IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI
Before Sh. N. K. Saini, AM And Sh. Beena A. Pillai, JM

ITA no. 738/Del/2016
Assessment Year : 2011-12
&
Stay Application No. 79/Del/2016
(In ITA No. 738/Del/2016)
Assessment Year : 2011-12

JC Bamford Investments Ltd. Rocester, Uttoxeter, ST 14 5JP, Staffordshire England	Vs	DCIT (International Taxation) Circle-(2)(1)(2), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AACCJ0726B		

Appellant by : Sh. Vineet Jain, CA, Sh. Sanjay Arora, CA
Respondent by : Sh. Sh. Anurag Sharma, Sr. DR

Date of Hearing :03.03.2016		**Date of pronouncement: . 08. 04.2015**

ORDER

PER N.K. SAINI, A.M.

The appeal by the assessee is directed against the order dated 4.12.2015 of the AO passed u/s 144C(13) read with section 143(3) of the IT Act, 1961 (hereinafter referred to as the act) and vide stay application no. 79/Del/2016 the assessee sought the stay of outstanding demand of Rs. 21,26,15,744/-.

2. Following grounds have been raised in this appeal by the assessee :-

1. The Learned Dispute Resolution Panel ('Ld. DRP') and Learned Assessing Officer ('Ld. AO') erred in following the order of AY 2010-11 without giving due consideration to the submissions of the assessee.

2. The Ld. DRP and Ld. AO erred in holding that assessee has a service Permanent Establishment ("PE") in India within the meaning of Article 5 of India UK Double Taxation Avoidance Agreement ("DTAA").

3.The Ld. DRP and Ld. AO erred in holding that the assessee has a service PE in India under Article 5(2)(k) of the DTAA without appreciating that: -

-Technology Transfer Agreement ("TTA") dated March 5, 2004 read with Intellectual Property Agreement ("IPA") dated December 17, 2007 and International Personnel Assignment Agreement ("IP AA") dated December 5, 2005 are independent contracts for materially different purposes.

-IP AA between JC Bamford Excavators Limited ("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 or IPA.

-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 assessee is effectively connected to alleged service PE of the assessee in India and has failed to appreciate that:

-Intangible property in respect of which Royalty has been paid was wholly developed outside India;

-No functions, assets or risks associated with such intangible property is undertaken or present in India;

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 has failed to appreciate that:

-Under Article 7(1) read with Article 7(2) & 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;
-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 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 DT AA 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 erred in not following the Hon'ble Income Tax Appellate Tribunal order in assessee's case for AY 2008-09 where it has been held that Royalty earned by the assessee is not effectively connected to alleged service PE of the assessee in India.
8. Under the facts and circumstances of the case and in law, the Ld. Aa while framing the assessment order has erroneously erred in not following the direction of Ld. DRP by allowing expenses at a lower amount of INR 329,238,504/- instead of INR 411,548,129/- (1/3rd ofthe amount attributed to alleged Service PE in India, as directed by Ld. DRP).
9. Under the facts and circumstances of the case and in law, the Ld. DRP and Ld. AO erred in levying interest under Section 234A, 234B, 234C and 234D of the Act.
10. The Ld. AO erred in initiating penalty proceedings under Section 271(1)(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. Grievance of the assessee vide ground nos. 1 to 3 is that as to whether the assessee has permanent establishment (PE in India or not). As regards to this

issue the ld Counsel for the assessee at the very outset stated that this issue has been decided against the assessee vide earlier order dated 4.7.2014 in ITA no. 80/Del/2013 for the assessment year 2008-09 and order dated 8.4.2015 in ITA no. 6573/Del/2014 for the assessment year 2010-11. The ld. DR in his rival submissions submitted that this issue has already been decided against the assessee in assessee's own case in the preceding assessment years.

4. After considering the submissions of both the parties, it is noticed that this issue has been decided against the assessee in the preceding year vide aforesaid referred to order dated 04.07.2014 wherein relevant findings have been given in para 4 which read as under:

> *"4. We have heard the rival submissions and perused the relevant material on record. It is observed that in the earlier years, JCBE licensed intellectual property rights for manufacture of excavators under the brand name 3DX to JCBI. However, by virtue of new Agreement entered on 17.12.07 w.e.f. 01.04.07 amongst the assessee, JCBE and JCBI, the intellectual property rights came to be sub-licensed to the assessee without interfering in any manner its actual exploitation by JCBI. All the terms and conditions for the use of such rights by JCBI under TTA and IPAA are same. The only difference that came into the hitherto arrangement was that whereas earlier JCBI was paying royalty directly to JCBE, now it is being routed through the assessee with the deduction of 0.05%. The question of a service PE of JCBE in India came up for consideration before the Tribunal for assessment years 2006-07 and 2007-08. Vide its order for the AY 2006-07, the tribunal categorized employees of JCBE on deputation to India on assignment basis in the first category and those doing stewardship activities and inspection and testing in the second category. JCBI has been held to be constituting a service PE of JCBE in India because of the employees of the first category. The matter of the establishment of PE for the current year would have become a covered matter for the current year if*

there had not been the new factor of the tripartite agreement dated 17.12.2007, under which JCBE sub-licensed the intellectual property right to the assessee to 'manage the licensing of JCB UK's intellectual property to JCB India going forward.'. To buttress the view that the employees of JCBE constituted service PE of the assessee in India, the AO has observed that the employees of JCBE, earlier seconded to JCBI, continued to render services to JCBI during the year in question in the same way as they were doing in the past. This position was noticed by virtue of Clause (d) of the new Agreement and Clause 4.2 of this Agreement which clarifies that the delivery of technical documentation and making available of technical personnel as set out in earlier clauses III and IV of the Technology Agreement shall remain unaffected by this agreement and shall continue as rights and obligations between JCBE and JCBI under the Technology Agreement. The AO held that the above details coupled with the fact that JCBE received 99.5% of royalty from the assessee left nothing to doubt that there was service PE of the assessee as per Article 5(2)(k) of the DTAA covered within the ambit of 'other personnel'. Since this position has been candidly accepted by the ld. AR as well, we, therefore, refrain from any independent evaluation of this aspect. The ld. AR accentuated that his objections against the holding of the service PE of the assessee in India were practically the same which were taken for the earlier years. The tribunal has discussed and jettisoned such objections in its order for the A.Y. 2006-07. Under such circumstances and following the precedent, we hold that all the requisite conditions for attracting the mandate of Article 5(2)(k) are 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 out of India; (iv) such services are rendered by 'other personnel'; and (v) such activities continued for a period of more than 90 days within 12 months' period. It is thus held that the service PE of the assessee is established in India. These grounds are, therefore, not allowed."

5. So, respectfully following the aforesaid referred to order in assessee's own case for the assessment year 2008-09, the issue agitated vide Ground Nos. 1 to 3 is decided against the assessee by holding that the services PE of the assessee is established in India."

6. Vide ground no. 4 and 5 the issue agitated relates to the royalty earned by the assessee and ground no. 6 relates to the earning of profit by assessee at arm's length. As regards to these issues, the ld. Counsel for the assessee submitted that these issues are similar to the issues involved in the earlier years which had been adjudicated by the ITAT Delhi Bench 'D', New Delhi vide order dated 04.07.2014 in ITA no. 80/Del/2013 for the assessment year 2008-09 and order dated 08/04/2015 in ITA no. 6573/Del/2014 for the assessment year 2010-11. Copy of the said order was furnished which has placed on record.

7. In her rival submissions the ld. CIT DR although supported the order of the AO but could not controvert the aforesaid contention of the ld. Counsel for the assessee.

8. After considering the submissions of both the parties and material available on the record. It is noticed that identical issues having similar facts have been decided by the ITAT Delhi Bench 'D', New Delhi vide order dated 04.07.2014 in ITA No. 80/Del/2013 wherein relevant findings have been given in para 5 which read as under:

> *"5. The next major issue raised through various grounds is against the holding by the AO that the royalty earned by the assessee was effectively connected with the service PE of the assessee in India. We find that similar issue was there and has been elaborately*

discussed in the afore stated order of the tribunal for the earlier years. The tribunal has held that the total amount consisting Lumpsum Licence/Know-how Fees and also royalty as mentioned in para 2.2 of TTA was consideration for the transfer of IP rights simplicitor and also the service rendered by the employees of the second category. The Tribunal further held that in so far as the question of royalty representing consideration for the transfer of IP rights simplicitor was concerned, the service PE representing the deputationists had no role to play either in creating or making it available to JCB India. That is how the Tribunal came to hold that the same was not effectively connected with the service PE of the assessee in India. The amount of royalty and consideration for rendering of services by the employees of second category has been held to be not falling in para 6 of Article 13 and hence chargeable to tax as per para 2 of Article 13 of the DTAA. However, as regards the fees for technical services resulting from the rendering of services by the employees of the second category, the Tribunal has held that the same did not fall in para 6 of Article 13 and was, hence, chargeable to tax as per para 2 of the Article 13 of the DTAA. As regards the consideration for the employees of the first category, the Tribunal has held that the fees for technical services in relation to such employees was covered within para 6 of Article 13 of the DTAA. That is how, the Tribunal concluded that the consideration for rendering of services by the employees of first category was chargeable to tax under Article 7 of the DTAA. The AO was directed to determine the amount of income in terms of Article 7. As the facts for the instant year are admittedly similar to those of the preceding years on this issue, respectfully following the precedent for A.Y. 2006-07, we set aside the impugned order and send the matter back to the file of AO for determining income in consonance with the directions given for the earlier year."

9. So, respectfully following the aforesaid referred to order these issues are set aside and remitted back to the file of the AO for determining the income inconsonance with the direction given for the earlier years in the said order dated 04.07.2014.

10. Ground no. 7 is correlated with ground no. 1,2 and 3, so, it does not require any separate adjudication since the issue has already been adjudicated in the former part of this order while deciding the ground no. 1,2 and 3.

11. Ground no. 8 was not pressed so it is dismissed as not pressed.

12. Ground no. 9 relates to the charging of interest u/s 234A, 234B, 234C and 234D. As regards to this issue, the ld. Counsel for the assessee submitted that a similar issue was involved in the earlier year vide ground no. 8 in ITA No. 6573/Del/2014 for the assessment year 2010-11 which has been decided vide order dated 08.04.2015. Therefore, the same course may be adopted for this year also. The ld. DR could not controvert the aforesaid contention of the ld. Counsel for the assessee.

13. After considering the submissions of both the parties and the material on record, it is noticed that an identical issue was subject matter of the assessee's appeal for the assessment year 2010-11 in ITA no. 6573/Del/2014 wherein relevant findings has been given vide para 10 to 13 of the order dated 08/04/2015 in ITA no. 6573/Del/2014 which read as under :

"10. The last issue vide Ground No. 8 relates to the charging of interest u/s 234A, 234B, 234C & 234D. The ld. Counsel for the assessee submitted that the issue relating to charging of interest u/s 234B is decided in favour of the assessee vide order dated 04.07.2014 in ITA No. 80/Del/2013 for the assessment year 2008-09.

11. In her rival submissions the ld. CIT DR supported the order of the AO and submitted that the charging of interest u/s 234A, 234B, 234C and 234D of the Act is mandatory.

12. After considering the submissions of both the parties, it is noticed that the issue relating to charging of interest u/s 234B of the Act has already been decided in assessee's favour in the earlier years and the relevant findings have been given in para 6 of the order dated 04.07.2014 in ITA No. 80/Del/2013 (supra) which read as under:-

"6. The last ground of the assessee's appeal against the charging of interest u/s 234B is also decided in assessee's favour by following the view taken in the order for AY 2006-07. Relevant discussion has been made in para 20.2 of the order by which it was held that the liability of interest u/s 234B did not arise as the assessee had included the amount of royalty and fees for technical services in its total income."

13. So, respectfully following the aforesaid referred to order the issue relating to charging of interest u/s 234B is decided in favour of the assessee, for the remaining issues relating to the charging of interest u/s 234A, 234C & 234D of the Act, we hold that it is consequential in nature."

14. So respectfully following the aforesaid referred to order, the issue related to charging of interest u/s 234B is decided in favour of the assessee and for the remaining issue relating to charging of interest u/s 234A, 234C and 234D of the Act, we hold that it is consequential in nature.

15. Ground no. 10 is raised pre- maturely, so it does not require any adjudication on our part.

16. Since, we have adjudicated the appeal of the assessee in the former part of this order, therefore, the stay application in SA No. 79.Del.2016 becomes infructuous, we order accordingly.

17. In the result, the appeal of the assessee is partly allowed for statistical purposes and stay application is dismissed as infructuous.

Order pronounced in the open court on 8th April, 2016.

Sd/-	Sd/-
(Beena A. Pillai)	(N.K.Saini)
Judicial Member	Accountant Member

Dated: 08/04/2016
Binita
Copy to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.

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Asstt. Registrar
ITAT, New Delhi

Sl. No.	Description	Date
1.	Date of dictation by the Author	01.04.2016
2.	Draft placed before the Dictating Member	01.04.2016
3.	Draft placed before the Second Member	
4.	Draft approved by the Second Member	
5.	Date of approved order comes to the Sr. PS	
6.	Date of pronouncement of order	
7.	Date of file sent to the Bench Clerk	
8.	Date on which file goes to the Head Clerk	
9.	Date of dispatch of order	