

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'FRIDAY / A' NEW DELHI**

**BEFORE SHRI G.S. PANNU, VICE PRESIDENT
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA.Nos.9759 & 9760/Del/2019
(Assessment Years: 2015-16 & 2016-17)**

J.C. Bomford Excavators Ltd. Vs. ACIT(International Taxation),
Rocester, Uttoxeter, ST 14 5JP, Circle – 2(1)(2),
Staffordshire, England New Delhi

[PAN No. AABCJ 6004 D]

(Appellant)

..

(Respondent)

Appellant by: Sh.Ravi Sharma, Adv.

Respondent by: Sh. Saras Kumar, Sr. D.R.

Date of hearing: 06/03/2020

Date of order : 06/03/2020

ORDER

PER K. NARASIMHA CHARY, J.M.

Aggrieved by the common order dated 20.08.2019 for Assessment Years 2015-16 & 2016-17 passed by the Dispute Resolution Panel-2, New Delhi ('Learned DRP'). The assessee filed these two appeals on the following identical grounds:

1. *“Under the facts and circumstances of the case and in law, the Hon’ble Dispute Resolution Panel (‘Hon’ble 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 Hon’ble 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 (“JOB 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 Hon’ble 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’, ‘Loadall model’ and ‘Model 4DX’ under different TTAs dated 21 October 2010, 22 October 2013 and 3 July 2015 respectively, totaling to INR 3,55,25,952 as also effectively connected with the alleged Service PE without assigning any reason for the same.

5. Without prejudice to above grounds, under the facts and circumstances of the case, the Hon’ble 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. The Hon’ble 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, 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 can be taxed only to the extent of profits attributable to Indian operations. The Hon'ble DRP and Ld. AO thus grossly erred in determining the taxability applying arbitrary mechanism under Rule 10(iii) of the Income tax Rules, 1962 and ignoring the principle of apportionment as laid down under Rule 10(ii) of the Income tax Rules, 1962 which is consistent with the provisions of Article 7(3) of the DTAA.*
6. *Under the facts and circumstances of the case and in law, without prejudice to the above grounds, the Hon'ble DRP and Ld. AO has failed to appreciate that the Indian company i.e. JOB 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 Hon'ble 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.*
- 7.1 *Under the facts and circumstances of the case and in law, the Hon'ble DRP has erred in holding that royalty is effectively connected to the Service PE of the appellant in India and simultaneously directing the Ld. AO that same attribution as has been made in appeal effect to ITAT's order for AY 2013-14 be followed.*
8. *Under the facts and circumstances of the case and in law, the Ld. AO has erred in levying surcharge and education cess on Royalty and fees for technical services which are chargeable to tax on gross basis as per rates specified under Article 13 of DTAA.*
9. *Under the facts and circumstances of the case and in law, the Ld. AO has erred in restricting credit of tax deducted at source (TDS) to Rs. 27,01,75,342 as against Rs.27,50,90,096 claimed by the Appellant and also reflecting in Form 26AS for the year under consideration.*
10. *Under the facts and circumstances of the case and in law, the Ld. AO has erred in incorrectly levying consequential interest under section 234B of the Act.*
11. *Under the facts and circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 271(i)(c) of the Act.*

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."

2. M/s. JC Bamford Excavators Ltd., UK ("JCBE"), is the assessee. It is a company incorporated under the laws of the United Kingdom. It is a non-resident company for the purpose of Indian tax laws and is a tax resident of UK under Article-4 of the DTAA. In India, JCBE derives income in the nature of 'Royalty & FTS', which is offered to tax on gross basis in India as per the tax rates specified in the DTAA and the Act, as the case may be. Assessee had entered into Technology Transfer Agreement ('TTA') dated March 5, 2004 with JCB India Limited to license 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 (P-92 version)' in the territory of India under the brand name 3DX. On December 17, 2007, assessee, JCB India and JC Bamford Investments entered into an Intellectual Property Agreement ('IPA') pursuant to which the head license under its intellectual property to manufacture and market 3DX was transferred by assessee to JCBI in consideration of the payment of royalty by JCBI to assessee. 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 assessee. Assessee entered into another TTA dated October 21, 2010 with JCB India to license the know-how and related technical documents consisting of all drawings and designs with an exclusive right to manufacture the 'Backhoe Loader' P-106 in the territory of India. On July 3, 2015, assessee entered into another TTA pursuant to license the know-how and related technical documents consisting of all drawings and designs with an exclusive right to manufacture the product '4DX' in the territory of India. Assessee has entered into International Personnel Assignment Agreement (IPAA) dated 5.12.2005 pursuant to which assessee sent some of its employees on deputation to JCB India to manage the

overall operations of JCB India. Learned Assessing Officer held that employees of the assessee working in JCB India constitute service PE of the assessee in India. The royalty and FTS were connected to PE of the assessee, hence taxable under article 7 of Indo UK DTAA. The assessee is before this panel objecting to the same.

3. Aggrieved by the findings of the Learned Assessing Officer, the assessee filed objections before the DRP and the Learned DRP by way of impugned order noticed that the facts and circumstances, ground of objections and even the submissions of the assessee in respect of these two assessment years are identical to those involved for A.Y. 2013-14 & 2014-15 to reach the conclusion that the affairs of the Indian Company is being guided and controlled by the assessee by means of these second employees and the Royalty was also connected with the service PE in India and therefore, upheld the conclusion of the Learned AO in including the same in the income taxable u/s article 7 of Indo UK DTAA. So far as the profits to the PE is concerned, the Learned DRP held that 75% of the receipts are attributable to the PE in India and $\frac{1}{3}^{\text{rd}}$ of such attribution is allowed as expenditure.

4. Learned DRP further noticed that for A.Y. 2013-14 by order dated 11.09.2018, the Tribunal held that the assessee had a service PE in India, that the Royalty was not effectively connected to the PE, and on the issue of attribution of income to the PE, the matter was set aside to the Assessing Officer for fresh consideration. Learned DRP was of the opinion that the appeal was filed before the Hon'ble High Court against the decision of the ITAT to uphold the action of the AO in the matter of service PE and Royalty, but directed the AO to verify the issue relating to the attribution in line with the appeal effect order for A.Y. 2013-14.

5. Learned AR produced a copy of order before the Tribunal dated 10.12.2019 in ITA No.7457/Del/2018 for A.Y. 2014-15 in assessee's own case wherein the Co-ordinate Bench followed the order dated 11.09.2018 in ITA No.6787/Del/2017 for A.Y. 2013-14 in assessee's own case.

6. Having heard the Counsel's on either side and perused the record and order dated 10.12.2019 in ITA No.7457/Del/2018 in assessee's own case for A.Y. 2014-15, we find that quite for a long time the Tribunal had taken a consistent view that the assessee has service PE in India, but the issue as to whether the Royalty is connected to PE of the assessee was decided in favour of the assessee. Further, the issue of determination of income of the service PE of the assessee has been set aside to the file of the Learned AO to decide it in accordance with law and as per the Para No.18 of the order for A.Y. 2006-07.

7. Since there is no dispute that the facts and circumstances agitated for all these years are identical, we do not find any compelling reasons to take a different view. We, therefore, while respectfully following the consistent and established view taken by the Tribunal for A.Y. 2006-07 onwards, hold that the assessee had service PE in India, Royalty is not effectively connected to the PE and set aside the issue relating to the attribution to the income to the PE to the file of the Assessing Officer for fresh determination inconsonance with the view taken for earlier years.

8. In view of the contention of the Learned Counsel for the assessee. The assessee had filed its return of income before the due date, Learned Assessing Officer will verify this said Act and levy interest as per law.

9. In the result, appeals of the assessee is allowed in part for statistical purposes.

Pronounced in open court on this the of 06th March2020.

Sd/-
(G.S. PANNU)
VICE PRESIDENT

Sd/-
(K. NARSIMHA CHARY)
JUDICIAL MEMBER

Dated: /03/2020
PY*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI