IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

M.A. no.513/Mum./2019
(Arising out of ITA no.969/Mum./2017)
(Assessment Year : 2013–14)

Link Laters LLP, Tower–3
27–32, India Bulls Finance Centre
Elphinstone Mill Compound .... Appellant
Senapati Bapat Marg, Elphinstone (W)
Mumbai 400 013 PAN – AABCL5182G

v/s

Dy. Commissioner of Income Tax
International Transaction .... Respondent
Circle–3(1)(2), Mumbai

Assessee by	:	Shri Soli E. Dastur a/w Shri Niraj Seth
Revenue by	:	Shri Michael Jerald

Date of Hearing – 29.11.2019	Date of Order – 14.02.2020

O R D E R

PER SAKTIJIT DEY. J.M.

By way of this application, the assessee seeks rectification of the order dated 21st June 2019, passed in ITA no.969/Mum./2017.

2. Shri S.E. Dastur, leaned Sr. Counsel for the assessee submitted, while deciding ground no.2 raised by the assessee relating to existence of Permanent Establishment (PE) in India, the Tribunal following its

decision in assessee's own case for the assessment year 2012–13 has restored the issue to the Assessing Officer to verify assessee's claim that the employees of the assessee have rendered service in India for a period less than 90 days in the relevant previous year. The learned Sr. Counsel submitted, in course of assessment proceedings, in response to the query raised by the Assessing Officer, the assessee had furnished the details of employees / personnel who have rendered services in India during the previous year and the number of days for which they have rendered services in India is 42 days, hence, less than 90 days. Therefore, as per Article–5(2)(k)(i) of the India–U.K. Tax Treaty, there is no PE in India. He submitted, the aforesaid factual position has been accepted by the Assessing Officer as well as the DRP and also accepted by the Departmental Representative in his submissions. He submitted, when the facts relating to the stay of assessee's employees / personnel in India are available on record and already been examined, there is no need for further verification by the Assessing Officer. Thus, it has been submitted that instead of restoring the issue, the Tribunal should have decided the issue finally by allowing assessee's claim. Having not done so, the Tribunal made a mistake in restoring the issue to the Assessing Officer for verifying the assessee's claim. In support of his contention, he relied upon the decision of the Tribunal in LinkLaters LLP v/s DCIT, MA no.238/Mum./2019, dated 12th March 2018.

3. The learned Departmental Representative strongly opposing the contentions raised on behalf of the assessee submitted, the Tribunal having considered all material facts, since, has taken a conscious decision to restore the issue to the Assessing Officer for factual verification, no mistake can be found in the said decision of the Tribunal. He submitted, in the garb of rectification the assessee actually wants review of the order passed by the Tribunal. Therefore, he submitted, the application filed by the assessee being devoid of merit should be dismissed.

4. We have considered rival submissions and perused the material on record. The issue arising for consideration before the Tribunal was, whether in the year under consideration the assessee had a PE in India? It is the contention of the assessee that during the relevant previous year, assessee's employees / personnel were in India for rendering services for a period of less than 90 days, to be precise, 42 days. It is the further contention of the assessee that the aforesaid factual position has been accepted by the Assessing Officer and learned DRP. However, on a perusal of record we find that though during the assessment proceedings the assessee had made submissions that in the relevant previous year, its employees / personnel were in India for rendering services for a period of 42 days, hence, there is no PE as per Article–5(2)(k)(i) of the India–U.K. Tax

Treaty, however, the Assessing Officer apparently has not accepted the aforesaid contention of the assessee. Had the Assessing Officer accepted the aforesaid claim of the assessee, then he would not have concluded that in the year under consideration, the assessee had a fixed place PE in India. This is very much evident from the concluding part of the assessment order. Even, a perusal of the order passed by learned DRP would reveal that except relying upon their own decision in the assessment year 2012–13 in assessee's own case, learned DRP has not given any independent finding of their own either on the issue of existence of PE or any other issue. Suffice to say, neither the Assessing Officer nor learned DRP have given any factual finding on the assessee's claim that during the previous year relevant to the assessment year under dispute, employees / personnel of the assessee were in India for only 42 days and not more than 90 days. While deciding assessee's ground raised on the issue of existence of PE, the Tribunal following its decision in assessee's own case for the assessment year 2012–13 has accepted in principle that the expression *"any 12 month period"* as mentioned in Article–5(2)(k)(i) of the India–U.K. Tax Treaty would mean the previous year or financial year as per section 3 of the Act. Finding that assessee's claim regarding stay of its employees / personnel in India for rendering services for an aggregate period of 42 days has not been factually verified either by the Assessing Officer or by learned DRP, the Tribunal while allowing the ground raised by the assessee has issued a direction to the Assessing Officer to factually verify assessee's claim regarding stay of its employees / personnel in India for an aggregate period of 42 days during the previous year relevant to the assessment year under dispute. In our considered opinion, there cannot be any mistake in the aforesaid direction of the Tribunal as assessee's claim, though, was made before the Revenue authorities, however, neither the Assessing Officer nor learned DRP has recorded any factual finding regarding the aforesaid claim of the assessee. In the aforesaid factual position, it becomes imperative to factually verify assessee's claim regarding the stay of its employees / personnel in India. In case, assessee's claim regarding stay of its employees / personnel in India is found to be correct, then it has to be held that during the year under consideration, the assessee did not have any PE in India. Considered in the aforesaid perspective, we do not find any mistake, much less, a mistake apparent on the face of record as envisaged under section 254(2) of the Act. What the assessee wants by filing this application is a decision from the Tribunal in a particular manner and to its own liking. This cannot be the intent and purpose of section 254(2) of the Act which is only for rectifying mistake apparent on the face of record. In the facts of the present case, the Tribunal after considering all relevant facts has taken a conscious decision of directing the Assessing Officer to verify assessee's claim regarding stay of employees /

personnel in India for rendering service during the previous year relevant to the assessment year under dispute. That being the case, there is no mistake in the decision of the Tribunal. As regards the decision of Tribunal, Mumbai Bench, in case of LinkLaters LLP (supra) cited by the leaned Sr. Counsel for the assessee, on careful reading we found it to be not applicable to the facts of the present case, as it has been decided on the basis of its own peculiar facts. The Tribunal has recorded a finding of fact that the details of income attributable to services rendered in India and outside India were furnished before the Assessing Officer and the Assessing Officer has found them to be in order. However, in the facts of the present case, there is no finding by the Assessing Officer regarding assessee's claim that its employees / personnel stayed in India for rendering services for a period of 42 days. Therefore, we do not find merit in the present application filed by the assessee.

5. In the result, misc. application is dismissed.

Order pronounced in the open Court on 14.02.2020

Sd/-	**Sd/-**
RAJESH KUMAR	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 14.02.2020

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

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai