

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

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

ITA No. 7457/DEL/2018 [A.Y 2014-15]

M/s JC Bamford Excavators Ltd
Rocester, Uttoxeter, ST 145 JP
Staffordshire, England

Vs. The Dy. C.I.T
Circle 2(1)(2)
New Delhi

PAN: AABCJ 6004 D

(Applicant)

(Respondent)

Assessee By : Shri Ravi Sharma, Adv

Department By : ShriG.K. Dhall, CIT- DR

Date of Hearing : 09.12.2019

Date of Pronouncement : 10.12.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order dated 24.09.2018 framed u/s 144C(13) r,w,s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

2. The grievances of the assessee read as under:
 1. Under the facts and circumstances of the case and in law, the Learned Dispute Resolution Panel ("Ld. DRP") and Learned Assessing Officer ("Ld. AO") has erred in passing the assessment order without giving due consideration to the submissions of the Appellant.
 2. Under the facts and circumstances of the case and in law, the Ld. DRP and Ld. AO has erred in holding that Appellant has a service Permanent Establishment ("PE") in India within the meaning of Article 5 of India UK Double Taxation Avoidance Agreement ("DTAA").
 3. Under the facts and circumstances of the case and in law, the Ld. AO erred in proposing that the Appellant has a service PE in India under Article 5(2)(k) of the DTAA without appreciating that:
 - 3.1 Technology Transfer Agreement ("TTA") dated March 5, 2004 and International Personnel Assignment Agreement ("IPAA") dated December 5, 2005 are independent contracts for materially different purposes.
 - 3.2 IPAA between JCB Excavators ("JCBE") and JCB India Limited ("JCB India") provides for employees sent by JCBE to JCB India on deputation (secondment) which is admittedly as per specific requirements of JCB India and not for services in relation to TTA.

3.3 Seconded employees sent as per arrangement under IPAA are employees of JCB India.

4. Without prejudice to ground No. 3, under the facts and circumstances of the case and under law, the Ld. DRP and Ld. AO has grossly erred in holding that royalty earned by the Appellant is effectively connected to alleged service PE of the Appellant in India and has failed to appreciate that:

4.1 Intangible property in respect of which royalty has been paid was wholly developed outside India;

4.2 No functions, assets, or risk associated with such intangible property is undertaken or present in India.

4.3 The Ld. AO erred in inadvertently including the royalty received by the Appellant towards backhoe-loader P-106 under a different TTA dated October 21, 2010 amounting to Rs. 3,40,31,604 as also effectively connected with the alleged Service PE without assigning any reason for the same.

Without prejudice to above grounds, under the facts and circumstances of the case, the Ld. DRP and Ld. AO has erred in not applying the desired computation mechanism for chargeability of Royalty income alleged to be covered under provisions of Article 7 of the DTAA between India and UK. The Ld. DRP and Ld. AO failed to appreciate that:

- 5.1 Under Article 7(1) read with Article 7(2) and 7(3) of the DTAA between India and UK, the entire Royalty received from India cannot be subjected to tax in India since no functions, assets and risks are associated with the alleged PE in India;
- 5.2 Royalty income alleged to be considered as business income under Article 7 of the DTAA between India and UK can be taxed only to the extent of profits attributable to Indian operations. The Ld. DRP and Ld. AO thus grossly erred in determining the taxability applying arbitrary mechanism under Rule io(iii) of the Income tax Rules, 1962 and ignoring the principle of apportionment as laid down under Rule io(ii) of the Income tax Rules, 1962 which is consistent with the provisions of Article 7(3) of the DTAA between India and UK.
6. Under the facts and circumstances of the case and in law, without prejudice to the above grounds, the Ld. DRP and Ld. AO has failed to appreciate that the Indian company i.e. JCB India is a profitable company and as long as the same is earning profit at arm's length, no further attribution is possible even in case of an alleged PE.
7. Under the facts and circumstances of the case and in law, the Ld. DRP and Ld. AO has erred in not following the Hon'ble Income Tax Appellate Tribunal order in Appellant's case for AY 2006-07 where it has been held that Royalty earned by

the Appellant is not effectively connected to alleged service PE of the Appellant in India.

8. Under the facts and circumstances of the case and in law, the Ld. AO erred in levying the interest under section 234A & 234B of the Act.
9. The Ld. AO erred in initiating penalty proceedings u/s 271(1)(c) of the Act for furnishing inaccurate particulars of income."
2. At the very outset, the ld. counsel for the assessee stated that the entire grievances have been considered and decided by the Tribunal in earlier years in assessee's own case. The ld. counsel for the assessee supplied copies of the order of the Tribunal.
3. It is the say of the ld. counsel for the assessee that precisely, the issue of PE has been decided against the assessee whereas the issue relating to royalty has been decided in favour of the assessee. The issue relating to attribution of profit has been set aside by the Tribunal.

4. Per contra, the ld. DR fairly conceded and stated that in earlier Assessment Year the Tribunal has decided the issues in dispute.

5. We have given thoughtful consideration to the orders of the authorities below. We find force in the submissions of the ld. counsel for the assessee. The co-ordinate bench in assessee's own case for Assessment Year 2013-14 in ITA No. 6787/DEL/2017 vide order dated 11.09.2018 has considered all the issues under appeal before us. The relevant findings of the Tribunal read as under:

"5. Without prejudice to above grounds, under the facts and circumstances of the case, the Ld. DRP and Ld. AO has erred in not applying the desired computation mechanism for chargeability of Royalty income alleged to be covered under provisions of [Article 7](#) of the DTAA between India and UK. The Ld. DRP and Ld. AO failed to appreciate that:

5.1 Under [Article 7\(1\)](#) read with [Article 7\(2\)](#) and [7\(3\)](#) of the DTAA between India and UK, the entire Royalty received from India cannot be subjected to tax in India since no functions, assets and risks are associated with the alleged PE in India;

5.2. Royalty income alleged to be considered as business income under [Article 7](#) of the DTAA between India and UK can be taxed only to the extent of profits attributable to Indian operations. The Ld. DRP and Ld. AO thus grossly erred in determining the taxability

applying arbitrary mechanism under Rule io(iii) of the Income tax Rules, 1962 and ignoring the principle of apportionment as laid down under Rule io(ii) of the Income tax Rules, 1962 which is consistent with the provisions of [Article 7\(3\)](#) of the DTAA between India and UK.

6. Under the facts and circumstances of the case and in law, without prejudice to the above grounds, the Ld. DRP and Ld. AO has failed to appreciate that the Indian company i.e. JCB India is a profitable company and as long as the same is earning profit at arm's length, no further attribution is possible even in case of an alleged PE.

7. Under the facts and circumstances of the case and in law, the Ld. DRP and Ld. AO has erred in not following the Hon'ble Income Tax Appellate Tribunal order in Appellant's case for AY 2006-07 where it has been held that Royalty earned by the Appellant is not effectively connected to alleged service PE of the Appellant in India.

8. Under the facts and circumstances of the case and in law:

8.1 the Ld. A.O has erred in levying interest u/s 234B of the Act.

8.2. The Ld. A.O erred in granting lower credit of Tax deducted at source amounting to Rs.18,65,04,610/- instead of Rs.26,71,90,946/-, thereby levying interest u/s 234B of the Act on a higher amount.

9. Under the facts and circumstances of the case and in law, the Ld. A.O erred in law:

9.1. In charging the interest amounting to Rs. 18,63,010/- under [section 234C](#) of the Act.

9.2. In levying the interest under [section 234A](#) and [234D](#) of the Act. 9.3. In withdrawing the interest under [section 244A](#) of the Act.

10. The Ld. AO erred in initiating penalty proceedings under [section 271\(i\)\(c\)](#) of the Act for furnishing inaccurate particulars of income.

That the above grounds of appeal are without prejudice to each other That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal."

3. *JC Bamford Excavators Ltd., U.K. ('JCBE' hereafter), is a company incorporated under the laws of the United Kingdom and has its principal office at Rocester Staffordshire England ST 14 5JP. It is a non-resident Company for the purposes of the Indian tax laws and is a tax resident of U.K. under [Article 4](#) of the tax treaty entered into between India and U.K. It is the flagship company of JCB in U.K. which develops and manufactures excavators. The return of income was filed by the assessee on 29.11.2013 declaring total income of Rs. 1,81,07,24,365/-. The case was selected for scrutiny and initial notice u/s 143(2) of the [Income Tax Act](#), 1961 was issued to the assessee on 16.09.2014 by DDIT(I.T.), Circle 3(1), New Delhi. After internal restructuring of the Income-tax department, the jurisdiction of the case was transferred to Circle 2(1)(2), New Delhi. Accordingly,*

notice u/s 142(1) and 143(2) of the Act alongwith a detailed questionnaire dated 26.08.2016 was issued to the assessee. The case was referred to TPO for computation of Arm's Length Price u/s 92CA of the Act. As per TPO order dated 31.08.2016, no adverse interference has been drawn by the TPO officer in respect of Arm's Length Price of the international transaction for the year under consideration. On March 5, 2004 JCBE entered into Technology Transfer Agreement ('TTA') with JCB India Ltd. (hereafter 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 'Excavator Loader (P-92 version)' in the territory of India under the brand name 3DX. On October 21, 2010, JCBE and JCB India entered into another Technology Transfer Agreement pursuant to licence the know- how and related technical documents consisting of all drawings and designs with an exclusive right to manufacture the 'Backhoe Loader (P106)' in the territory of India. JCBE and JCB India had also entered into an IPAA dated December 5, 2005 pursuant to which JCBE sent some of its employees on deputation to JCB India to manage the overall operations of JCB India. On December 17, 2007, JCBE, JCB India and JC Bamford Investments Limited (hereafter JCB) entered into an Intellectual Property Agreement ('IPA') pursuant to which the head licence (pertaining to TTA) under its intellectual property to manufacture and market 3DX was transferred by JCBE to JCBI in consideration of the payment of royalty by JCBI to JCBE. In other words, JCBE licensed its technology to JCBI which in turn sub-licensed it to JCB India. This sub- licensing was duly authorised by Clause 2.2 of the

1PA. Further, with effect from July 1, 2011, JCBI had agreed to be released and discharged from its obligations under the IPA and royalty accrued to the JCBE. During the year under consideration, the assessee has earned 'royalty income' and 'Fee for Technical Services' from JCB India amounting to Rs. 1,73,77,77,504/- and Rs.7,29,46,861/-respectively. The said receipts are subject to tax @ 15%/10.506% of the gross amount as 'Royalty & Fee for Technical Services', being the tax rate provided under [Article 13\(2\)](#) of Double Taxation Avoidance Agreement entered between India and UK ('DTAA') and [section 115A](#) of the Act, as the case may be. The details of the royalty income earned form JCB India are as under:-

S. No.	Particulars	Amount in INR
1	Royalty received from Model 3DX	1,71,22,15,010/-
2	Royalty received other than Model 3DX	2,55,62,494/-
	Total	1,73,77,77,504/-

It is noteworthy that JCBE used to receive Royalty in the earlier years, i.e. A.Y. 2006-07 & A.Y. 2007-08, it was held by the Assessing Officer in the case of JCBE that the secondment of employees by JCBE to India resulted in establishment of a Permanent Establishment (PE) or a 'service PE' of the JCBE as per [article 5\(2\)\(k\)\(i\)](#) of the DTAA between India and UK. And further to it, based on the facts of the case, it was held that the payment of Royalty made by JCB India to the JCBE in respect of

the rights granted by the JCBE to JCB India under the TTA, is effectively connected with the such 'service PE' of the assessee in India. And accordingly, the taxation of such royalties was held to be governed by [Article 7](#) of the Treaty and was taxed accordingly.

3. The Ld. AR submitted that Ground No. 1 is general in nature. The Ld. AR further submitted that Ground Nos. 2, 3, 3.1, 3.2, 3.3 are decided against the assessee in the assessee's own case for Assessment Year 2006-07 by the Tribunal being ITA No. 540/Del/2011 order dated 14 th March 2014 as well as for A.Y. 2012-13 being ITA No. 1700/Del/2017 order dated 31.07.2017.

4. The Ld. DR relied upon the Assessment Order.

5. We have heard both the parties and perused all the relevant material available on record. Ground No. 1 is general in nature hence dismissed. As regards Ground No. 2, 3, 3.1, 3.2, and 3.3 in assessee's own case for A.Y. 2006-07 as well as 2012-13, the Tribunal dismissed these grounds. The relevant extract of the Tribunal's decision for A.Y. 2012-13 are as under:

"6. After considering the submission of the assessee both the parties agreed before us that there is no change in the facts and circumstances of the case compared to the AY 2006-07 wherein, this issue has been decided against the assessee in the preceding year vide aforesaid referred to order dated 14.03.2014 wherein relevant findings have been given in para 7 which read as under:

"7. 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 twelve months 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."

7. Therefore, respectfully following the aforesaid order in assessee's own case for the assessment year 2006-07, the issue agitated vide Ground Nos. 1 to 3 is decided against the assessee by holding that the assessee has a service PE in India. In the result ground Nos 1 to 3 of the appeal of the assessee are dismissed."

Thus, the issue is squarely covered against the assessee as the facts are identical in the present assessment year. Hence Ground No. 2, 3, 3.1, 3.2, and 3.3 are dismissed.

6. As regards Ground No.4, 5 & 7, the Ld. AR submitted that the same are decided in favour of the assessee by the decision of the Tribunal for Assessment Year 2006-07 as well as for A.Y. 2012-13 being ITA No. 1700/Del/2017 order dated 31.07.2017.

7. The Ld. DR relied upon the Assessment Order.

8. We have heard both the parties and perused all the relevant material available on record. As regards Ground No. 4, 5 & 7, in assessee's own case for A.Y. 2006-07 as well as 2012-13, the

Tribunal allowed these grounds in favour of the assessee. The relevant extract of the Tribunal's decision for A.Y. 2012-13 are as under:

"10. We have carefully considered the rival contentions and also perused the arguments of the parties that issue is squarely covered by order of the coordinate bench and there is no change in the facts and circumstances of the case. The coordinate bench vide order dated 14.03.2014 in ITA No. 540/Del/2011 wherein relevant findings have been given in para 16.5 & 18 which read as under:

"16.5 In so far 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.

18....."

11. Therefore, respectfully following the aforesaid decision regarding whether royalty is effectively collected to the PE of the assessee is decided in favour of the assessee..."

Thus, the issue is squarely covered in favour of the assessee as the facts are identical in the present assessment year. Therefore, Ground No. 4, 5 & 7 are allowed.

9. The Ld. AR further submitted that Ground No. 6 has to be set aside in light of Tribunal's decision in the assessee's own case for A.Y. 2006-07 and 2012-13 and also in light of appeal effect order dated 16 th December 2016 for Assessment Year 2006-07.

10. The Ld. DR relied upon the Assessment Order.

11. We have heard both the parties and perused all the relevant material available on record. Ground No. 6 regarding attribution of income has already decided in assessee's own case for A.Y. 2006-07 as well as 2012-13, the Tribunal set aside this issue to the file of the Assessing Officer. The relevant extract of the Tribunal's decision for A.Y. 2012-13 are as under:

"10. We have carefully considered the rival contentions and also perused the arguments of the parties that the issue is squarely covered by order of the coordinate bench and there is no change in the facts and circumstances of the case. The coordinate bench vide order dated 14.03.2014 in ITA No.540/Del/2011 wherein relevant findings have been given in para 16.5 & 18 which read as under:

16.5.....

18.Since separate details of such receipts and actual expenses incurred for earning them are not available on record, we remit this matter to the file of Assessing Officer for fresh determination of the amount of income in terms of [Article 7](#) as per our above discussion after allowing a reasonable opportunity of being heard to the assessee."

11. Therefore, respectfully following the aforesaid decision regarding whether royalty is effectively collected to the PE of the assessee is decided in favour of the assessee. Further, the issue of determination income of the service of PE of the assessee is set aside to the file of the Id Assessing Officer and decide it, in accordance with the law and as directed by para No. 18 in the impugned order of the coordinate bench for AY 2006-07. In result ground Nos. 4, 5 and 6 of the appeal of the assessee are decided accordingly."

In light of the above findings and also the facts are similar in the present year, we set aside this issue to the file of the Assessing Officer with the direction to decide this issue for fresh determination after following the principles of natural justice given to the assessee. Ground No. 6 is partly allowed for statistical purpose".

6. Respectfully following the findings of the co-ordinate bench, we hold accordingly.

7. The only other issue relates to charging of interest u/s 234A/234B of the Act.

8. The contention of the ld. counsel for the assessee that the assessee has filed its return of income before the due date of filing of return of income has to be verified by the Assessing Officer and if found correct, the Assessing Officer is directed to charge interest as per provisions of law.

9. In the result, the appeal of the assessee in ITA No. 7457/DEL/2018 is allowed.

The order is pronounced in the open court on 10.12.2019.

Sd/-

**[KULDIP SINGH]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 10th December, 2019

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
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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	
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Date on which the file goes to the Head Clerk	
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