

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI**

**BEFORE SHRI B. R. R. KUMAR, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR US, JUDICIAL MEMBER**

I.T.A. No. 603/DEL/2021 (A.Y 2016-17)

(THROUGH VIDEO CONFERENCING)

JCB India Ltd. B1/I-1, 2 nd Floor, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi-110044 PAN No. AAACE0078P (APPELLANT)	Vs	DCIT NeAC New Delhi (RESPONDENT)
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Appellant by	Sh. Vishal Kalra, Sh. S. S. Tomar & Sh. Ankit Sahni, Advs
Respondent by	Sh. Surender Pal, CIT (DR)
Date of Hearing	31.01.2022
Date of Pronouncement	17.05.2022

ORDER

PER YOGESH KUMAR US, JM

This appeal is filed by the assessee for Assessment Year 2016-17 against the order dated 05/04/2021 u/s 143(3) r/w Section 144C of Income tax Act, 1961, passed by DCIT, New Delhi.

2. The grounds of appeal are as under:-

Appeal under section 253(1) of the Income-tax Act, 1961 ("Act") against the order dated April 5, 2021 (received on April 5, 2021), passed under section 143(3) of the Act read with sections 144C(3),

143(3A) and 143(3B) of the Act, by the Deputy Commissioner of Income Tax, National E-Assessment centre, Delhi ("Assessing Officer/AO") for the assessment year ("AY") 2016-17.

GROUND OF APPEAL

1. That on the facts and circumstances of the case and in law, the final assessment order passed by the AO is bad in law, void ab initio and liable to be quashed as the same has been passed in violation of section 144C of the Act, and not in conformity with the directions passed by the Dispute Resolution Panel ("DRP").

2. That on the facts and circumstances of the case and in law, the final assessment order passed by the AO is bad in law, void ab initio and liable to be quashed as the AO has suo moto enhanced the assessed income of the Appellant which was neither part of the draft assessment order nor the order of the Transfer Pricing Officer ("TPO") and not even directed by the DRP.

3. That on the facts and circumstances of the case and in law, the AO has grossly erred in not following the mandatory provisions of sections 92CA(4) and 144C(13) of the Act and not computing the assessed income in conformity with the order/ directions of the TPO/ DRP.

3.1 That on the facts and circumstances of the case and in law, the AO has erred in enhancing the transfer pricing adjustment with respect to payment of royalty on 2DX model and retaining disallowance under section 37(1) of the Act, in express violation of the above provisions of law and not following the principles of natural justice and passing

the order without providing any opportunity of being heard to the Appellant.

3.2 That on the facts and circumstances of the case and in law, the AO has erred in enhancing the assessed income of the Appellant to INR 90,49,36,982 from INR 89,48,34,092, on account of transfer pricing adjustment and also retaining the protective disallowance amounting to INR 149,13,90,154 under section 37(1) of the Act, in variation to the transfer pricing order and directions passed by the DRP.

4. That on the facts and circumstances of the case and in law. the AO has erred in enhancing the transfer pricing adjustment on payment of royalty for 2DX model, ignoring the detailed economic analysis undertaken by the Appellant in its transfer pricing documentation benchmarking the same using uncontrolled comparable license agreements for applying Comparable Uncontrolled Price ("CUP") method.

5. That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in not appreciating the approach followed by the Hon'ble Competent Authorities of two countries (India and the UK) in the Appellant's own case for prior AYs 2009-10 to 2015-16, wherein the arm's length price of royalty payments for the 3DX model was settled under the provisions of Article 27 (Mutual Agreement Procedure or MAP) read with Article 10 of the India-UK DTAA'.

6. That on the facts and circumstances of the case and in law, the AO ought to have considered the arm's length price of royalty payments for the 3DX model at 4 percent for the AY

2016-17, as agreed between the Competent Authorities of India and the UK under the provisions of Article 27 read with Article 10 of the India-UK DTAA.

7. That on the facts and circumstances of the case and in law. the AO/ DRP/ TPO have erred on facts and in law In making a transfer pricing adjustment with respect to payment of royalty on 3DX model by the Appellant to its AEs, without appreciating or erring:

7.1. the economic analysis, benchmarking methodology followed, and arbitrarily rejecting/ ignoring the uncontrolled comparable license agreements identified for applying CUP method in its transfer pricing documentation maintained as per the provisions of the Act;

7.2 the corroborative benchmarking of royalty payment under Transactional Net Margin Method ("TNMM") disregarding the principle of aggregation of benchmarking closely linked transactions, ignoring the settled ratio decidendi,

7.3 in upholding transfer pricing adjustment stating application of Other Method²' to broaden the selection criteria for comparable agreements and selecting a non-exclusive trademark agreement as comparable to the Appellant's exclusive technology transfer agreement, and not accepting the comparable agreements identified by the Appellant from the TPOs search process;

7.4 *in not considering additional agreements proposed by the Appellant based on the search criteria applied by the TPO;*

7.5 *in computing the ad hoc transfer price of the royalty rate at 2 percent post certain economic adjustments based on surmises and conjectures de hors the fact that in the comparable agreement selected by TPO the royalty rate was 3%*

8. *That on the facts and circumstances of the case and in law, the AO/ TPO has erred in making protective adjustment being against the mandate of law and without any legal basis, by*

8.1 *misinterpreting the benefits received by the Appellant under the Technology Transfer Agreements and further disregarding the business model and key value drivers of the Appellant in concluding that the increase in advertisement spend and expansion in dealers' network is the real reason for increase in sales of the Appellant:*

8.2. *misinterpreting the disclosures made in the Annual Report of the Appellant and erroneously alleging that the Appellant is engaged in R&D activities, import substitution and that the AE does not have patent registered in relation to the licensed products*

9. *That on the facts and circumstances of the case and in law, the AO has grossly erred in computing of total assessed income at INR 8,35,79,90,352 as against INR 7,47.99.55.792 by inadvertently adding" income from house property and other sources amounting to*

INR 87.80.34.560 in the computation sheet without appreciating that same were already included in the returned income

10. That on the facts and circumstances of the case and in law, the AO has erred in not granting credit of tax deducted at source amounting to INR 12,89,750.

11. That on the facts and circumstances of the case and in law, the AO has erred in levying interest under sections 234B and 234C of the Act.

12. That on the facts and circumstances of the case and in law, the AO has erred in initiating penalty proceedings under Section 271(1)(c) of the Act without appreciating the fact that the Appellant did not furnish any inaccurate particulars of income.

Additional Ground of Appeal

13. That on the facts and circumstances of the case and in law, the AO has failed to consider the deduction of Education Cess and Secondary and Higher Education Cess while computing the taxable income for the subject assessment year.

13.1 That on the facts and circumstances of the case and in law. Education Cess and Secondary and Higher Education Cess is not disallowable under section 40(a)(n) of the Act and is an allowable expenditure under section 37 of the Act.

13.2 That on the facts and circumstances of the case and in law the AO has failed to follow the principles of judicial discipline while passing the draft assessment order as the AO has not followed the

decisions of the Hon'ble High Courts and jurisdictional Income Tax Appellate Tribunal which have held that Education Cess and Secondary and Higher Education Cess is an allowable expenditure.

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the appellant.

3. Brief facts of the case are that, the assessee Company is manufacturing of earth moving and construction equipment at manufacturing plant in Ballabgarh, Pune and Jaipur. Since, the establishment of JCB India, its parent Company, JCB, UK had licensed its property technology of JCB India through various accommodation agreement entered into firm from time to time.

4. The assessee has filed return for the year 2016-17 declared a total income of Rs. 657,50,18,810/-. The case was selected for scrutiny under CASS and also notices u/s 143 (2) of the notice u/s 142(1) of Income Tax have been issued. During the year under consideration, reference to Transfer Pricing Officer was made u/s 92CA of the Act. The TPO vide order dated 24/10/2019 has proposed substantive adjustment of Rs. 89,48,34,092/- by treating the Arms Length Price of royalty at 2% against the 5% claimed by the assessee along with a protective addition of Rs.149,13,90,154/-.

5. The draft assessment order u/s 144C of the Act was passed on 23/12/2019 by making addition on account of disallowance u/s 37(1) of the Act for Rs. 149,13,90,154/-. The income of the assessee has been proposed at Rs.806,64,08,964/- as against the return income of Rs. 657,50,18,810/-. The assessee has filed objection on 24/1/2020 in Form No. 35A. The DRP after considering the objection of the assessee passed order u/s 144C(5) of the Act on 9/12/2020.

6. On receipt of the Order of the DRP, the Assessing Officer has proceeded to pass the Assessment order by considering the issues involved. The A.O has observed that there is nothing to suggest that the assessee has derived any benefits on account of which royalty payments were made by it to its AE, the royalty expenses made on account of '3DX' Model have not been incurred wholly and exclusively for the purposes of business of the assessee and are not allowable u/s 37 (1) of the Act. Thereby royalty payment made amounting to Rs. 149,13,90,154/- has been disallowed and added back to the income of the assessee on protective basis and passed the Assessment on 05/04/2021, u/s 143(3) read with Section 144C & 144C(3), 143(3A) 143(3D) of the Income Tax Act by computing the income of the assessee as under:-

<i>Income as per return</i>	<i>Rs. 657,50,18,810/-</i>
<i>Add: Addition on account of ALP as suggested by Transfer Pricing Officer vide letter dated 23.01.2020 as discussed in Para 5.</i>	<i>Rs. 90,49,36,982/-</i>
<i>Assessed Income</i>	<i>Rs. 747,99,55,792/-</i>
<i>Rounded off u/s 288A</i>	<i>Rs. 747,99,55,790/-</i>

7. Aggrieved by the order dated 5/4/2021, passed impugned order, the assessee has preferred the present appeal by raising the above grounds.

8. During the pendency of the appeal the rectification order has been passed on 04-10-2021 by rectifying the error committed by the NeAC in raising the Demand, however there was no change in the income of the Assessee.

9. Heard the arguments of Assessee's Representative and Departmental Representative. The Ld. Counsel for the assessee submitted that the grounds of

Appeal No. 5 to 8.2 have become infructuous since the issue of payment of royalty for 3DX model has been resolved by MAP settlement between competent authorities in India and the UK.

10. The Ld. Counsel of the assessee on addressing argument on Ground No. 1 to 4 submitted that, the Ld. A.O in its order dated 05/04/2021 made in correct adjustment u/s 37(1) of the Act despite granting the relief by the DRP which is contrary to the Section 144C of the Act.

11. We have verified the directions given by the DRP vide order dated 09/12/2020 which is extracted as under:-

5.5. In view of the above fact that,

.....

(v) an agreement waswe are of the view that there is no logic behind making disallowance u/s 37(1) of the Act ignoring the adjustment recommended by the TPO u/s 92CA of the Act. Accordingly, the Assessing Officer is directed to delete the disallowance made u/s 37(1) of the Act. Thus, Ground of Objection No. 3 is allowed.”

Contrary to the said direction to the DRP the Ld. AO enhanced the transfer pricing adjustment with respect to payment of royalty on 3DX Model and retaining the disallowance u/s 37(1) of the Act. In our view, the action of the A.O is contrary to the mandates enumerated u/s 92CA (4) and Section 144C (13) of the Act. Accordingly, **we allow the Grounds of Appeal No. 1 to 4** and delete the disallowance made u/s 37(1) of the Act by the A.O and direct the A.O to pass order in confirming with the directions of the DRP.

12. Further, the Ld. Counsel for the assessee has drawn our attention to the Mutual Agreement Procedure (MAP) entered into between India and UK for the

real assessment year 2009-10 to 2015-16 wherein the Arm's Length Price for royalty payment for the 3DX model was settled under the provisions of Article 27 of MAP read with Article 10 of India UK Double Taxation Avoidance Agreement ('DTAA') wherein considered the Arm's Length Price for royalty payment for the 3DX model at 4%.

The Ld. Counsel for the assessee further submitted that, after giving effect to the MAP Settlement, the adjustment made u/s 31(1) of the Act and the protective adjustment made in the final assessment order relating to 3DX Model shall no longer survive. The said contention of the Ld. Counsel for the assessee has neither been disputed nor produced any document to negate the said contention by the Ld. DR. Therefore, the Ground No. 5 to 8 requires no adjudication. In view of MAP Settlement. Accordingly, we **dismiss Grounds No. 5 to 8 for having become infructuous.**

13. The Ground No. 9 is regarding computation of total assessed income in the computation sheet. The Ld. Counsel for the assessee submitted that, in the final assessment order and in the computation of income and tax liability thereto A.O has incorrectly enhanced the total income of the assessee by double counting the income under the head of house property and income from other sources amounting to INR 87,80,34,563/-. The Ld. DR has also not disputed the said fact. Therefore, we feel it fit to remand the issue to the file of A.O with a direction to re-compute the income in accordance with law. Accordingly, we allow Grounds of Appeal No. 9 for statistical purpose.

14. The Ground No. 8 is in respect of not granting credit of TDS, hence, we direct the A.O to give credit of TDS in accordance with law, accordingly we allow the Ground No. 8 for statistical purpose. Further, the Ground No. 9 & 10 are consequential in nature which requires no adjudication.

15. Additional Grounds of Appeal is in respect of Education cess and Secondary High Education Cess paid on income tax which has been claimed as allowable expenditures. Since the assessee has not pressed the said additional ground in light of recent amendment by the Finance Act, we dismiss the additional grounds of appeal.

16. In the result, the appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the Open Court on this 17th Day of May, 2022

Sd/-
(B. R. R. KUMAR)
ACCOUNTANT MEMBER

Sd/-
(YOGESH KUMAR US)
JUDICIAL MEMBER

Dated: 17/05/2022
*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI