

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई।

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

**BEFORE SHRI SAKTIJIT DAY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

आयकर अपील सं/ I.TA No.4691/Mum/2016
(निर्धारण वर्ष / Assessment Year:2011-12)

M/s.Linklaters,

बनाम/ Vs. The Addl. DIT(International Taxation)

C/o.Deloitte Haskins & Sells LLP India Bulls
Finance Centre, Elphinstone Mill
Copound,Senapati Bapat
Marg,Elphinstone(W),
Mumbai 400 013.

Scindia House, N. M. Road,
Ballard Estate, Mumbai.

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.AABFL2160 M
(अपीलार्थी /Appellant)

.. (प्रत्यर्थी / Respondent)

आयकर अपील सं/ I.TA No.4644/Mum/2016
(निर्धारण वर्ष / Assessment Year:2011-12)

The Addl. DIT(International Taxation) **बनाम/ M/s.Linklaters,**

Scindia House, N. M. Road,
Ballard Estate, Mumbai.

**Vs. C/o.Deloitte Haskins & Sells LLP India Bulls
Finance Centre, Elphinstone Mill
Copound,Senapati Bapat
Marg,Elphinstone(W),
Mumbai 400 013.**

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.AABFL2160 M
(अपीलार्थी /Appellant)

.. (प्रत्यर्थी / Respondent)

Revenue by:
Assessee by:

Shri V.Sreekar Chaitanya Anjarin,CIT DR
Shri S.E.Dastur, &
Shri Niraj Sheth

सुनवाई की तारीख / Date of Hearing : 06.12.2019
घोषणा की तारीख /Date of Pronouncement : 18.12.2019

आदेश / O R D E R

PER RAJESH KUMAR ACCOUNTANT MEMBER

The cross appeals are directed against the order of the Ld. CIT(A)-57, Mumbai-51 dated 22.3.2016 pertaining to assessment year 2011-12 and these are heard together and disposed of through this common order.

2. Ground Nos.1 to 7 has not been pressed at the time of hearing and therefore need not to be adjudicated.

3. Ground Nos.14 & 15 are against the order of the Id.CIT(A) in not specifically holding that the appellant is not having permanent establishment in India during the financial year as the number day of days for which the services were rendered do not exceed 90 days . The Ground Nos.14 & 15 are extracted as under:-

“14. The Id.CIT(A) erred in not specifically holding that the provisions of Article 5 of India-UK Tax Treaty are not applicable to the facts of the appellant.

15. The Id.CIT(A) erred in not specifically holding that the appellant did not have a fixed base in India.”

4. The facts in brief are that the assessee is engaged in the business of providing legal advice services word over to various clients and during the year filed return of income on 29.09.2011 declaring the total income of Rs.30,37,690/-. Thereafter, the case of the assessee was selected for scrutiny. The assessee in its return of income has stated that assessee has no branch or office in India during the financial year 2010-11 nor the assessee has established any office or place of business in India during the financial year 2010-11. It was also submitted that during the 12 months period pertaining to financial year 2010-11, the rendering of services including services on behalf of group concerns by assessee’s personnel has not exceeded 90 days and accordingly, assessee has no permanent establishment in India for the A.Y. 2011-12 in terms of the India-UK Tax Treaty Article-5(2)(k)(i) and no income is liable to tax in India as per Article-7(1) of the Tax Treaty.

5. Further, the Article-5(2)(k)(i) of the treaty provides that for the purpose of this treaty , the term ‘permanent establishment’ means a fixed place of business through which the business of an enterprise is wholly or partly carried on. Article 5(2)(k) further provides that the term permanent establishment shall include especially the providing of services including managerial services, other than those taxable under Article-13 (Royalties and fees for technical services), within a Contracting State by an enterprise through employees or other personnel, but only if activities of that nature continue within that State for a period or periods aggregating to more than 90 days within any twelve month period. Before the Bench, the learned A.R. of the assessee submitted that

the income of the assessee could only be brought to tax, if the assessee carries on activities of that nature for more than 90 days within any twelve month period, but in the case of the assessee, the period during which these activities were furnished by the assessee, does not exceed 90 days and therefore, whatever income, if the assessee has received, is not taxable under business income. The learned A.R. of the assessee referred to the statement of showing details of the number of days, the assessee furnished services/activities in India, a copy of which is filed at page 70 of paper book, which shows that the total number of mandays /cumulative were only 21 days, which are less than 90 days and therefore, the income of the assessee cannot be brought to tax in India. The learned A.R. of the assessee submitted that the said factor has been stated clearly in the statement of income by way of note. The learned A.R. of the assessee referred to the Order passed by Id.CIT(A) and specifically pointed out at page-7 of his order that in response to direction from the ADIT to furnish number of mandays spent by the employees in India, the assessee filed detailed summary containing number of days spent by employees in India for rendering services during financial year 2010-11, which has not been controverted by the Id.ADIT. The learned A.R. of the assessee further pointed out that the Id.CIT(A) further noted that ADIT has failed to appreciate that the income earned by the assessee during the ordinary course of business was in nature of business income and accordingly governed of Article-7 of Tax Treaty. The learned A.R. of the assessee vehemently submitted for the Bench that in view of the said fact there is no question of assessing the income of the assessee under Article-7 as Id.CIT(A) has also admitted the fact of having furnished the details of number of days spent by employees in India for rendering services, which were 21 days during the year, far below 90 days and therefore the assessee was not having any permanent establishment in India in terms of Article- Article 5(2)(k)(i) of the treaty . Learned A.R. of the assessee therefore prayed that the order of the Id.CIT(A) may kindly be reversed and direction may be given to this effect that the income of the assessee is not taxable at all in India.

6. On the other hand, learned D.R. relied on the order of the AO and the Id.CIT(A) and left the issue to the decision of the Bench.

7. After hearing both the parties and perusing the material available on record, we observe that undisputed facts are that that total number of days spent by the

employees in India by rendering services during the year were 21 days as is clear from the statement filed by the assessee at page-70 of the paper book, which is reproduced below for the sake of ready reference:-

Sl.No	Name of employee	Period	No.of days	Cumulative of days in previous year 2010-11
1	Jonathan Horan	30.05.2010	1	1
2	Jonathan Horan & Jererny Webb	31.05.2010 -01.06.2010	2	3
3	Lee Randal & Hyung Ahn	17.6.2010 -18.6.2010	2	5
4	Philip Badge	22.6.2010	1	6
5	Lee Randal	28.6.2010	1	7
6	Lee Randal, Hyung Ahn & Samnatha Kim	29.6.2010- 30.6.2010	2	9
7	Hyung Ahn & Samnatha Kim	01.7.2010	1	10
8	Hyung Ahn	02.7.2010	1	11
9	Hyung Ahn	07.7.2010	1	12
10	Hyung Ahn & Samnatha Kim	08.7.2010	1	13
11	Jererny Webb	25.8.2010-27.8.2010	3	16
12	David Ludwick	7.9.2010-9.9.2010	3	19
12	Jererny Webb	18.01.2011 – 19.1.2011	2	21

The said fact has been acknowledged by the Id.CIT(A) in the appellate order at page-37, para-3 wherein Id.CIT(A) has noted as under:-

“During the course of assessment proceedings, the Id.ADIT directed the appellant to provide the number of days spent by the employees. In this connection, the appellant submitted details of number of days spent by employees in India for rendering services during the financial year 2010-11. As per the said statement the number of days

“spent by employees in India for rendering services during the financial year 2010-11 was 21 days. The said detail has not been controverted by the Id.ADIT.”

7.1 Now the only issue for our consideration is whether the assessee has permanent establishment in India or not. As apparent from the records before us, the total number of mandays spent by the employees of assessee in India are less than 90 more specifically 21 days. Article-7 provides that the profits of an enterprise of a Contracting State shall be taxable only in that State, unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. The profits of the enterprise may be taxed in the other State but only so much of them, as is directly or indirectly attributable to that permanent establishment. But, in the present case, the assessee is not having any permanent establishment in India as is clearly from the fact that the total number of days spent by employees by providing services in India which are only 21 days and it is not qualified to permanent establishment in terms of Article-5(2)(k)(i) of India-U.K tax Treaty as it has been specifically provided under Article 5(2)(k)(i) that the total number of days should be more than 90 days within a period of 12 months and the period of 12 months has been interpreted to be as financial year.

7.2 In view of these facts, we have considered the view that the assessee is not having any permanent establishment in term of Article-5(2)(k)(i) of India-U.K tax Treaty and accordingly, the income of the assessee is not taxable in India.

7.3 Since we have decided the issue in favour of the assessee, the other grounds raised by the assessee in this appeal becomes academic and needs no adjudication.

8. In the result, the appeal of assessee is partly allowed.

ITA No.4644/Mum/2016(Revenue's Appeal)

9. Since we have decided in assessee's appeal in ITA No.4691/Mum/2016 that the assessee is not having any permanent establishment in India for Financial year 2010-11, therefore, the issue raised by the Revenue in its appeal become academic and needs no adjudication.

10. In the result, the appeal of Revenue is partly allowed.

11. To sum up, both the appeal of the assessee and the Revenue are partly allowed.

(Pronounced in the open court on 18th December, 2019.)

Sd/-
(SAKTIJIT DAY)

न्यायिक सदस्य/JUDICIAL MEMBER
मुंबई Mumbai; दिनांक Dated : 18th December, 2019
KSS , Sr. PS

Sd/-
(RAJESH KUMAR)
लेखा सदस्य / ACCOUNTANT MEMBER

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)-
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