No penalty on Foreign Co. due to false claim of not having any Indian PE when existence of PE was debatable

Summary – The Mumbai ITAT in a recent case of Linklaters., (the Assessee) held that where penalty proceeding was initiated on ground that assessee had made a false claim that it had no PE in India, but records showed that assessee had specifically disclosed details of partners and employees who visited India as also income from Indian operations in return, initiation of penalty was unjustified

Facts

- The assessee a U.K. based company, was engaged in rendering legal services to various clients having projects in India.
- The Assessing Officer held that the assessee had a 'Permanent Establishment' in India, under article 5(2)(k) of the India-UK DTAA and that the services rendered in India and abroad, as regards the projects in India, were liable to tax in India and, thus, assessed the income of the assessee.
- The Commissioner (Appeals) concluded that the assessee had a 'PE' in India; however only that part of the fees which was related to the services rendered by the assessee in India could be attributed to the 'PE'.
- The Tribunal dismissed the appeal of the assessee and confirmed the existence of a 'PE' under article 5(2)(k).
- Thereafter, the Assessing Officer observed that the assessee was at all times aware about the number of partners and staff members who visited India, as well as the time spent by them in India, and as such was very much aware that the threshold limit of 90 days contemplated under article 5(2)(*k*) stood breached and that the 'PE' under article 5(2)(*k*) was in existence. The Assessing Officer, thus, concluded that the assessee had furnished inaccurate particulars of income and concealed the particulars of its income, and imposed penalty under section 271(1)(*c*).
- The Commissioner (Appeals) deleted the penalty.
- On appeal:

Held

- There is considerable force in the claim of the assessee that the issues involved in the case were highly debatable and have not attained clarity even till date, which could be gathered from the very fact that a reference to the 'Special Bench' is pending on the said issue. The issue as to whether the assessee had a PE in India, or not, being debatable, the assessee remaining under a *bona fide* belief that professional services of the nature rendered by the assessee were not covered by the provisions of article 5(2)(*k*) had claimed that no 'PE' was in existence in India. Alternatively, even if it was to be held that the assessee had a PE in India, there still remained a considerable debate on the scope of income that could be attributed to such 'PE'. It is found that the assessee had made full

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disclosure of facts in the statement of income filed alongwith its 'return of income', and the claim that it did not have a 'PE' in India was made after disclosing all the relevant facts. The assessee had specifically disclosed that the partners and employees of the assessee had visited India and performed services in India. The assessee had computed the income and expenditure pertaining to its Indian activities, and had duly reflected an income in respect of such Indian activities, against which after taking into account expenditures attributable to the same, the assessee had reflected an income of Rs. 4,68,419 from its Indian operations. In the backdrop of the aforesaid facts it can safely be concluded that the assessee after disclosing all the relevant facts, *i.e.*, the fact that the partners and employees had visited India, rendered services in India, as well as the approximate value of the income from such services, is to the best of his understanding, therein remaining under a *bona fide* belief, had raised a legal claim that it did not have a 'PE' in India.

- The main controversy between the revenue and assessee which had travelled up to the Tribunal was on the issue of attribution of income, while for in the present case the assessee had on its own given calculation of the income which was attributable to the 'PE' in India in its return of income. On a conjoint appreciation of the aforesaid facts, it can safely be concluded that as it is a case where the assessee had made a legal claim after disclosing all the relevant particulars, the case of the assessee, as canvassed by the assessee before is squarely covered by the judgment of the Supreme Court in the case of *CIT* v. *Reliance Petroproducts (P.) Ltd.* [2010] 322 ITR 158/189 Taxman 322 wherein it was held that where the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part, it was up to the authorities to accept its claim in the return or not. In the backdrop of the facts of the present case the Tribunal is persuaded to subscribe to the view arrived at by the Commissioner (Appeals), who had rightly vacated the penalty imposed by the Assessing Officer under section 271(1)(*c*) in the hands of the assessee. Thus, no reason is found to take a different view as against that arrived at by the Commissioner (Appeals) and, thus, the order is upheld and the appeal of the revenue is dismissed.

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