

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 1540/DEL/2014
[A.Y 2004-05]
&
SA No. 187/DEL/2014

J.C. Bamford Excavators Ltd
Rocester, Uttoxeter ST 145 JP
Staffordshire, England

Vs. The D.D.I.T
Circle [1] -
International Taxation
New Delhi

PAN : AACCCJ 0726 B

[Appellant]

[Respondent]

Date of Hearing : **09.07.2018**
Date of Pronouncement : **18.07.2018**

Assessee by : Shri G.C. Srivastav, Adv
Shri Daksh S. Bhardwaj, Adv
Shri Anubhav Jain, Adv

Revenue by : Shri G.K. Dhall, CIT- DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

With this appeal, the assessee has challenged the correctness of the order dated 30.01.2014 framed u/s 143(3) r.w.s 144C(5) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'].

2. The grievances of the assessee can be summarised as under:
- 1) The DRP/Assessing Officer has erred in holding that the assessee has a service Permanent Establishment [PE] in India within the meaning of Article 5 of the India UK Double Taxation Avoidance Agreement [DTAA];
 - 2) The DRP/Assessing Officer has erred in holding royalty is effectively connected to the alleged service PE of the assessee in India;
 - 3) The DRP/Assessing Officer has erred in holding that the receipts on account of central costs recharges and structural tests by the assessee is on account of fees for technical services [FTS] and, therefore, covered under Article 13 of India-UK-DTAA;
 - 4) The DRP/Assessing Officer has erred in holding reimbursement towards salary cost and expenses by service PE JCB India to assessee on account of employees seconded by the assessee to JCB India in pursuance to IPAA Agreement is taxable as fees for technical services;
 - 5) The DRP/Assessing Officer has erred in applying arbitrary computation mechanism u/r 10 of the Income tax Rules, 1962 for determining chargeability of income

alleged to be covered under the provisions of Article 7 of the DTAA between India and UK; &

- 6) The DRP/Assessing Officer has erred in levying interest u/s 234B of the Act.

3. The representatives of both the sides were heard at length. The case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. Judicial decisions relied upon were carefully perused.

4. It is imperative to understand the facts of the case in hand. M/s JCB Bamford Excavators Ltd ['JCBE' the appellant for short] is a company incorporated under the laws of UK. It is a non-resident company for the purposes of Indian Tax Laws and is a tax resident of UK under Article 4 of the DTAA entered into between India and UK. On 5.03.2004, JCBE entered into Technology Transfer Agreement [TTA] with JCB India to licence the know-how and related technical documents consisting of all drawings and designs with an exclusive right to manufacture and market the technology/excavator loader in the territory of India under the brand name '3DX'.

5. In the earlier years, as per the terms of TTA dated 5.3.2004, JCBE used to receive royalty from JCB India. On 17.12.2007, JCB Investments [another group company] entered into an Intellectual Property Agreement, pursuant to which the head licence under its Intellectual Property Agreement to manufacture and market 3DX was sub-licenced by JCBE to JCB Investments in consideration of payment of royalty by JCB Investment to JCBE.

6. As mentioned elsewhere, the appellant used to receive royalty from JCB India. However, after agreement dated 17.12.2007, the royalty is first paid by JCB India to JCB Investments, which, in turn, pays to JCBE in full less 0.5%. Effectively, this means that the royalty ultimately reaches JCBE but through JCB Investments. In the earlier assessment years, i.e. 2006-07 and 2007-08, it was held by the AO in the case of the appellant that the secondment of employees by JCBE to JCB India resulted into establishment of a PE or a Service PE of the assessee. The AO further held in those years that the payment of royalty made by JCB India to JCBE in respect of the rights granted by the assessee to JCB India under TPA is effectively connected with Service PE of the assessee in India.

7. In so far as holding JCB India as a Service PE of the assessee is concerned, this action of the AO was upheld by the Tribunal. However, in the same order, the Tribunal held that there is no effective connection of income with Service PE.

8. The ld. AR vehemently stated that the facts of the year under consideration are different from the facts of A.Ys 2006-07 and 2007-08. It was the say of the ld. counsel that since the facts are clearly distinguishable, the findings given by the Tribunal in A.Y 2006-07 in so far as holding JCB India, as Service PE of the assessee is not to be considered.

9. We will first address to this contention of the ld. AR. As mentioned elsewhere, in earlier years, the appellant had licence to know-how and related technical documents consisting of all drawings and designs with an exclusive right to manufacture and market the technology/excavator loader in the territory of India under the brand name 3DX to JCB India. During the year under consideration, we find that pursuant to the agreement dated 17.12.2007, which is a Tripartite Agreement between JCBE, JCB India and JCB Investments, the royalty paid by JCB India to the assessee was routed through JCB Investments.

In our considered opinion, the only difference that came into the hitherto arrangement was that, whereas earlier JCB India was paying royalty directly to JCBE, now it is being routed through the assessee with the deduction of 0.05%. Except for this, all the terms and conditions of the agreement between the assessee and JCB India are same relating to TTA and IPAA which means that employees of JCBE earlier seconded to JCB India continue to render services to JCB India during the year under consideration in the same way as they were doing in the past. Our view is fortified by clause (d) of the new agreement and clause 4.2 of this agreement clarifies that the delivery of technical documentation and making available of technical personnel as set out in earlier clauses (iii) & (iv) of the technology agreement shall remain unaffected by this agreement and shall continue as rights and obligations between JCBE and JCB India under technology agreement.

10. In earlier A.Ys, when there was a bilateral agreement in force between the assessee and JCB India on same set of facts and circumstances, the Tribunal in ITA No. 540/DEL/2011 and CO No. 73/DEL/2011 has conclusively held as under:

"It is thus seen that all the requisite conditions for attracting the mandate of Art.5(2)(k)(i) stand satisfied inasmuch as i. there is furnishing of services including managerial services; ii. such services are other than those taxable under Article 13 (Royalties and fees for technical services) ; iii. such services are rendered within India ; iv. such services are rendered by the assessee through its employees ; and v. such activities continued for a period of more than ninety days within twelvemonths period. Ex consequenti, we hold that JCB India constituted a service P.E of the assessee in India. The impugned order on this score is set aside and the view taken by the AO is restored."

11. As mentioned elsewhere, except for routing the royalty payment through JCB Investments, the assessee has received everything as per bilateral agreement existing in earlier years minus 0.05%. Therefore, we do not find any distinguishing fact as contended by the ld. AR. Respectfully following the findings of the coordinate bench [supra] we hold that JCB India a Service PE of the assessee. Ground No. 1 with its sub-grounds is dismissed.

12. Second issue raised by the assessee is that the royalty is not effectively connected to the alleged Service PE of the assessee.

13. As mentioned elsewhere in the earlier years, this issue arose when JCB India [Service PE] used to make payment directly to assessee and the Tribunal vide its order in ITA No. 540/DEL/2011 and CO No. 73/DEL/2011 has held as under:

"Insofar as the question of royalty representing consideration for the transfer of IP Rights simplicitor is concerned, it is clear that the service PE representing eight deputationists had absolutely no role to play either in creating or making it available to JCB India. It is not even the case of the A.O that these eight deputationists had anything to do in the grant of IP Rights to JCB India. The service PE, as the very name suggests and the actual position indicates, is concerned only with the activities of rendering services after the grant of IP Rights. The Id. DR was also fair enough to candidly accept this position. Thus, it follows that albeit the amount of royalty received by the assessee arises out of IP Rights which are in the nature of right or property but the same cannot be considered under para 6 of Article 13 because it is not effectively connected with the service PE of the assessee in India."

14. Since there is no difference in the facts and circumstances of the royalty payment, we do not find any reason to differ from what has been held by the Coordinate Bench [supra]. Respectfully following the same, we hold that royalty received by the assessee cannot be

considered under Para 6 of Article 13 because it is not effectively connected with Service PE of the assessee in India.

15. Third issue relates to receipts on account of central costs recharges and structural tests.

16. During the year under consideration, the assessee had three streams of receipts. Under the first stream the assessee has shown receipts at Rs. 2,64,70,179/- which was stated to be in the nature of FTS. The bifurcation of the same is as under:

SN	Particulars	Amount in INR
1.	Central costs MIS & SAP	2,04,56,359/-
2.	Central cost CAD Station Recharge	33,08,924/-
3.	Structural tests	27,04,896/-
	Total	2,64,70,179/-

17. The assessee explained that SAP and CAD station recharge includes salary cost of the assessee's employees and other related overheads for providing online SAP software related support and for providing CAD software support to JCB India. MIS includes certain I.T. costs and other related costs. Although the assessee had stated that these receipts were in the nature of FTS but were claimed that since

such services were not made available as per Article 13(4) of the treaty, the same should not be taxable in India.

18. It is strongly contended that necessary condition of make available for holding the said receipts as FTS within the meaning of Article 13 of the DTAA entered between India and UK is not satisfied. For this proposition, strong reliance has been placed on the judgment of the Hon'ble Delhi High Court in the case of Guy Carpenter & Co. Ltd., Hon'ble Karnataka High Court in the case of CIT Vs. De Beers India Minerals [P] Ltd '346 ITR 467, Delhi Bench of the Tribunal in the case of Romer Labs Singapore Pte Ltd, Pune Bench of ITAT in the case of Sandvik Australia Pvt. Ltd and Kolkata Bench of the ITAT in the case of Outotee Oyj

19. We have carefully considered the judicial decisions relied upon by the ld. Counsel qua the issue. The facts of the case in hand are different from the facts considered by the Hon'ble High Court and coordinate benches. A perusal of the bilateral agreement and tripartite agreement shows that royalty shall be equal to the royalty received by JCB Investments from JCB India under the licence and from any other permitted sub-licencee of JCB Investments less 0.5%. It can be seen

that the entire royalty amount is passed on to JCBE through JCB Investments less 0.5%. We have no hesitation to hold that JCB Investments is nothing but a pass through entity.

20. A perusal of the agreements clearly and explicitly lead out that the delivery of technical documentation and making available of technical personnel as set out in clause (iii) and (iv) of the TTA shall remain unaffected by this agreement and shall continue as rights and obligations between JCBE and JCB India.

21. Since the impugned receipts are ancillary and subsidiary to the application or enjoyment of the right, property or information for which the royalty payments were received by the assessee, in our considered opinion such receipts would fall under sub-clause (a) and Article 13(4) and would be taxable as FTS. On peculiar facts of the case, we further find that sub-clause (c) of Article 13(4) which entails 'make available' clause would, therefore, not be applicable.

22. At this stage, let us first consider the relevant part of Article 5 of the India-UK DTAA clause (k) and the same reads as under:

“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”.

23. The assessee has already accepted that the receipts are FTS under domestic laws, therefore, the only issue which remains for determination is as to whether these receipts are FTS under Article 13(4) of the treaty or not. Under Article 13 the term ‘Royalty’ means:

“(a) payments of any kind received as consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematographic films or films and tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience.

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

4. For the purposes of paragraph 2 of this Article, and subject to paragraph 5 of this Article, the term "fees for technical services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including the provision of services of technical or other personnel) which:

(a) *are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3(a) of this Article is received : or*

(b) *are ancillary and subsidiary to the enjoyment of the property for which a payment described in paragraph 3(b) of this Article is received; or*

(c) *make available technical knowledge, experience, skill, knowhow or processes, or consist of the development and transfer of a technical plan or technical design." (emphasis supplied)*

24. A perusal of the above shows that any payment to qualify as FTS under the treaty:

(i) the service needs to be technical or consultancy in nature and are ancillary and subsidiary to the application or enjoyment of the right, property and information for which the payment described in para 3(a) i.e. royalty is received, or

(ii) services need to make available technical knowledge, experience, skill know-how process, or consists of the development and transfer of a technical plan or technical design.

25. In the light of the above, it would be preferable to go through the contents of agreement dated 17.12.2007 [Tripartite Agreement]:

"Page 1, Clause (C):

Under a Technology Transfer Agreement dated 5 March 2004 (the "Technology Agreement") JCB UK granted to JCB India an exclusive license under JCB UK's intellectual property to manufacture, assemble and sell licensed products (as defined in the Technology Agreement) in India and a non-exclusive licence under JCB UK's intellectual property to sell the Licensed Products outside India as determined by mutual written agreement between the parties.

(D) *JCB UK now wishes for JCB investments to manage the licensing of JCB UK's intellectual property to JCB India going forward.*

.... "PAYMENT TERMS

6.1 JCB Investments shall provide JCB UK on a biannual basis within 30 days of the 30th June and 31st December in each year with Royalty accounts showing the following for each preceding half year:

6.1.1 The royalty payable by JCB India under the License (or by and other permitted sub-licensee where applicable); and

6.1.2. The amount of any withholding tax to be paid under Clause 6.3.

6.2 *The Royalty shall be payable within thirty (30) days of receipt by JCB Investments of relevant royalty payments from JCB India under the License (or from any other permitted sub-licensee where applicable).*

7. 3 JCB Investment shall not:

7.3.1 Make any representation or do and act, save as expressly granted in this Agreement, *which may be taken to indicate that it has any right, title or interest in or to any IP Rights...*

... "Schedule

THE ROYALTY

The Royalty shall be equal to the royalty received by JCB Investments from JCB India under the License (and from any other permitted sub-licensee of JCB Investments where relevant), less 0.5% (half of one percent)."

26. As mentioned elsewhere and as it can be seen from above, the entire royalty amount is passed on to JCBE [the appellant] through JCB Investment less 0.05%. It is has already been mentioned conclusively elsewhere that the delivery of technical documentation and making available of technical personnel as set out in clause (iii) and (iv) of the TTA dated 05.03.2004 will remain unaffected by this tripartite agreement and rights and obligations between JCB UK and JCB India will continue.

27. The disputed receipts are in relation to the payment received by the assessee as royalty from JCB Investments which has received it from JCB India. As it has been conclusively mentioned elsewhere that in earlier years there was a bilateral agreement and during the year under consideration, there is tripartite agreement, the contents are

mutatis mutandis same. In our opinion, substance shall get precedence over the form. In our considered view, the impugned receipts are ancillary and subsidiary to the application or enjoyment of the right, property or information for which the royalty payment were received by the assessee through such receipts would fall under clause (a) of Article 13(4) and would be taxable as FTS and the services provided by the assessee are to be considered as having been made available to the recipient of the services. ***Substance will rule over form.***

28. The common meaning of the word 'make available' is merely offering or made accessible to the other party and it never meant that the other party should be trained or made expert in such technical knowledge. If such is the case, it would be absurd for a person to make other person expert of its core competency and a situation will arise that the recipient of services would not look again to the service provider when these services are needed in future. In the context of bilateral vis a vis tripartite agreement, the service provider by the assessee have to be considered as having been 'made available' to the recipient of service and we hold accordingly. Ground No. 3 is dismissed.

29. Next issue relates to reimbursement towards salary costs and other expenses of seconded employees.

30. The second stream of receipts have been claimed as reimbursement of salary cost of employees which were seconded to JCB India amounting to Rs. 3,56,95,116/- and third stream of receipts is the claim as reimbursement of telephone, travelling expenses of seconded employees amounting to Rs. 1,88,93,184/-.

31. A perusal of the assessment order reveals that neither the assessee has explained the reason and purpose for such reimbursement nor any documentary evidence in support of the same was furnished so as to corroborate its claim that such receipts were merely reimbursements. We find that the assessee has also not explained the benefit extended by it to the payer of such reimbursement. Therefore, in the interest of justice and fair play, we restore this issue to the file of the Assessing Officer. The assessee is directed to demonstrate that the impugned receipts are nothing but reimbursement with supporting documentary evidences and the Assessing Officer is directed to verify the same and decide the issue

afresh after giving reasonable opportunity of being heard to the assessee.

32. Further, we find that in the case of JCB Investments also, JCB India has been treated as service PE on account of employees seconded by the assessee to JCB India. In order to determine the income of service PE on account of employees seconded by the assessee to JCB India, the Tribunal has restored back the matter to the file of the Assessing Officer for correct assessment of the profits to be attributed to the Service PE and the Assessing Officer, while giving effect to the directions of the Tribunal has framed the order dated 24.3.2017 u/s 254/143(3) of the Act. The Assessing Officer is directed to decide this issue in accordance with the directions given by the co-ordinate bench in the case of JCB Investments in ITA No. 6573/DEL/2014 order dated 08.04.2015. The AO is further directed to see that the same income is not doubly taxed in the hands of the appellant. This issue is, accordingly, treated as allowed for statistical purposes.

33. Next issue relates to attribution of income in India.

34. The ld. counsel for the assessee strongly contended that the Tribunal has already held that JCB Investments as Service PE in India on account of employees seconded by the assessee to JCB India. The ld. counsel for the assessee further contended that in the hands of JCB Investments, the Assessing Officer has already made necessary attribution on account of alleged Service PE in India. Therefore, question of attribution will not survive in the hands of the assessee.

35. We do not find force in this contention of the ld. counsel for the assessee. We have already mentioned elsewhere that during the year under consideration, the assessee has received everything from JCB India minus 0.05% which was retained by JCB Investments through which entire payments have been received. We have already held that substance will prevail over form. In our understanding of the facts of the case in hand, we are of the considered opinion that the amount received by the assessee after deduction of 0.05% has to be considered separately for the purposes of attribution of income in India. We, accordingly, direct the Assessing Officer to do the attribution as done in the case of JCB Investments after giving opportunity of being heard to the assessee. The AO is further directed to reduce the income

already taxed in the hands of JCB Investments to avoid double taxation of the same income. This issue is also allowed for statistical purposes.

36. Last issue relates to the charging of interest u/s 234B of the Act. We find that an identical issue was considered by the Tribunal in assessee's own case in ITA No. 540/DEL/2011 and CO No. 73/DEL/2011 and the coordinate bench has decided this issue in favour of the assessee and against the Revenue. The relevant findings read as under:

"After considering the rival submissions and perusing the relevant - material on record we find it as undisputed fact that the assessee included the entire amount of royalty and fees for technical services in real income by treating it as covered under Article 13(2) of the DTAA. The case of the Revenue is that it is para 6 of Article 13 which will operate in the present case for taxing such amount under Article 7. -The Reliance of the Id. DR on the judgment dated 7.11.2013 rendered by Hon'ble Delhi High Court in the case of *DIT Vs Alcatel Lucent USA* is misplaced. In that case the Hon'ble High Court held that a non- resident assessee which does not admit income chargeable to tax in his must be inferred to have induced the Indian payer not to deduct at source and hence he is liable for interest on non-payment of advance tax. It has further been laid down in this case that where the assessee admits that it

has income chargeable to tax in India but does not advance tax on the ground that the Indian payer ought to have deducted tax at source, no liability for interest u/s 234B arises. The second situation considered by the Hon'ble Delhi High Court in the case *Lucent USA Inc. (supra)* is reiteration of the view taken in its earlier judgment in *DIT Vs Jacobs Civil Incorporated : (2011) 330 ITR* As the assessee in the extant case included the amount of and fees for technical services in its total income, it is the *ratio decidendi* in the case of *Jacobs Civil Incorporated (supra)* which shall apply to relieve the assessee from any interest liability u/s 234B of the Act. This ground is allowed."

Respectfully following the findings of the co-ordinate bench, we direct the Assessing Officer to relieve the assessee from any interest liability u/s 234B of the Act. This ground is allowed.

37. In the result, the appeal of the assessee in ITA No. 1540/DEL/2009 is partly allowed.

38. Since we have decided the appeal, stay petition is accordingly dismissed.

The order is pronounced in the open court on 18.07.2018.

Sd/-

[KULDIP SINGH]
JUDICIAL MEMBER
Dated: 18th July, 2018

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	13.07.2018
Date on which the typed draft is placed before the dictating Member	16.07.2018
Date on which the typed draft is placed before the Other Member	.07.2018
Date on which the approved draft comes to the Sr.PS/PS	.07.2018
Date on which the fair order is placed before the Dictating Member for pronouncement	.07.2018
Date on which the fair order comes back to the Sr.PS/PS	.07.2018
Date on which the final order is uploaded on the website of ITAT	.07.2018
Date on which the file goes to the Bench Clerk	.07.2018
Date on which the file goes to the Head Clerk	.07.2018
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	