Legal advisory service fee received by partnership firm couldn't be taxed under article 15 of India-UK DTAA

Summary – The Mumbai ITAT in a recent case of Linklaters LLP., (the Assessee) held that where assessee, a Limited Liability Partnership incorporated under Laws of United Kingdom (UK), provided legal advisory services to its clients worldwide including India, since by rendering those services, assessee did not 'make available' any technical knowledge, know-how or experience to its clients, amount received by it was not taxable in India as fee for technical services

Since article 15 of India-UK DTAA applies to determine taxable income in hands of individual and not other persons, assessee being a partnership firm, impugned amount of fee received by assessee for rendering legal advisory services was not taxable in India

Where assessee received certain amount as reimbursement of expenses, since said expenses were of routine nature and, moreover, there was no mark up involved therein, amount in question could not be brought to tax as assessee's income

Facts

- The assessee was a limited liability partnership firm and was a tax resident of United Kingdom. It offered legal consultancy through its clients all over the world including India. In its return of income, assessee offered certain amount to tax as income attributable to work performed in India by Permanent Establishment (PE) of assessee in India which was created on account of its personnel (employees and other executives) staying in India for more than 90 days.
- The Assessing Officer after verifying the return of income and other information called for, found that in the relevant previous year the assessee had provided legal services to various clients and the work relating to such services was partly performed in India and partly outside India.
- The Assessing Officer observed that the income received by the assessee was in the nature of fees for technical services (FTS) as per section 9(1)(*vii*) and the assessee was not entitled to the benefit of India-UK DTAA.
- The DRP rejected the objections of the assessee and directed the Assessing Officer to finalize the assessment.
- On appeal:

Held

Legal Advisory Services v. FTS

- 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*) as well as under the DTAA. However, the Tribunal, while

deciding the issue of applicability of India-UK DTAA to the assessee in assessee's own case for assessment year 2011-12, has held that assessee is eligible for the benefits of India-UK DTAA so long as entire profits of the partnership firm are taxed in UK, whether in the taxable income is determined in relation to personal characteristics of the partners or in the hands of the firm directly. In the year, there was no dispute on facts that ultimately tax has been paid either by the said firm or by its partners in UK.

- Thus, in view of the aforesaid decision of the Tribunal in assessee's own case, it was held that the assessee is entitled to claim benefit under India-UK DTAA. Tribunal in the order has ultimately concluded that the income of the assessee would not fall in the category of 'Fee for Technical Services' as envisaged in article 13. 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, in view of section 90(2).
- The income received by the assessee not being in the nature of FTS as envisaged under article 13 cannot be brought to tax by applying the provisions of section 9(1)(vii), since the assessee is entitled to claim the benefit of India-UK DTAA.

Permanent Establishment

- The Assessing Officer while framing the draft assessment order held that, since the assessee through its employees or other personnel has rendered services in India for a period aggregating more than 90 days within the period beginning from 1-4-2011 to 31-1-2012, it has to be considered that it has PE in India.
- The Assessing Officer referring to article 5(2)(*k*)(*i*) has concluded that the assessee had a PE in India, since its employees or personnel have rendered services in India for a period of 90 days or more within any 12 month period. Notably, the expression 'any 12 month period' as used in article 5(2)(*k*)(*i*) has not been defined anywhere in the DTAA. Section 5 which defines scope of total income refers to the total income of any previous year of a person who is a resident. Similarly, section 6 postulates that an individual or a HUF or a company or any other person can be considered to be a resident in India in any previous year if it satisfies the condition mentioned therein. Thus, for the purpose of being considered as a resident in India, a reference has been made to the previous year. Section 4, which is the charging section, mandates that a person shall be charged to income tax in respect of the total income of the previous year. The expression 'previous year' has been defined under section 3 to mean the financial year immediately preceding the assessment year. Thus, as per the provisions of domestic law, the 12 month period would mean the previous year or the financial year which is the unit for which the income of a person is taxable. If the provisions of article 5(2)(*k*)(*i*) is read harmoniously with the provisions of the Act it will be fair and reasonable to conclude that the expression 'any 12 month period' mentioned in article 5(2)(*k*)(*i*). DTAA has to be construed to mean the previous year or financial year as per section 3 since, the income is sought to be taxed in India. Therefore, it has to be seen whether the employees or personnel of the assessee have rendered services in India for a period aggregating to 90 days or more in financial year 2011-12

to constitute a PE. As per the chart submitted by the assessee it is claimed that the employees and personnel of the assessee were situated in India for rendering services for a period aggregating to 77 days. Since, the aforesaid factual aspect has not been verified by the departmental authorities as the assessee did not raise this issue before them, the issue is restored to the Assessing Officer for adjudication.

Taxability under article 15

- While deciding identical issue in assessee's own case the Tribunal held that article 15 shall be applicable for determining taxable income in the hands of individual and not other persons. The assessee is certainly not an individual. Thus this article cannot be made applicable on the assessee being not an individual. Thus, the impugned amount of fee received by the assessee would not be liable to be taxed under article 15.
- Facts being identical, respectfully following the aforesaid decision of Tribunal, the income received by the assessee will not be taxable under article 15.