INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI

BEFORE
SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 3994/Del/2017
Asstt. Year: 2014-15

Herbert Smith Free LLP C/O SRBC & ASSOCIATES LLP, GOLF VIEW CORPORATE TOWER-B, SECTOR 42, Gurgaon Haryana Pin 122002 PAN AAFFH0766B	Vs.	DCIT Circle 2(1)(1) New Delhi.
(Appellant)		**(Respondent)**

Assessee by:	Shri Porus Kaka, Sr. Adv. Shri Manoj Sabharwal & Shri Divesh Chawla, Advocate
Department by:	Shri Vizay B. Vasanta, CIT-DR
Date of Hearing:	14.03.2024
Date of pronouncement:	08..04.2024

O R D E R

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order dated 13.04.2017 of the Ld. Commissioner of Income Tax (Appeals)- 43, New Delhi **("CIT(A)")** pertaining to the Assessment Year **("AY")** 2014-15.

2. The assessee has raised the following grounds of appeal:-

"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 22,45,971) 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 CIT(A) erred in not quashing the penalty proceedings initiated by the learned AO under section 271(1)(c) of the Act."*

3. Briefly stated, the assessee, a Non-Resident LLP, is a firm of Solicitors registered in UK and is engaged in providing legal services to its clients worldwide. It provides legal services to clients (both resident as well as non-resident in India) who have utilized its services in business(es) undertaken by these clients in India and/or earning income from a source(es) in India (**"Indian engagements"**). During the AY 2014-15, it did not maintain any office in India and rendered these services through its members and employees, primarily from outside India (with only occasional visits to India).

3.1 The assessee filed its return for AY 2014-15 on 30.09.2014 declaring income of Rs. 1,40,59,840/- and claiming refund of Rs. 8,98,84,270/-. The case was selected for scrutiny. Statutory notices alongwith questionnaire were issued/served. In response, written submissions were filed and examined. The Ld. Assessing Officer **("AO")** found that the assessee has declared its income received from provisions of legal services on Indian engagements at 22,45,971 GBP. During assessment proceedings, the Ld. AO required the assessee to explain the reasons why the assessment for AY 2014-15 be not completed in line with the assessment for AY 2013-14. The assessee submitted its reply dated 13.09.2016, the relevant paras of which the Ld. AO reproduced in para 3.1 of the assessment order. The Ld. AO proceeded to examine the taxability of the aforesaid receipts under the provisions of the Income Tax Act, 1961 **(the "Act")** and the relevant provisions of Double Taxation Avoidance Agreement between India and UK **("India-UK DTAA")**. In para 4.2 of the assessment order the Ld. AO concluded that the whole of the impugned receipts quality as Fee for

Technical Services **("FTS")** as per Explanation 2 to section 9(1)(vii) of the Act as substituted by the Finance Act, 2010 w.e.f. 01.06.1976. Thereafter, the Ld. AO negatived the assessee's claim of its eligibility for benefit of India-UK DTAA for the reason recorded in para 5 of the assessment order. Accordingly, the Ld. AO completed the assessment on 29.09.2016 under section 143(3) of the Act treating the impugned receipt of 22,45,971 GBP equivalent to Rs. 22,09,36,207/- as FTS.

4. Aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A) but without success. The Ld. CIT(A) relying upon his following observation and findings given in assessee's appeal No. 21/2015-16 dated 29.08.2016 pertaining to AY 2012-13 upheld the action of the Ld. AO.

"4.4 In that appeal order, I had noted at paras 4.4 till 4.8 as follows:

"4.4 I find that the AO's case is that the appellant is not eligible for benefit 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 appellant was not a resident of UK. The AO holds 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. Article 4.1 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,"

A Limited Liability Partnership (LLP) is not liable for taxation in UK, in its capacity as 'Limited Liability Partnership'. It is the partners of an LLP, in UK, which are taxable. 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.

The case of a Partnership Firm (which includes a Limited Liability Partnership), is opposite in India. In India, it is the entity ie. the Partnership Firm or 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 or in the LLP.

4.5 The appellant submitted, among other things, at page 6 till page 15 of their write up dated 26.08.2016, as follows:-

"At the outset, it would be important to outline the relevant provisions of the India-UK Tax Treaty, as discussed below:

Article 1 of the India-UK Tax Treaty, provides that the treaty shall apply to a person who is a resident of one or both of the contracting states. Relevant extracts of the same have been reproduced below:

"Article 1: Scope of the Convention

*(1) This Convention shall apply to **persons** who are **residents** of one or both of the Contracting States"*

Article 3 of the India-UK Tax Treaty defines the term 'Person' relevant as follows:

"Article 3: General Definitions

(1) In this Convention, unless the context otherwise requires;

(a).....(e)

(f) the term "person" includes an individual, a company and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States, but, subject to paragraph (2) of this Article, does not include a partnership.

(g) the term "company" means any body corporate or any entity which is treated as a company or body corporate for tax purposes;

(h).....(k)

(2) A partnership which is treated as a taxable unit under the Income-tax Act, 1961 (43 of 1961) of India shall be treated as a person for the purposes of this Convention."

Further, the term 'resident' has been defined under Article 4 of the India-UK Tax Treaty as follows:

"Article 4: Fiscal Domicile

(1) 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.

(2)..."

Accordingly, based on a combined reading of Article 1, Article 3 and Article 4 of the India-UK Tax Treaty, following conditions need to be satisfied for a person to be eligible for the beneficial provisions of India-UK Tax Treaty:

The entity should be covered within the meaning of the term "person", as defined in Article 3 of the India-UK Tax Treaty; and

Such person should qualify as a "resident" under the India-UK Tax Treaty.

HSF qualifies as a 'person' under the India-UK Tax Treaty

During the previous year relevant to the subject AY, the Appellant operated as a Limited Liability Partnership ("LLP") in the UK.

As per Article 3(1)(1) of the India-UK Tax Treaty, the term 'person' is defined to include an individual, a company and any other entity which is treated as a taxable unit under the taxation laws in force in the respective countries. Purther, it specifically excludes partnerships other than a partnership which is treated as a taxable unit under the Act.

Further, Article 3(1)(g) of India-UK Tax Treaty defines the term 'company' in a fairly exhaustive manner to cover the following:

(a) Any body corporate; and

(b) Any entity which is treated as a body corporate for tax purposes.

Therefore, 'any' body corporate created under the law of 'any' country is a 'body corporate' under the India-UK Tax Treaty.

LLPs incorporated in the UK qualify as a body corporate as per the provisions of Limited Liability Partnerships Act, 2000 ("UK LLP Act"), since:

Section 1(2) of the UK LLP Act provides that an LLP is a "body corporate" with personality distinct from that of its members.

Section 2 of the UK LLP Act provides for incorporation of an LLP. A LLP has to be registered with the Registrar of Companies and a Certificate of Incorporation has to be issued.

Further, the features such as independent legal and perpetual existence, separate personality from its members, conduct of business under common seal and in its own name, ownership of the assets of LLP and obligation towards LLP liabilities, etc, under the UK LLP Act, also support the argument that an LLP is a body corporate.

Thus, in accordance with the UK LLP laws, the Appellant, being a LLP incorporated under the UK LLP Act, having a legal personality separate and distinct from that of its members, qualifies as a "person" for the purpose of India-UK Tax Treaty.

Separately, it may be pertinent to highlight that while Article 3(1)(g) of the India-UK Tax Treaty excludes partnerships, Article 3(2) of the India-UK Tax Treaty provides that a partnership which is treated as a taxable unit under the Act shall be treated as a 'person' for the purposes of India-UK Tax Treaty. In case of the Appellant, since the Act itself treats the Appellant (i.e., HSF) as a taxable unit in India, it qualifies as a 'person' under the India-UK Tax Treaty.

<u>HSF qualifies as a 'resident' under the India-UK Tax Treaty</u>

Having concluded that the assessee qualifies as a 'person', it is now relevant to examine whether it would be regarded as a 'resident' under the India-UK Tax Treaty. In this regard, Article 4(1) of the India-UK Tax Treaty provides that 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.

*In the context of taxation of LLPs in the UK, UK domestic tax laws require the LLPs to file their tax return in the UK, and the tax liability of the LLP is merely appropriated against the partners. The same is evident from the tax return form filed by UK LLPs, which has been enclosed as **Annexure** therewith.*

Therefore, it is evident that even under the UK domestic tax laws, LLPs are treated as a taxable unit and appropriation of tax liability amongst the partners is merely a mechanism for levy of tax on the taxable unit, being the LLP.

As per the provisions of Article 4 of the India-UK Tax Treaty, what is relevant is the tax liability in the UK and not necessarily that the tax liability should actually be imposed on or discharged by the same entity. Even the Indian Income Tax Act contemplates situations where tax pass-through is allowed to various entities (including LLPs) established as Alternate investment funds / Business Trusts wherein specified nature of income(s) of such entity are not taxed at entity level, rather at the level of constituents investor/unit holders. One such example is the case of an LLP established in India as an investment fund registered as a Category I or a Category II Alternative Investment Fund and is

regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012, made under the Securities and Exchange Board of India Act, 1992.

This principle has been duly affirmed by the Hon'ble Mumbai Income Tax Appellate Tribunal ("ITAT") in the case of ***Linklaters LLP vs ITO*** *(132 TTJ 20), wherein the Hon'ble ITAT concluded that a UK LLP would be eligible for the benefits under the India-UK Tax Treaty as long as profits of the partnership firms are taxed in the UK, whether in the hands of the partnership firm or in the hands of the partner(s) directly. Towards the same, the Mumbai Income-tax Appellate Tribunal has 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."

The Hon'ble Mumbai ITAT further clarifies that the determining factor is the fact of taxability instead of mode of taxability. The relevant observations of Mumbai ITAT in this regard are quoted as under:

"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." (Emphasis supplied)*

Further, with regard to the distinction in taxability mechanism of a partnership firm, in UK and India, the Mumbai ITAT has held that such distinction in approach cannot impact the residency of an entity. The relevant observations of Mumbai ITAT in this regard are quoted as under:

"The undisputed objective of article 4 is to ascertain fiscal domicile of a person, and the heading of article 4, is 'Fiscal domicile.....in the process of interpreting a statute, one must start from the title and interpret the text of the provision with reference to its title. …… ***Viewed thus, the purpose of article 4 is ascertainment of fiscal domicile of a person, and a fiscal domicile is a factual aspect which cannot oscillate due to peripheral variations in the scheme tax laws of that jurisdiction.*** *It is only elementary that no man can be without a domicile. The same is true for an enterprise, and for a fiscal domicile, as well."*

(Emphasis supplied)

In addition to the above, the Hon'ble Mumbai ITAT in case of ***M/s A.P. Moller us ACIT*** *(TS-155-ITAT-2013) relying on its own decision in the case of Linklaters LLP (supra) concluded that the taxpayer (being a fiscally transparent partnership established under Danish law) is entitled to the benefit of the India-Denmark tax treaty once the income of the partnership is taxed in Denmark, irrespective of the fact that the same is taxed in the hands of the partners. The relevant observations from the ruling are reproduced below:*

"32. Thus, even though the partnership firm is a transparent entity but once its income and profit is taxed in the hands of the partners, the treaty benefit should be extended to the partners. Accordingly, we respectfully following the reasoning and the conclusion drawn by the co-ordinate bench in Linklaters LLP (supra), we hold that the assessee firm is entitled for the treaty benefit and if any such income of the assessee is not liable for tax under the Articles of the treaty, the benefit has to be given. Once the resident State has a right to tax the income of the partnership firm irrespective of the fact that the same is being taxed from the partners, then it is suffice that it has to be treated as fiscal domicile of that State within Article-4."

Accordingly, in light of the above, the taxing of income in the hands of partners is only a mode of recovery of tax an, an LLP shall not cease to be a tax resident due to the same.

In light of the aforesaid, it is submitted that the entity liable to tax and therefore, resident in the UK, is HSF (.e., the Appellant) and as a mechanism of taxation, the income of HSF is taxed in the hands of the partners/ members of HSF UK.

*In the case of **T.D Securities** (2010 TCC 186; Decision dated April 8, 2010), the Tax Court of Canada also had an occasion to deal with the issue of entitlement to tax treaty benefits in case of income earned by a pass-through/transparent entity and, assessed to tax in the hands of its members. The decision dealt with a fiscally transparent entity of the USA and the tax treaty benefit (ie., USA-Canada tax treaty) was granted despite the fact that in the US, the income was assessable in the hands of the members.*

*Further, even the Hon'ble Calcutta High Court in the case of **P & O Nedlloyd Ltd & Ors**. (TS-682-HC-2014-CAL) has held that since section 2(23) of the Act has defined the term 'firm' to have the same meaning as assigned in the Indian Partnership Act, 1932, it could be concluded that the UK partnership firms are firms as per the Act and therefore a 'person' for the purpose of the Act. Accordingly, UK partnership firms can be brought to tax in India as per the Act, qualify as a person under Article 3 of the India-UK Tax Treaty and are eligible for tax treaty benefit.*

The relevant observations from the decision are reproduced below for your reference:

"The effect of the relevant provisions of the India-UK Treaty as reproduced above is the convention applies to persons who are residents of one or both of the Contracting States by operation of clauses 1(f) and 2 of Article 3 of the convention. It is found the said partnership, partners of which are registered in the UK, is not a person treated as a taxable unit under the taxation laws in force in the UK. Under section 2(31) (iv) of the Income Tax Act, 1961, person includes a firm. Under section 2(23)(i) thereof a firm shall have the meaning assigned to it in the Indian Partnership Act, 1932 and shall include a limited liability partnership as defined in the Limited Liability Partnership Act, 2008. The provisions of the Indian Partnership Act, 1932, in particular sections 4 and 69 when applied for the purpose of determining whether the said partnership is a firm within the meaning of the said Act, leads this court to conclude in the affirmative. That obviates the necessity of applicability of the provisions of the Limited Liability Partnership Act, 2008. Once it is found the said partnership is a firm under section 2(23)(i) of the Income Tax Act, 1961, it becomes a person under section 2(31)(iv) of the said Act, attracting the operation of paragraph 2 of Article 3 of the said convention.

*Such conclusion is inescapable as the Revenue must bring a charge On income tax against a person under section 4 of the Income Tax Act, 1961. The Revenue in treating the said partnership as an assessee and seeking to assess income of it which had escaped assessment is for the purpose of charging tax on the income of the said partnership, treating it as a person liable to be charged with the levy of income tax under the said section. In doing so the revenue has to treat the said partnership as a person within the definition provided of person under section 2(31)(iv) of the said Act. **Thus the Revenue's case the said partnership is not covered by the said convention fails. In as much as in the facts and circumstances aforesaid it would be unjust to compel the said partnership or the petitioners to submit themselves to the assessment sought by the impugned notice, the writ petition succeeds.** The impugned notice dated 25th March 2004 issued under section 148 of the Income Tax Act, 1961 to P&O Nedlloyd (partnership) is set aside and quashed. There will, however, be no order as to costs." (Emphasis supplied)*

Accordingly, in view of the aforesaid, and given the taxation principles that have been affirmed by various judicial precedents (as cited supra), it is submitted that the Appellant is eligible to avail the

beneficial provisions of the India-UK Tax Treaty, since the Appellant qualifies as a 'person' 'resident' in the UK, under the India-UK Tax Treaty. ***In fact, the Appellant's tax residency status and thereby its eligibility to avail the provisions of the India-UK Tax Treaty is duly supported by the Tax Residency Certificate ("TRC") issued by the UK HMRC."***

4.6 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 a 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.

The pre-protocol Article 4 of India-UK DTAA reads as follows:-

"1. 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.

2. Where by reason of the provisions of paragraph 1 of this Article an individual is a resident of both Contracting States, then his status shall be determined in accordance with the following rules:

(a)	*he shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (centre of vital interests);*
(b)	*if the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;*
(c)	*if he has an habitual abode in both Contracting States or in either of them, he shall be deemed to be a resident of the Contracting State of which he is a national;*
(d)	*if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.*

3. Where by reason of the provisions of paragraph 1 of this Article a person other than on individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated."

The post-protocol (e. Amended) Article 4 of India-UK DTAA as follows:

"1. For the purposes of this Convention, the term resident of a Contracting State means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of

management, place of incorporation, or any other criterion of a similar nature, provided, however, that:

(a)	*this term does not include any person who is liable to tax in that State in respect only of income from sources in that State, and*
(b)	*in the case of income derived or paid by a partnership, estate, or trust, this term applies only to the extent that the income derived by such partnerships, 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. Where by reason of the provisions of paragraph 1 of this Article an individual is a resident of both Contracting States, then his status shall be determined in accordance with the following rules:

(a)	*he shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him. If he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (centre of vital interests):*
(b)	*if the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode,*
(c)	*if he has an habitual abode in both Contracting States or in either of them, he shall be deemed to be a resident of the Contracting State of which he is a national;*
(d)	*if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.*

3. Where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated"

4.7 The effect of the protocol is that it modifies Article 4 of the India-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. It is therefore, clear that this benefit is available to a UK entity (in this case the fiscally transparent LLP as is the appellant), only after the amendments consequent to Protocol coming into force. The protocol was concluded on 30.10.2012 and its entry into force was 27.12.2013.

I note 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 for even clarificatory). The amendments introduced by the Protocol are clearly prospective. 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 not have been allowed Treaty benefit by UK Tax Authorities.

The benefit of Treaty as claimed by the appellant is thus, not available to it as it refers to a period prior to the Protocol coming into force.

4.8 In light of the above analysis, I uphold the action of the AO. Ground nos. 2 till 5 are decided against the appellant."

4.5 1 find that the protocol as referred above came into force with effect from 27.12.2013, and was to be acted upon with effect from 01.04.2014.

Accordingly, basing myself upon my own adjudication in appellant's own case in appeal for AY 2012-13, as detailed above, ground nos. 2 and 3 are adjudicated against the appellant."

5. Dissatisfied, the assessee is in appeal before the Tribunal and ground No. 1 to 3 relate thereto.

6. The Ld. AR submitted that against the Ld. CIT(A)'s order for AY 2012-13 and 2013-14 on the same issue, the assessee had gone in appeal before the ITAT. The appeals of the assessee have since been decided. The order of the ITAT has been reported as (2023) 146 taxmann.com 173 (Delhi-Trib)/(2023) 198 ITD 633 (Delhi-Trib) wherein it is held that the assessee LLP, tax resident of UK provided legal services to its clients worldwide. It was entitled to benefit of Article 4(1) of India-UK DTAA on portion of its income from Indian engagements which had been taxed in UK in hands of its UK tax resident partner.

7. The Ld. CIT-DR supported the orders of the Ld. AO/CIT(A).

8. We have heard the Ld. Representative of the parties and perused the records. It is not in dispute that the facts of the case under consideration remain identical to those of AY(s) 2012-13 and 2013-14 wherein the ITAT

decided appeals of the assessee for both the above AY(s) in its favour. The observation and findings of the ITAT are reproduced hereunder:-

"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) Dy. DIT (IT) v. A. P Moller [2013] 39 taxmann.com 27/{2014] 67 SOT 147 (URO)/158 TTJ 537 (Mum.) (Page 197 of the Paperbook)

(ii) P & O Nedlloyd Ltd & Ors vs Asstt. DIT-IT [2014] 52 taxmann.com 468/[2015] 228 Taxman 90/[2014] 369 ITR 282 (Cal.)(Page 190 of the Paperbook)

(iii) Maersk Line U.K. Ltd vs Dy. DIT [2016] 68 taxmann.com 173 (Cal.) (Page 237 of the Paperbook)

(iv) T D Securities (USA) LLC v. The Queen 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 2019 (111 taxmann.com 198(Mum.) 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 CIT(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 Azadi Bachao Andolan (supra).*

13.3 *She further referred to the decision of K.P. Varghese vs. ITO [1981]7 Taxman 13/131 ITR 597 (SC) 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 ITA No.5760/Del./2016 ITA No.3993/Del./2017 14 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."

9. Respectfully following the decision (supra) of the ITAT, we decide ground No. 1 to 3 of the assessee in its favour.

10. Ground No. 4 regarding penalty under section 271(1)(c) of the Act cannot be considered in quantum appeal. It is a matter to be considered in separate penalty proceedings.

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

Order pronounced in the open court on 8th April, 2024.

sd/-	**sd/-**
(G.S. PANNU)	**(ASTHA CHANDRA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 08/04/2024
Veena

Copy forwarded to -
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	