IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI YOGESH KUMAR US, JUDICIAL MEMBER

ITA No.5760/Del./2016
(ASSESSMENT YEAR : 2012-13)

ITA No.3993/Del./2017
(ASSESSMENT YEAR : 2013-14)

Herbert Smith Freehills LLP, C/o SRBC & Associates LLP, Golf View Corporate Tower B, Sector 42, Gurgaon – 122 002 (Haryana).	vs.	ACIT, Circle 2(1)(1), International Taxation New Delhi.
(PAN : AAFFH0766B)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Porus Kaka, Senior Advocate
Shri Divesh Chawla, Advocate
REVENUE BY : Ms. Sapna Bhatia, CIT DR

Date of Hearing : 11.08.2022
Date of Order : 20.10.2022

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

These appeals by the assessee are directed against the orders of the ld. CIT (Appeals)-43, New Delhi dated 29.08.2016 & 13.04.2017 for the assessment years 2012-13 & 2013-14 respectively. Since the issues are common and connected and the appeals were heard together, these are being disposed off by this common order.

2. For the sake of convenience, the ground of appeal taken by the Revenue for AY 2012-13 reads as under :-

> "On the facts and circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) - 43, New Delhi ['CIT (A)'] has erred in dismissing the appeal filed by the assessee on certain additions made by the learned assessing officer ('AO') in the assessment order passed under section 143(3) of the Act by passing his order under section 250(6) of the Income-tax Act, 1961 ('the Act').
>
> That on the facts and circumstances of the case and in law:
>
> 1. The order passed by the learned CIT (A) confirming the additions to the Appellant's taxable income made by the learned AO is erroneous and bad in law and liable to be quashed.
>
> 2. The learned CIT (A) erred in upholding the taxation of entire revenue received by the Appellant from provision of legal services on Indian engagements (amounting to GBP 2,777,511) as 'Fees for Technical Services' under the provisions of section 9(1)(vii) of the Act for the subject assessment year.
>
> 3. The learned CIT (A) erred in affirming the learned AO's position that the Appellant is not eligible to be governed by the beneficial provisions of the Double Taxation Avoidance Agreement between India and the UK ("India-UK tax treaty".
>
> 4. The Learned CLT (A) erred in not quashing the penalty proceedings initiated by the learned AO under section 271 (1)(c) of the Act.
>
> All the above grounds of appeal are without prejudice and notwithstanding each other."

3. Brief facts of the case are that the assessee is a firm of solicitors, having its registered office in the United Kingdom and is engaged in providing legal services to its clients worldwide (non-residents and

residents of India). The assessee is a UK based Limited Liability Partnership with a majority of its partners being tax residents of the UK. During the previous year under consideration, the assessee provided legal services to its clients in India/ Outside India relating to activities carried out by such clients in India. The AO in his assessment order opined that the assessee is not eligible for benefits of India-UK DTAA. According to the AO, an entity to be eligible for India-UK DTAA, needs to be 'resident of a contracting state', within the meaning of Article 4.1 of India-UK DTAA. In this case, according to the AO, the assessee was not a resident of UK. The AO held that a Limited Liability Partnership incorporated as per the laws of UK, is a fiscally transparent entity, not liable to taxation in UK and has been specifically excluded from the definition of a resident. The AO referred to Article 4.1 which reads as follows :-

> "For the purposes of this Convention, the term resident of a contracting state means any person who, under the law of that state, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature."

4. AO further opined that a Limited Liability Partnership (LLP) is not liable for taxation in UK, in its capacity as Limited Liability Partnership. That it is the partners of an LLP, in UK, which are taxable. That unless an entity is liable to taxation, it does not fall within the purview of a

resident within the meaning of Article 4(1) of the India-UK DTAA and is therefore, not eligible for benefit of India-UK DTAA.

5. He further noted that the case of a Partnership Firm (which includes a Limited Liability Partnership) is opposite in India, it is the entity i.e. the Partnership Firm of the LLP which is taxed as an entity on a standalone basis. The partners themselves are not taxed with regard to their share of income in the partnership Firm in the LLP.

6. Upon assessee's appeal, ld. CIT (A) noted assessee's submissions. He held that there was a protocol entered into between India and UK, amending the 1993 India-UK DTAA. That the protocol was concluded on 30.10.2012, and the effective date was 27.12.2013. That prior to this Amendment coming into force the position was that where a partnership is registered as fiscally transparent in its country of location, the entity as such, is not liable to tax in that country and so it cannot be a resident of purposes of the Tax Treaty. That consequently, the availability of Treaty benefits was to be denied unless a specific declaration covering such partnership was included. That the same was accomplished by means of the protocol concluded on 30.12.2012. Thereafter, ld. CIT (A) referred to pre-protocol Article 4 of India-UK DTAA and according to him, the effect of the protocol is that it modifies Article 4 of the India-UK DTAA which specifically deals with partnerships. That under the modified

Article, the tax treaty benefits begin to apply to income derived by a partnership firm to the extent such income is taxed in the UK in the hands of its partners. That it is therefore clear that this benefit is available to a UK entity (in this case the fiscally transparent LLP, as is the assessee) only after the amendments consequent to protocol coming into force. That the protocol was concluded on 30.10.2012 and its entry into force was 27.12.2013.

7. Ld. CIT (A) further stated that none of the case laws relied upon by the assessee had the benefit of the implications of the protocol having been entered into and its coming into force with effect from 27.12.2013, having been brought for discussion. That the amendments introduced by the protocol are not retrospective (or even clarificatory). That the amendments introduced by the protocol are clearly prospective. That there was no intention in the India-UK DTAA to allow benefit to such fiscally transparent entities. That it is clear that before the protocol having come into force, an Indian entity placed similarly would not have been allowed Treaty benefit by UK Tax Authorities. That the benefit of Treaty as claimed by the assessee is thus not available to it as it refers to a period prior to the protocol coming into force. Accordingly, he upheld the order of the AO.

8. Against this order, the assessee is in appeal before us. We have heard both the parties and perused the record.

9. Ld. Counsel of the assessee submitted that 1egal services have been provided by the Appellant primarily from outside India with nominal visits to India, which are lower than 90 man-days during a financial year. During the FYs, 20 I 1-12 and 2012-13 (as relevant to the subject A Y s), the aggregate of such visits to India was 21 days and 25 days, respectively. For this, ld. AR referred to page 44 of the factual paperbook.

9.1 As per the UK domestic tax laws, the Appellant files its income tax returns in the UK. The Partnership firms are required to file the return of income and are covered by the taxation laws of the UK. The firm is liable to tax on its profits in the UK and the recovery of tax is done through its partners.

9.2 HSF has filed the Indian income-tax returns for A Y s 2012-13 and 2013-14, wherein, for the purpose of determining its taxable income in India, HSF has claimed the benefits of the India-UK Double Taxation Avoidance Agreement (‚India-UK DTAA') on the portion of its income from Indian engagements, which has been taxed in the UK in the hands of its UK tax resident partners.

9.3 Accordingly, as per the India-UK DTAA, income received by HSF from the provision of legal services under Indian engagements does not fall within the meaning of Fees for Technical Services ('FTS') (as defined in Article 13 of the India-UK DTAA) since the subject services do not make available inter-alia any technical knowledge, experience, skills, know-how or process. Therefore, the income received by HSF from the provision of legal services, being in the nature of business income for HSF, is not taxable in India in the absence of a Permanent Establishment ('PE') of HSF in India as per the provisions of Article 5 read with Article 7 of the UK-India Convention.

9.4 The balance portion of the income from Indian engagements (i.e., income to the extent of profit share relating to partners who are tax residents of countries other than the UK, i.e., non-UK tax resident partners) has been offered to tax under the provisions of section 9(l)(vii) of the Income Tax Act, 1961 ('the Act') as FTS in India.

10. Thereafter, ld. Counsel of the assessee submitted that aforesaid issue is squarely covered by the ruling of ITAT in the case of Linklaters LLP (2010) 40 SOT 51 (Mum.). He further submitted that the assessee was a UK Partnership (similar to the Appellant), a fiscally transparent entity in the UK. The Hon'ble Mumbai ITAT has held that as long as the entity's income is taxed in the concerned jurisdiction, either in the hands

of partners or the partnership firm, the relevant tax treaty benefits should be available to the partnership firm! LLP. It has been categorically held that:

> "From a country perspective, what really matters is whether the income, in respect of which treaty protection is being sought, is taxed in the treaty partner country or not."

10.1 The Mumbai ITAT has further clarified that in order to determine the eligibility of claiming the tax treaty benefits, what is relevant is that the entity person should be taxed in its resident jurisdiction (i.e., fact of taxability) and not necessarily that the tax liability should actually be imposed and discharged by the same entity! person (i.e., mode of taxability). The relevant extracts of the decision in Para 71 (at Page 69 of the legal paperbook) are quoted here as under:

> "71. It is the fact of taxability of entire income of the person in the residence State, rather than the mode of taxability there, which should govern whether or not the source country should extend treaty entitlement with the Contracting State in which that person has fiscal domicile. In effect thus, even when a partnership firm is taxable in respect of its profits not in its own right but in the hands of the partners, as long as entire income of the partnership firm is taxed in the residence country, treaty benefits cannot be declined."

11. Ld. Counsel of the assessee further submitted that subsequently, the decision of Linklaters LLP (supra) has been followed in the below mentioned decisions :-

(i) Linklaters LLP vs DCIT 79 taxmann.com 12 (Mumbai - Trib.) (Page 153 of the legal paperbook)

(ii) Linklaters LLP vs DCIT 97 taxmann.com 464 (Mumbai - Trib.) (Page 174 of the legal paperbook)

(iii) Income-tax Officer, (International Taxation)-3 (I) vs Linklaters & Paines 49 taxmann.com 66 (Mumbai - Trib.) (Page 183 of the legal paperbook)

12. Thereafter, he referred and drew support from the interpretation to term 'liable to tax' from the decision of Hon'ble Supreme Court in the case of Azadi Bachao Andolan 263 ITR 706. He further submitted that in addition to the above, in the following judicial pronouncements, the eligibility of a fiscally transparent partnership firm to avail of the tax treaty benefits has been affirmed on the basis that the income of the partnership firm has been taxed in the foreign state in the hands of its partners:

(i) DDIT vs A. P Moller 67 SOT 147 (Page 197 of the Paperbook)

(ii) P & O Nedlloyd Ltd & Ors vs ADIT-IT 369 ITR 282 (Page 190 of the Paperbook)

(iii) Maersk Line U.K. Ltd vs DDIT 68 taxmann.com 173 (Page 237 of the Paperbook)

(iv) T D Securities (20 I 0 TCC 186; Decision dated April 8, 2010), the Tax Court of Canada (Page 263 of the Paperbook)

12.1 Further, the Hon'ble Mumbai Tribunal, in the case of Linklaters LLP, on the same issue of tax treaty eligibility, was dealing with AYs

2011-12, 2012-13 and 2013-14. The Hon'ble Tribunal pronounced the rulings in the year 2017 (79 taxmann.com 12), 2018 (97 taxmann.com 464) and 20 I 9 (111 taxmann.com 198), respectively, clearly after the protocol amendment came into effect. Hence, the Department Representative's submissions that the Protocol, which provides for an extension of India-UK DTAA applicability to a UK-based partnership, is effective only from AY 2015-16 and onwards and shall not apply to the year under consideration is entirely incorrect, erroneous and contrary to the judicial precedents.

13. Per contra, ld. DR for the Revenue relied upon the orders of the authorities below. She further gave a written submission on ground no.3 of this appeal. She referred to the ld. CIT (A)'s order as under :-

> "The Ld CIT (A) in his order observed as under:
>
> "I note that there was a protocol entered into between India and UK, amending the 1993 India UK DTAA. The protocol was concluded on 30.10.2012, and the effective date was 27.12.2013. Prior to this Amendment coming into force the position was that where a Partnership is regarded as fiscally transparent in its country of location, the entity as such, is not liable to tax in that country and so it cannot be resident of purposes of the Tax Treaty. Consequently, the availability of treaty benefits was to be denied unless a specific declaration covering such partnerships was included. The same was accomplished by means of the protocol concluded on 30.12.2012.
>
> Further, in Para 4.7 page no. 31, the Ld ClT(A) observed as under:

"The effect of the protocol is that it modifies Article 4 of the 1ndia UK-DTAA, which specifically deals with partnerships. Under the modified Article, the tax treaty benefits begin to apply to income derived by a partnership firm to the extent such income is taxed in the UK in the hands of its partners. 1t is therefore, clear that this benefit is available to a UK entity (in the case the fiscally transparent LLP as is the appellant), only after the amendments consequent to protocol coming into force. The protocol was concluded on 30.12.2012 and its entry into force was 27.12.2013."

13.1 Referring to the above, ld. CIT DR further contended as under :-

"Most humbly, it is submitted that none of the case laws relied upon by the appellant had the benefit of the implications of the Protocol having been entered into and its coming into force with effect from 27.12.2013, having been brought for discussion.

The amendments introduced by the protocol are not retrospective or even clarificatory The amendments introduced by the protocol are clearly prospective.

Prior to the entering into of the Protocol by the competent authorities of the respective states, the benefit of DTAA between India and the UK was not available to the persons, more specifically the fiscally transparent entities which do not fall under the definition of the tem "persons" under the DT AA. Thus, it is evident that prior to the Protocol there was no intention in the India -UK DTAA to allow benefit to such fiscally Transparent entities. It is clear that before the Protocol having come into force, an Indian entity placed similarly would have also not been allowed Treaty benefit by UK Tax Authorities.

In the circumstances, the interpretations laid down by various courts in the decisions cited by the Ld AR during the course of arguments, was not correct and therefore, the decisions rendered by various courts and relied upon by the appellant in so far as they relate to the period prior to the amendment of DTAA between India and UK are decisions in Personam and not decisions in rem and therefore have no binding force and

> cannot be applied to the facts of the case of the assessee which evidently relate to the period prior to the amendment of DTAA between India and UK."

13.2 Thereafter, ld. CIT DR referred to the interpretation of clauses of DTAA on the basis of observation of Hon'ble Supreme Court in the case of Union of India & Anr. Vs. Azadi Bachao Andolan and Anr. (2003) 263 ITR 706 (SC).

13.3 She further referred to the decision of K.P. Varghese vs. ITO about the imposition of CBDT's circulars and also referred to rule of contemporanea exposition. Referring to other cases and interpretation of terms in the Treaties, she submitted as under :-

> "The fact that a reciprocally expressed tax treaty provision may only have effect in one State does not rob this provision of any of its force.
>
> Thus, it is submitted that when the terms of the treaty are clear and unequivocal, no further aid from any source is required to be taken. The appellant being a fiscally transparent entity under the Laws of UK, cannot be treated as a person under Article 3(1)(1) of the DTAA between India and UK prior to its amendment by the Protocol Notified on 10th Feb 2014 vide Notification No.10/2014."

13.4 Further she referred to the Press Note setting up of High Level Committee to interact with trade and industry on tax law and the Budget Speech and mad following further submissions :-

> "On the Basis of recommendations issued by the Committee in its half yearly reports, the Government issued a status report of actions taken by the CBDT/CBEC. One of the

recommendations of the Committee was on the issue of extending benefit of India UK DTAA to the fiscally transparent entities. The committee recommended as under:

Denial of tax treaty benefits in India to some transparent UK entities:

"In the United Kingdom (UK), the profits earned by partnership firms are taxable in the hands of the partners, as per their share in the firm. Partnership firms are treated as 'pass through entities' or 'fiscally transparent' for the purpose of taxation. UK Partnership firms were not in a position to unequivocally claim treaty benefits as they were not considered 'resident' under the India-UK DTAA. Even after amendment of the India-Us, DTAA through a Protocol between India and UK dated October 30, 2012, (notified vide Notification No 20/2014 dated February 10, 2014, with retrospective effect from December 27, 2013), the definition of person under Article 3(1)(f) still does not specifically include partnership firms. Therefore,

i) a circular may be issued by CBDT to clarify that UK partnership firms, including LLPs, are eligible for the treaty benefits to the extent that the partners are taxable in UK; or

ii) another protocol may be entered into with UK to specifically include partnership firms and LLPs within the term 'person' as defined in Article 3 (similar to the India-USA Treaty)

In the status, CBDT clarified that Circular No.02/2016 dated 25th February 2016 has been issued on the lines as recommended by the HLC. The Circular issued by the CBDT reads as under:

CBDT Circular No 2 of 2016

"Benefits of the India United Kingdom (UK) Double Taxation Avoidance Agreement to UK Partnership firms

An Amending Protocol to the India UK Double Taxation A voidance Agreement (DTAA) was notified vide Notification No 10/2014 dated 10TH February 2014 with effect from 2th

December 2013. As a result of the aforesaid protocol, interalia, the earlier definition of the term person in article 3(1)(f) of the DTAA was amended to delete the exclusion of UK partnership firms and in addition, it has been provided in Article 4 of the DTAA that in case of a partnership, estate or trust the term "resident of contracting state" applies only to the extent that the income derived by such partnership, estate or trust is subject to tax in that state as the income of a resident, either in its hands or in the hands of its partners or beneficiaries.

2 Apprehensions that the term "person" in the DT AA does not specifically include "partnerships" have been brought to the notice of the Central Board of Direct Taxes (the Board) and further clarity has been sought on whether the provisions of the treaty are applicable to a partnership. In exercise of the powers conferred under section 119 of the Income Tax Act 1961, the Board hereby clarifies that the provisions of the India UK DTAA to the extent that the income derived by such partnership, estate or Trust is subject to tax in that state as the income of a resident, either in its own hand or in the hands of its partner or beneficiaries.

3. This may be brought to the Notice of all concerned"

Thus, it is amply evident that under the extant DTAA between India and UK, fiscally transparent entities were not covered under the definition of "person" under Article 3 of the said DTAA. The benefit of DT AA between India and UK has only been extended to the partnership firms by virtue of the amendment carried out in the DT AA and entering into of Protocol effective from 27th December 2013. In the circumstances, decisions rendered by various Courts which have been relied upon by the Ld AR are clearly decisions in Personam and cannot be extended to any other person/entity.

In the circumstances, the present appeals being devoid of merit needs to be dismissed. It is prayed accordingly."

14. Upon careful consideration, we note that the claim of the assessee in this case is that the issue is squarely covered in favour of the assessee

by the decision of ITAT Mumbai Bench in the case of Linklaters LLP (2010) 40 SOT 51 (Mum.). Further, this has been countered by the Revenue by suggesting that the decision did not have the benefit of implication of the protocol amendment which, according to the Revenue, came into force from 27.12.2013, hence this decision is not applicable. Per contra, ld. Counsel of the assessee stated that this claim of the Revenue is not correct inasmuch as ITAT Mumbai Bench in the case of Linklaters LLP on the same issue of tax treaty eligibility was dealing with AYs 2011-12, 2012-13 & 2013-14 and the ITAT pronounced the rulings in the year 2017 (79 taxmann.com 12), 2018 (97 taxmann.com 464) and 2019 (111 taxmann.com 198) respectively. Hence it is the submission of the assessee's counsel that Departmental authorities as well as the Departmental Representative's submission that the Protocol, which provides for an extension of India-UK DTAA applicability to a UK based partnership, is effective only from AY 2015-16 and onwards and shall not apply to the year under consideration, is entirely incorrect and not in accordance with the judicial precedents. We find ourselves in agreement with the submission of the ld. Counsel of the assessee. We note that ld. CIT DR has distinguished the decisions cited by suggesting that the decision was rendered prior to the protocol amendment and ld. CIT DR is also suggesting that these decisions are not applicable. However, we find

that no contrary decision has been produced by the Revenue. Hence, the canons of judicial discipline comes into play and the decision of ITAT on this issue cannot be ignored by mere claim of the Departmental Authorities and Representatives that these decisions are not applicable inasmuch as they have been rendered without considering the implication of the protocol amendment.

15. We may recap that the assessee is a firm of solicitors having office in the United Kingdom and providing legal services to its clients worldwide i.e. non-residents and residents of India. The assessee is a UK based Limited Liability Partnership with a majority of its partners being tax residents of the UK. During the previous year under consideration, the assessee provided legal services to its clients in India/ Outside India relating to activities carried out by such clients in India. The Revenue's opinion was that assessee is not eligible for benefits of India-UK DTAA within the meaning of Article 4(1) of India-UK DTAA. The Revenue's suggestion is that assessee is a Limited Liability Partnership and is not liable for taxation in UK in its capacity as Limited Liability Partnership and its partners of an LLP in UK are taxable. That unless an entity is liable to taxation, it does not fall within the purview of a resident within the meaning of Article 4 (1) of the India-UK DTAA and is, therefore, not eligible for the benefit of India-UK DTAA.

16. WE find that ITAT was considering the same issue in the case of Linklaters LLP (supra) and it has opined that assessee is entitled to the benefit of India-UK DTAA on the portion of its income from Indian engagements, which has been taxed in the UK in the hands of its UK tax resident partners. Further, the case is supported by the case laws referred by ld. Counsel of the assessee in the following judicial pronouncements that the eligibility of a fiscally transparent partnership firm to avail of the tax treaty benefits is affirmed on the basis that the income of the partnership firm has been taxed in the foreign state in the hands of its partners :-

(i) DDIT vs A. P Moller 67 SOT 147 (Page 197 of the Paperbook)

(ii) P & O Nedlloyd Ltd & Ors vs ADIT-IT 369 ITR 282 (Page 190 of the Paperbook)

(iii) Maersk Line U.K. Ltd vs DDIT 68 taxmann.com 173 (Page 237 of the Paperbook)

(iv) T D Securities (20 I 0 TCC 186; Decision dated April 8, 2010), the Tax Court of Canada (Page 263 of the Paperbook)

17. Thus, we note that the above case laws as well as ITAT Mumbai Bench decision in the case of Linklaters LLP (supra) has opined that benefit of Article 4.1 is to be granted to the assessee in identical facts and

circumstances of the case. Accordingly, we set aside the orders of the authorities below and decide the issue in favour of the assessee.

18. Our above order applies *mutatis mutandis* to the appeal for AY 2013-14.

19. In the result, both the assessee's appeals stand allowed.

Order pronounced in the open court on this day 20th of October, 2022.

Sd/-	**sd/-**
(YOGESH KUMAR US)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 20th day of October, 2022
TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT (A)-43, New Delhi.
5.CIT(ITAT), New Delhi.

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