IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU, PRESIDENT, AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.7307/Mum./2017

(Assessment Year : 2014–15)

Linklaters LLP
C/o Deloitte Haskins & Sells LLP
Tower–3, 27–32 Floor, Indiabulls Finance
Centre, 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 P.J. Pardiwala a/w
Shri Niraj Sheth
Revenue by : Shri Lovish Kumar

Date of Hearing – 17/04/2023	Date of Order – 11/05/2023

O R D E R

The captioned appeal has been filed by the assessee challenging the impugned final assessment order dated 03/10/2017, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (*"the Act"*), pursuant to the directions dated 28/09/2017 issued by the learned Dispute Resolution Panel–1(WZ), Mumbai, [*"learned DRP"*], under section 144C(5) of the Act for the assessment year 2014–15.

2. In this appeal, the assessee has raised the following grounds:–

"The appellant objects to the order dated October 3, 2017 passed by the Deputy Commissioner of Income Tax Range (International Taxation) 3(1)(2), Mumbai (AO) under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 (the Act) passed pursuant to the directions of the Dispute Resolution Panel (DRP") on the following grounds:

1. The learned AO/DRP erred in computing the total income of the appellant at Rs. 47.77,691.

2. The appellant submits that the learned DRP erred in arriving at various unwarranted and erroneous discussions and conclusions which has not been subject matter of the draft assessment order dated December 31, 2016 passed under section 143(3) r.ws 144C.

Permanent Establishment

3. The DRP erred in holding at para 2.6 that the appellant has a permanent establishment in India which is contrary to the fact that the number of days furnishing of services in India during the previous year relevant to the assessment year 2014-15 did not exceed 90 days.

4. The learned AO/DRP therefore ought to have held that, in absence of permanent establishment in India no part of its fees is liable to tax in India.

5. The learned AO/DRP erred in not following the decision of the Mumbai Tribunal in the appellant's own case for the assessment year 2011-12.

6. Without prejudice the learned AO ought to have appreciated that the income earned by the appellant is covered by the provisions of section 9(1)(1) of the Act and accordingly only income in respect of services rendered in India of Rs. 48,06,887 is liable to tax in India.

Denial of India-UK Tax Treaty benefit

7. The learned AO erred in not granting benefit of the India-UK tax treaty to the appellant. The AO ought to have appreciated that the Hon'ble Dispute Resolution Panel had impliedly allowed the benefit of the tax treaty at para 2.6 of the DRP direction.

8. The learned AO erred in holding that the appellant cannot be treated as resident of the UK within the meaning of Article 4(1) of the India-UK DTAA.

9. The learned AO ought to have appreciated that income of the appellant is subject to UK laws and therefore the appellant is "liable to taxation" in the UK.

Income in the nature of Fees for technical services

10. The learned DRP erred in holding that the income of the appellant is in the nature of fees for technical services as per the India-UK tax treaty which was not the case of the AO in the draft order.

11. The learned DRP erred in dealing with the said issue in their order without giving any opportunity to the appellant.

Disbursement treated as part of gross receipts

12. The learned AO erred in taxing an amount of Rs. 1,33,099 being reimbursement of expenditure. The appellant submits that reimbursement of expenditure is not income and therefore the same cannot be brought to tax.

13. The learned AO erred in not providing an opportunity of being heard before taxing the disbursements.

14. Without prejudice to the above, the learned AO ought to have allowed deduction for expenditure incurred for such disbursements.

Wrong levy of surcharge

15. In computing the demand of Rs.30,96,310 the learned AO erred in levying surcharge of Rs.1,91,108 though the total income did not exceed Rs. 1 crore.

Deduction for expenses

16. The learned AO erred in restricting the deduction for expenses to Rs. 2,51,457.

Initiation of Penalty under section 271(1)(c)

17. The learned AO erred in initiating penalty proceedings under section 271(1)(c).

General

18. Each one of the above grounds of appeal is without prejudice to one another.

19. The appellant craves leave to add, alter or amend the grounds of appeal."

3. Grounds no.1 and 2 are general in nature and therefore need no separate adjudication.

4. The issue arising in grounds no.7-9, raised in assessee's appeal, is pertaining to the denial of benefit of the India-UK Double Taxation Avoidance

Agreement ("*DTAA*"). Since the adjudication of this issue is necessary for other issues raised in this appeal, therefore, the same is taken up first.

5. The brief facts of the case as emanating from the record are: The assessee is a Limited Liability Partnership, which is incorporated and registered with the Registrar of Companies for England and Wales under the Limited Liability Partnership Act 2000 of the United Kingdom ("*UK*"). The assessee is engaged in providing legal services to its clients. For the year under consideration, the assessee filed its return of income on 23/09/2014 as non-resident assessee declaring a total income of Rs. Nil. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) as well as section 142(1) were issued and served on the assessee. During the assessment proceedings, it was noticed that the assessee has been held not to be a resident in the UK for the purpose of the India-UK DTAA, as per Tax Residency Certificate issued by HMRC. The Assessing Officer ("*AO*") vide draft assessment order dated 31/12/2016 passed under section 144C(1) r/w section 143(3) of the Act came to the conclusion that partnership firm organised in UK are not included within the meaning of '*person'* as per Article 3 of the India-UK DTAA. The AO did not agree with the assessee's reliance on the decision of the coordinate bench of the Tribunal in its own case for the assessment year 1995-96 on the basis that in that case the AO had applied the treaty and taxed the assessee on account of having the PE in India, however, on technical grounds, the Tribunal considered the issue of eligibility for the Treaty benefit, when the same was not the ground of appeal of the Revenue. The AO also distinguished the decisions relied upon by the Tribunal in preceding year and held that an

entity which is fully exempt from tax as per the domestic law of the contracting state or is not considered at all as an entity for the purpose of taxation cannot be held as '*liable to tax*' in that state and, accordingly, cannot claim the benefits of the tax treaty as a resident of that state. The AO also referred to Article 1 of the India-UK DTAA, which says that the treaty applies in the case of a person who is a resident of one or both contracting states. Accordingly, the AO held that the benefit of the India-UK DTAA is not available to the assessee as it is not a '*person'* as per Article 3 of the DTAA and it is not a resident of any of the two contracting states within the meaning of Article 4(1) of the DTAA. As a result, the AO treated the total amount of Rs.50,29,148 invoiced by the assessee as income from sources in India, which had accrued or arisen or deemed to accrue or arisen in India. The assessee filed detailed objections against the additions made by the AO before the learned DRP. Vide directions dated 28/09/2017 issued under section 144C(5) of the Act, the learned DRP following its directions rendered in assessee's own case for the assessment year 2012-13, rejected the objections filed by the assessee after noting that the facts in the year under consideration are in *pari materia* with facts in the assessment year 2012-13. In conformity with the directions issued by the learned DRP, the AO passed the impugned final assessment order under section 143(3) r/w section 144C(13) of the Act. Being aggrieved, the assessee is in appeal before us.

6. During the hearing, the learned Sr. Counsel, appearing for the assessee, submitted that this issue is covered in favour of the assessee by decisions of

the coordinate bench of the Tribunal in assessee's own case for the preceding as well as the subsequent assessment years.

7. On the contrary, the learned Departmental Representative ("*learned DR*") by vehemently relying upon the orders passed by the lower authorities submitted that as per the Tax Residency Certificate issued by HMRC, the assessee has been held to be not a resident for the purpose of the India-UK DTAA. The learned DR also submitted that the assessee did not produce copy of the Limited Liability Partnership deed so as to know the members before any of the lower authorities.

8. In his rebuttal, the learned Sr. Counsel though agreed that the copy of the Limited Liability Partnership deed was not submitted by the assessee, however, submitted that the assessee furnished the list of the members as on 31/03/2014 before the AO vide its submission dated 29/12/2016.

9. We have considered the rival submissions and perused the material available on record. As per the assessee, it is liable to the UK tax system in view of its incorporation in the UK. Further, the assessee computes profit as per the provisions of UK tax law, which is allocated amongst its members, and therefore assessee's profits are subject to tax in the UK. Thus, it is the claim of the assessee that being a resident of the UK, it is entitled to the benefits of the India-UK DTAA. On the contrary, as per the Revenue, under the UK laws, the assessee is not a taxable entity and since the assessee is not liable to tax and its partners are assessed to tax, the assessee cannot be given the benefit of the India-UK DTAA. We find that a similar issue came up for consideration

before the coordinate bench of the Tribunal in assessee's own case in Linklaters LLP vs DCIT, in ITA No. 1540/Mum./2016, for the assessment year 2012-13. The coordinate bench vide order dated 29/08/2018 after following the decision rendered in the assessment year 2011-12 held that the assessee is entitled to claim benefit under the India-UK DTAA. The relevant findings of the coordinate bench are as under:-

> *"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. ……"*

10. We find that the coordinate bench of the Tribunal in assessee's own case in Linklaters LLP vs DCIT, in ITA No. 969/Mum./2017, for the assessment year 2013-14, vide order dated 21/06/2019 rendered similar findings. Similarly was held by the coordinate bench of the Tribunal in assessment years 2015-16 and 2016-17 in assessee's own case in ITA No. 6846/Mum./2018 and ITA No. 1256/Mum./2021 vide orders dated 12/06/2020 and 22/02/2023, respectively.

11. The learned DR could not show us any reason to deviate from the aforesaid decisions rendered in assessee's own case and no change in facts and law was alleged in the relevant assessment year. The issue arising in the present appeal is recurring in nature and has been decided by the coordinate bench of the Tribunal in the preceding assessment years. Thus, respectfully following the orders passed by the coordinate bench of the Tribunal in assessee's own case cited supra, we uphold the plea of the assessee that it is entitled to claim the benefit under the India-UK DTAA. As a result, grounds no.7-9 raised in assessee's appeal are allowed.

12. The issue arising in grounds no.10-11, raised in assessee's appeal, is pertaining to the taxability of income received by the assessee as '*Fees for Technical Services*' under the provisions of the India-UK DTAA.

13. We have considered the rival submissions and perused the material available on record. Since we have held that the assessee is entitled to the benefit of the India-UK DTAA, therefore it is relevant to analyse the taxability of the income received by the assessee under the provisions of the India-UK DTAA. From the perusal of the submission dated 02/12/2016 filed by the assessee before the AO, we find that the assessee rendered the following services during the year:-

(a) Advisory services to Reliance Industries Ltd in respect of proposed disinvestment, and attending due diligence and negotiation meetings in relation thereto in India;

(b) Attending meetings in India with respect to the restructuring of United Spirit Ltd's business operations in the UK; and

(c) Advising HSBC on a high yield notes offering outside India by an Indian corporate entity, and attending due diligence and meetings in relation thereto in India.

14. We find that the taxability of similar services under the head '*Fees for Technical Services*' came up for consideration before the coordinate bench of the Tribunal in assessee's own case in Linklaters LLP vs DCIT, in ITA No. 1690/Mum./2015, for the assessment year 2011-12. After analysing the services rendered by the assessee, the Co–ordinate bench of the Tribunal vide order dated 31/01/2017 decided this issue in favour of the assessee, by observing as under:-

> *"28. It is further noted by us that the common thread available in all the judgements we have discussed above is that the recipient of the services should be in a position to utilise the knowledge, know-how or skill or experience on its own in future with the aid of the service provider. Thus, to fit into the phrase 'make available' the technical knowledge, skill, know- how, experience, etc. must remain with the person receiving the services even after the process of rendering of services comes to an end. These ingredients should be imported and absorbed by the receiver so that the recipient can deploy similar technology or techniques in future without depending upon the service provider. We have analysed various services provided by the assessee to its clients on the basis of details brought before us. Our attention was drawn on various types of services provided to its clients by the assessee which have been tabulated before us in following manner:-*

I. Documentation services provided to non-Indian clients in relation to fund raising/lending activities of non-Indian parties for • *London listing of non-Indian entity* • *Financial transaction in international markets-loan documentation* • *Issuance of debt securities by non-Indian party-documents relating to issuance of subscription agreements, trust deed, agency agreement, set of terms and condition, prospectus.* • *Drafting preliminary and other documentation for an Initial public officering and listing in Singapore by non-Indian entity.* • *Voluntary cash general offer of a public listed company in Singapore Exchange*
II. Advising on foreign laws and other non-Indian matters to non-Indian clients, viz. • *On EU Law to Geneva based company* • *US based corporate in relation to complain submitted to European Commission* • *America distressed debt investor in relation to German Metal processing company* • *On bid documentation in Bahrain* • *Suspected fraud due diligence* • *Potential takeover bid of Swiss Corporate listed on Swiss Stock Exchange*
III. Documentation / advising services provided in connection with M&A activities of non-Indian clients, viz. • *Acquisition of stake by UK entity in Indian entity / blocks* • *Drafting of English law document in relation to exist form Indian business by German entity.* • *Sale of stake in a Germany entity by German companies* • *Group reorganization of a German multinational group no nexus with India* • *Litigation matter arising from M&A done in past - Litigation on environment contamination of site in Germany* • *Reviewing documents relating to exist from Indian JV by UK company*

• *Due Diligence for suspected fraud undertaken for UK company* *Advising National Grid of UK for potential acquisition in India.*
IV. Documentation services provided to non-India client for fund raising activities by Indian party in foreign market • *Drafting of placement documents, placing agreements and other documentation in connection with public offering* • *Drafting of prospectus, issue agreement and other documents.* • *Drafting of loan documentation*
V. Dispute related activities for non-Indian clients - The dispute related to acquisition by Singapore company of a Chinese grain business. The said activity has no nexus with India.

29. We also made client wise analysis on random basis and found that in the case of one of the clients, viz. B.P. Explorations (Alpha) Ltd-UK, the assessee provided advisory services for documenting contracts and other related agreements on its acquisition of a 30% stake of oil and gas production blocs from Reliance Industries Ltd and the formation of a 50- 50 joint venture between the two companies for sourcing and marketing of gas in India. Similarly, services were provided to Microsoft Corporation, USA in the form of advisory in relation to a competition law complaint submitted to the European Commission. Services were provided to M/s

VFS Global Services Pvt Ltd, UK in connection with a possible London listing of VFS Global. The assignment included due diligence of investigations into the business. Our attention was brought upon the nature of services provided to many other foreign clients also. It was noted by us that in all the cases, services provided were of the nature of advisory or due diligence for different kind of projects.

30. As per our understanding, for none of these services it can be said that technical knowledge, skill, experience, know-how or process remained with the clients to whom services were rendered by the assessee, even after the rendition of services was completed and agreement came to an end. These services were of purely legal advisory nature; it cannot be said that recipient of the services was in a position to duplicate similar skill or technology or techniques in future without the aid or assistance of the assessee for carrying out similar assignments. These services have been indeed used by the clients for their benefit but the re-application or repetition of the same benefit for future requirements of these clients without involvement of the assessee was not committed by the assessee, as per the facts brought before us. Thus, it cannot be said that by way of rendition of these services, the assessee 'made available' to its clients the technical knowledge, skill, experience, know-how or process, etc.

31. Further, in none of the aforesaid transactions, the Ld. CIT-DR was able to point out as to how there was transfer of technical knowledge, skill, experience

or know-how, etc. in such a manner that these recipients were able to utilise and perform these tasks again on their own without falling back upon the assessee for its assistance. If any of these recipients would come up with a new project next time in future, whether identical to the

previous projects or not, it would again need the services of assessee or any other legal advisor for availing advisory on new issues. The Revenue has taken help of few judgments which are not applicable on the facts of the case before us. The case of the assessee is covered by the judgements which have been discussed by us above in earlier part of our order.

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

15. Since in the year under consideration also the assessee rendered similar services in the nature of purely legal advisory, wherein it cannot be said that any technical knowledge, experience, skill, know-how, or processes can be utilised by the client in the future without the aid of the assessee, therefore, the services rendered by the assessee cannot be said to have '*made available*' the technical knowledge, skill, experience, know-how or process, etc. to the recipient of services. Thus, respectfully following the decision of the coordinate bench of the Tribunal rendered in assessee's own case cited supra, we are of the considered view that income received by the assessee is not in the nature of '*Fees for Technical Services*' as envisaged under Article 13 of the India-UK DTAA. As a result, grounds no.10-11 raised in assessee's appeal are allowed.

16. The issue arising in grounds No. 3-5, raised in assessee's appeal, is pertaining to the existence of the Permanent Establishment ("*PE*") of the assessee in India in terms of the provisions of the India-UK DTAA.

17. It is evident from the record that the AO vide draft assessment order did not go into the aspect of the existence of PE, since the assessee was at the outset denied the benefit of the India-UK DTAA. We find that the learned DRP in assessee's own case for preceding assessment years has held the assessee to have a PE in India, which directions were followed by the learned DRP in the year under consideration. During the hearing, the learned Sr. Counsel submitted that there are no express findings, in this year, regarding the provision under which the PE is constituted. It was further submitted that the assessee cannot be said to be taxable under the provisions of Article 5 r/w Article 7 of the India-UK DTAA, since the assessee neither has a fixed place of business in India nor any of its employees stayed in India for more than 90 days.

18. We have considered the rival submissions and perused the material available on record. We have already come to the conclusion that the fee received by the assessee is not in the nature of '*Fees for Technical Services*' under Article 13 of the India-UK DTAA. The said income can be taxable as business profits in India, only if the assessee is found to have a PE in India under the provisions of the India-UK DTAA. As per Article 5 of the India-UK DTAA, PE means a fixed place of business through which the business of an enterprise is wholly or partially carried on and the same includes especially a place of management, a branch, an office, a factory, a workshop, premises used as a sales outlet or for the receiving or soliciting orders, a warehouse, etc. In the present case, neither the Revenue has alleged the existence of the above nor has any material been brought on record to prove the same.

Undisputedly, the assessee is providing legal services to its clients on projects undertaken which are related to matters like mergers, acquisitions, restructuring, financing, etc. Thus, even to constitute a service PE under the provisions of the India-UK DTAA, the assessee has to satisfy the conditions laid down in Article 5(2)(k), which reads as under:-

> *"Article–5: Permanent establishment*
>
> *1. ……*
>
> *2. ……*
>
> *(a) to (j) ……*
>
> *(k)* the furnishing 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:*
>
> > *(i) activities of that nature continue within that State for a period or periods aggregating more than 90 days within any twelve-month period; or*
> >
> > *(ii) services are performed within that State for an enterprise within the meaning of paragraph (1) of Article 10 (Associated enterprises) and continue for a period or periods aggregating more than 30 days within any twelve-month period:"*

19. Clause (ii) of Article 5(2)(k) is relevant only in a case where the services are performed for an associated enterprise, which is not the fact in the present case. For clause (i) of Article 5(2)(k) to be applicable, the activities are required to continue for a period aggregating more than 90 days within any 12 month period. From the perusal of the submission dated 02/12/2016 filed by the assessee before the AO, forming part of the paper book from pages 9-22, we find that employees of the assessee were present in India for rendering services for a period aggregating to only 13 days. This fact was also reiterated by the assessee before the learned DRP. However, the same has not been

controverted. Even in the final assessment order pursuant to the directions issued by the learned DRP, the AO has not denied the aforesaid fact. Therefore, in view of the aforesaid uncontroverted factual position, we are of the considered opinion that the assessee does not have a PE in India under the provision of the India-UK DTAA, during the year under consideration. Since the assessee neither has a PE in India nor the income is found to be in the nature of '*Fee for Technical Services*' under the provisions of the DTAA, therefore, the said income cannot be brought to tax in India, even under the provisions of the Act in view of the provision section 90(2) of the Act. As a result, grounds no.3-5 raised in assessee's appeal are allowed.

20. In view of the aforesaid findings, ground no.6 is rendered academic and therefore is left open.

21. The issue arising in ground no.12-13, raised in assessee's appeal, is pertaining to the taxability of reimbursement of expenses received by the assessee.

22. We have considered the rival submissions and perused the material available on record. As per the assessee, it had invoiced its clients for professional fees and disbursements (being reimbursements for actual expenditure incurred). The total amount invoiced by the assessee towards disbursements was Rs.1,33,099. As per the assessee, the invoices were issued for these amounts for reimbursement of expenses actually incurred on account of travel, and hotel accommodation. During the assessment proceedings, vide its submission dated 02/12/2016, the assessee furnished the statement

showing the breakup of disbursements of Rs.1,33,099.54. However, the AO brings to tax the entire amount of Rs.50,29,148 invoiced by the assessee including the disbursements. From the perusal of the record, it is evident that the Revenue has not disputed the fact that out of the total amount of Rs.50,29,148 invoiced by the assessee, the amount of Rs.1,33,099.54 pertains to the reimbursement of travel and hotel accommodation. On page 23 of the paper book, the assessee has also provided the breakup of this disbursement and the clients from whom the same was charged. Since the disbursements are not in the nature of income and are only reimbursement of actual expenditure incurred by the assessee, therefore same cannot be chargeable to tax. As a result, grounds no.12-13 raised in assessee's appeal are allowed.

23. In view of the aforesaid findings, ground no.14 is rendered academic and therefore is left open.

24. Since the income earned by the assessee is held to be not taxable in India, the issues raised in grounds no.15-16 are rendered academic and therefore are left open.

25. Ground no.17 is pertaining to the initiation of penalty proceedings, which is premature in nature and therefore is dismissed.

26. In the result, the appeal by the assessee is partly allowed.

Order pronounced in the open Court on 11/05/2023

Sd/-	**Sd/-**
G.S. PANNU **PRESIDENT**	**SANDEEP SINGH KARHAIL** **JUDICIAL MEMBER**

MUMBAI, DATED: 11/05/2023

<u>Copy of the order forwarded to</u>:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai