnished by the partners and staff of the appellant during the previous year relevant to the A.Y. 2009-10. As per the said working, the period of 90 days in any 12 month period has exceeded only during the period April 2008 to October 2008. Accordingly, the appellant submitted that it does not have a service

permanent establishment during the period November 2008 to October, 2008. In my considered view, the claim of the appellant is completely absurd and intended towards availing a benefit for which the appellant is not at all entitled under the provision of law. The income tax return is filed for whole accounting year i.e. in the case of the appellant 01.04.2008 to 31.03.2009. The accounting year is of 12 months only in the case of appellant during the period. Even I also find that in the return of income, the appellant had offered to tax the income on the basis that it had service PE in India under Article 5(2)(k)(9i) for the entire year. Hence, in the facts of the appellant's case, I agree with the action of AO that the appellant has permanent establishment in India for the entire year. Therefore, the alternative contention raised by the appellant deserves to be rejected. Accordingly, these grounds in appeal are dismissed."

3. Learned A.R. of the assessee submitted the issue is squarely covered by the decision of Co-ordinate Bench of this Tribunal in assessee's own case passed ITA No.1540/Mum/2016 for A.Y. 2012-13 dated 29.08.2018 wherein the Hon'ble' Tribunal has accepted the argument of the assessee in principle that period of 12 months under the domestic law would mean the previous year or financial year which is a unit for which income is taxable in India. The coordinate bench has observed that since there is no definition of 12 months in the treaty, therefore the definition has to be borrowed from the domestic law. The learned A.R. of the assessee therefore prayed that the present ground on permanent establishment may kindly be decided by following the ratio laid down in ITA No.1540/Mum/2016 for A.Y. 2012-13(supra) and be allowed accordingly.

4. On the other hand, learned D.R. relied on the order of the authorities below. However, he fairly agreed that the issue has been decided by the Co-ordinate Bench of this Tribunal in assessee's own case as submitted by learned A.R. of the assessee.

5. We have heard the rival submissions and perused the material on record including the decision of the Co-ordinate Bench of this Tribunal in assessee's own case in ITA No.1540/Mum/2016 (supra) wherein the Co-ordinate Bench of this Tribunal decided that

the twelve months period would mean the previous year or the financial year. The operating portion of the Tribunal is reproduced below:-

“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 TAXPUNDIT.ORG 9 Linklaters LLP 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 TAXPUNDIT.ORG 10 Linklaters LLP 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 TAXPUNDIT.ORG 11 Linklaters LLP after due opportunity of being heard to the assessee. This ground is allowed for statistical purposes.”

6. Therefore, respectfully following the decision of the Co-ordinate Bench in assessee's own case, we set aside the order of the Id.CIT(A) and hold that the assessee is not having any permanent establishment in India during the year in terms of *Article 5(2)(k)(i) of the India-UK DTAA* as the total number of days through which the services were rendered by the personnel of the assessee were only 58 days, which is less than 90 days. Accordingly, the grounds raised by the assessee are allowed.

7. In the result, the appeal of the assessee is allowed.

(Pronounced in the open court on 29th November, 2019.)

Sd/-

(SAKTIJIT DEY)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(RAJESH KUMAR)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 29th November, 2019
KSS , Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-10
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai