

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" NEW DELHI**

**BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
AND
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A No.625/Del/2021

निर्धारणवर्ष/Assessment Year:2017-18

JC Bamford Excavators Ltd., Rocester, Uttoxeter, ST 14, 5JP, Staffordshire, England.	<u>बनाम</u> Vs.	ACIT (International Taxation), Circle-2(1)(2), Room No.508, 5 th Floor, D-Block, Civic Centre, NewDelhi.
PAN No.AABCJ6004D		
अपीलार्थी Appellant		प्रत्यर्थी/ Respondent

Assessee by	Shri Vishal Kalra, Adv. & Shri S.S. Tomar, Adv.
Revenue by	Shri Vijay B. Basanta, CIT DR

सुनवाईकीतारीख/ Date of hearing:	18.03.2025
उद्घोषणाकीतारीख/ Pronouncement on	09.04.2025

आदेश / O R D E R

PER C.N. PRASAD, J.M.

This appeal is filed by the Assessee against the final assessment order dated 26/03/2021 passed u/s 143(3) r.w.s. 144C(13) for the AY 2017-18 pursuant to the directions of the DRP dated 15/12/2020 u/s 144C(5) of the Income Tax Act, 1961. Assessee in its appeal raised the following grounds of appeal: -

1. "That on the facts and circumstances of the case and in law, the Assessing Officer ("AO") has erred in completing

the assessment of the Appellant not in pursuance to the directions issued by the Dispute Resolution Panel (“DRP”), and without giving due consideration to the submission of the Appellant, thus, the final assessment order passed is bad in law and void ab initio.

2. *That on the facts and circumstances of the case and in law, the DRP and 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. *That on the facts and circumstances of the case and in law, the AO erred in alleging 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.*
4. *That on the facts and circumstances of the case and in law, the Hon’ble DRP and AO has grossly erred in not following the decision of the Hon’ble Tribunal in Appellant’s own case holding that royalty earned by the Appellant is not effectively connected to alleged service PE, especially when the said decisions have been accepted by the Revenue Authorities.*
 - 4.1 *That on the facts and circumstances of the case and in law, the 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 Hon'ble ITAT's order for AY 2015-16 and AY 2016-17 be followed.

5. *Without prejudice to ground nos. 3 & 4, under the facts and circumstances of the case and under law, the DRP and 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 in holding so has failed to appreciate that:*

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

5.2 *No functions, assets, or risk associated with such intangible property are undertaken or present in India.*

5.3 *The Ld.AO erred in arbitrarily including the royalty received by the Appellant towards 'Backhoe-Loader P-106', 'Loadall model' and 'Model 4DX' under a different TTAs dated 21 October 2010, 22 October 2013 and 3 July 2015 respectively, totaling to Rs.7,54,09,973/- as also effectively connected with the alleged Service PE without assigning any reason for the same.*

6. *Without, prejudice to above grounds, that on the facts and circumstances of the case, the DRP and AO has erred in not applying the correct computation mechanism for chargeability of royalty income alleged to be covered under provisions of Article 7 of the DTAA. The Hon'ble DRP and AO while doing so failed to appreciate that:*

6.1 *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;*

6.2 *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 DRP and 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.

- 7. Without prejudice to the above grounds, that on the facts and circumstances of the case and in law, the AO has erred in taxing the balance royalty of 25 percent amounting to Rs.51,59,20,735/- as income from other sources (as royalty income) without appreciating the fact that when the royalty income is said to be effectively connected with alleged PE of Appellant in India, the provisions of Article 13 of the DTAA would no longer apply and income is liable to be taxed as per Article 7 of the DTAA.*
- 8. That on the facts and circumstances of the case and in law, the DRP has erred in not appreciating that the dividend distribution tax (“DDT”) on the dividend income distributed by JCB India to the Appellant is a tax on recipient of Income and DDT rate ought to be restricted to the beneficial tax rate of 10% in accordance with Article 11 (Dividends) of the DTAA, instead of the tax rate of 20.35% charged in terms of section 115O of the Act and not allowing the consequential on account of refund of excess taxes.*
- 9. That on the facts and circumstances of the case and in law, the DRP has erred in rejecting the ground in relation to DDT by holding that in absence of any claim made before the AO, the claim for DDT cannot be considered, without appreciating that DRP is an extension of the assessment proceedings and the additional ground of objection being purely legal in nature did not require any fresh investigation of facts.*
- 10. Under the facts and circumstances of the case and in law, the Ld. AO has erred in incorrectly levying interest u/s 234A of the Act.*

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

12. That on the facts and circumstances of the case and in law, the AO erred in initiating penalty proceedings under section 270A of the Act.”

2. Ld. Counsel for the Assessee, at the outset, submits that the disputed issues in ground nos. 2 to 7 were already settled by the Assessee under MAP proceedings and requested for withdrawal of these grounds.

3. The DR has no objection.

4. Heard rival submissions, perused the letter dated 18/09/2023 which was placed on record by the Authorized Representative on behalf of the Assessee requesting for withdrawal of ground nos. 2 to 7 of Appeal no. 625/Del/2021. The contents of the letter are as under: -

“In this regard, it is respectfully submitted that issue in relation to dispute of alleged Service Permanent Establishment (“PE”) of the Appellant in India and allocation of profits to such alleged Service PE has been resolved by settlement between the Competent Authorities of India and United Kingdom under Mutual Agreement Procedure (“MAP”) as provided under Article 27 of Double Taxation Avoidance Agreement between India and United Kingdom (refer Annexure 1). Further, acceptance of MAP resolution by the Appellant has already been placed on record (refer Annexure 2).

Accordingly, the Appellant requests for withdrawal of grounds of appeal no. 2 to 7 as the matter is now settled under MAP.”

5. In view of the above submissions and since the Assessee had settled the disputes in ground nos. 2 to 7 of grounds of appeal under MAP these grounds of appeal are dismissed as withdrawn.

6. Ground no.9 is with regard to not entertaining the ground raised before the DRP in respect of the claim of DDT which was not made before the Assessing Officer. It is the submission of the Ld. Counsel that the ground though not raised in the return or before the Assessing Officer can be agitated before the DRP/CIT(Appeals). Reliance was placed on the decision of the Delhi Bench of the Tribunal in the case of Nikon (India) Pvt. Ltd. Vs. DCIT (ITA No.6870/Del/2018) dated 24/01/2019 and the decision of the Mumbai Bench of the Tribunal in the case of Ashok Keshavlal Tejuja Vs. ACIT [91 taxmann.com 28].

7. After hearing rival submissions and perusing the orders of the coordinate benches, we hold that the Assessee can raise additional claims before the appellate authorities including the DRP even though the Assessee had not made any claim in the return of income or before the Assessing Officer. Therefore, the claim made by the Assessee for the first time before the DRP cannot be rejected on the

ground that such claim was not made before the Assessing Officer. Thus, following the decisions referred to above this ground of appeal is allowed.

8. Now coming to merits of this ground no. 8 of grounds of appeal i.e. in respect of dividend distribution tax, it is submitted that the issue is now stand decided against the Assessee by Special Bench of Mumbai Tribunal in the case of DCIT Vs. Total Oil India (P) Ltd. [149 taxmann.com 332] (Mum.) (SB). A copy of the order is placed on record.

9. We have perused the order of the Special Bench of Mumbai Tribunal, wherein it has been held that the DTAA does not get triggered when a domestic company pays Dividend Distribution Tax (DDT) u/s 115-O of the Act. The Special Bench further held as under: -

“Conclusion:

83. For the reasons give above, we hold that where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracts Additional Income-tax (Tax on Distributed Profits) referred to in sec. 115-0 of the Act, such additional income tax payable by the domestic company shall be at the rate mentioned in section 115-0 of the Act and not at the rate of tax applicable to the non-resident shareholder(s) as specified in the relevant DTAA with reference to such dividend income. Nevertheless, we are conscious of the sovereign's prerogative to extend the

treaty protection to domestic companies paying dividend distribution tax through the mechanism of DTAA's. Thus, wherever the Contracting States to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any. Thus, the question before the Special Bench is answered, accordingly."

10. Following the decision of the Special Bench in the case of DCIT Vs. Total Oil India (P) Ltd. this ground of appeal is dismissed.

11. Ground nos. 10 & 11 are in respect of levy of interest u/s 234A & 234B of the Act which are consequential in nature. These grounds are restored to the file of Assessing Officer.

12. Ground no. 12 is against initiation of penalty proceedings u/s 270A of the Act which is premature at this stage and need no adjudication.

13. In the result, appeal of the Assessee is partly allowed.

Order pronounced in the open court on 09.04.2025

Sd/-
(NAVEEN CHANDRA)
ACCOUNTANT MEMBER

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 09.04.2025

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi