

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'D' NEW DELHI**

**BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**I.T.A. No. 1741/DEL/2016 (A.Y 2011-12)**

JCB Heavy Products Ltd., Rocester, Uttoxeter, ST14 5JP, Staffordshire, England. (PAN : AABCJ 4692 H) <b>(APPELLANT)</b>	Vs	DCIT(International Taxation), Circle – 2(1)(2) New Delhi  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Sh. K. M. Gupta, Adv.</b>
<b>Respondent by</b>	<b>Shri Satpal Gulati, Sr. D.R.</b>

<b>Date of Hearing</b>	<b>08.01.2020</b>
<b>Date of Pronouncement</b>	<b>05.03.2020</b>

**ORDER**

**PER SUCHITRA KAMBLE, JM**

This appeal is filed by the assessee against the order dated 19.01.2016 passed by DCIT, Circle – 2(1)(2), International Taxation, New Delhi for Assessment Year 2011-12 under section 144C(13) r.w.s. 143(3) of the Income Tax Act, 1961.

2. The Grounds of appeal are as under:-

- “1. *The Learned Dispute Resolution Panel (“the Ld. DRP”) and Learned Assessing Officer (“the Ld. AO”) erred in holding that receipts on account of Rectification and Rework by the Appellant is in the nature of Fees for Technical Services (“FTS”) within the meaning of Article 13 of Double Taxation Avoidance Agreement (“DTAA”) entered between India & UK.*

2. *Without prejudice to Ground No.1, on the facts and circumstances of the case and in law, the Ld. AO erred in applying the tax rate of 15% as provided under the DTAA entered between India & UK on reimbursements towards rectification and rework cost, instead of the lower rate 10.5575% (including surcharge and education cess) provided under the Act.*
3. *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.*
4. *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. JC Bomford Heavy Products Ltd. i.e. the assessee, is a company incorporated under the laws of the United Kingdom. It is a non-resident company for the purposes of Indian Tax laws and is a tax resident of U.K under Article 4 of the Double Taxation Avoidance Agreement entered into between India and U.K. It is a wholly owned subsidiary of M/s J.C. Bamford Excavators Limited, England (JCBE). The assessee filed return of income for A.Y. 2011-12 declaring total income of Rs.15,68,12,533/- on 26.11.2011. The Assessing Officer observed that on 05.03.2004, M/s. JCBE entered into Technical Transfer Agreement with the assessee company to license the patents, know-how and designs and to transmit technical information for manufacture of licensed products in India on the terms and conditions agreed upon. The assessee was asked as to show that the assessee company is not Permanent Establishment in respect of the services against which receipts were received by the assessee company which cannot be performed at the premise of JCB India. The assessee company submitted that JCB Heavy Products is a company incorporated under the laws of the United Kingdom. It is a non resident company for the purpose of the Indian Tax laws and is a tax residents of UK under Article – 4 of the Double Taxation Avoidance Agreement entered into between India and UK. The assessee submitted before the

Assessing Officer that Royalty income earned under Technical Transfer Agreement is effectively connected with the 'Service Permanent Establishment'. Further as no employees of the assessee were deputed to work in India the question of having any permanent establishment does not arise. The Assessing Officer after considering the reply of the assessee held that even where the fee is charged at cost without any mark-up, it is held as not a case of reimbursement and TDS u/s 195 is applicable. Therefore, the Assessing Officer observed that the receipts of total amount of Rs.22,52,093/- which are attributable to the PE are held to be taxable as Fees for Technical Services on acquisition basis. The Assessing Officer concluded that the assessee has a service PE in India through which it is carrying out its business in India and the royalty received by the assessee from JCB India is effectively connected to the PE. The draft assessment order was passed on 24.03.2015. The assessee filed objections before the Dispute Resolution Panel which were disposed off vide direction dated 23.12.2015 by the DRP. The final assessment order was passed on 19.01.2016. The Assessing Officer held that once it is established that there exists a PE and that there are receipts which are attributable to such PE, it needs to be seen as to how much of the receipts can be attributable to such PE. In the instant case, Rule 10(iii) of the Income Tax Rules, 1962 was invoked and held that 20% of the receipts represent the expenses exclusively incurred by the PE of the assessee in India. In other words, 80% of the receipts accruing to the assessee is to be taxed at the prevailing tax rate applicable to the foreign companies. Thus, the Assessing Officer held that an amount of Rs.12,54,49,786/- (80% of 15,68,12,232/-) is taxable at the rate applicable to foreign companies for business income, i.e. 40% and hence taxed accordingly. The amount of Rs.18,01,674/- was taxed at 40%. Further, the amount of rectification work i.e. Rs.22,52,093/- was taxed similarly i.e. 20% of the receipts were treated as representing the expenses incurred wholly and exclusively by the Permanent Establishment of the assessee in India.

4. Being aggrieved by the assessment order, the assessee filed the present

appeal before us.

5. The Ld. AR submitted that the Assessing Officer has not given the finding as to how the taxable amount comes under the purview of fees for technical services when it is a Royalty. The Assessing Officer has treated rectification and rework components as export service activities and taxed entire expenses, but the repair is only that of Rs. 22,52,093/-. Thus, the Assessing Officer as well as DRP was not justified in making these additions. The Ld. AR submitted that the assessee earned royalty income from JCB India Ltd. (JCB India) amounting to Rs. 156,812,533. The said receipts are subject to tax @ 158/105575% of the gross amount as "Royalty & Fees 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 expenses are in the nature of pure reimbursements/business profits and thus are not considered as taxable in India. The company also sold materials/component to Rs. 9,928,146 to JCB India from U.K. who are not taxable in India. The assessee company does not have any branch office/Project Office/Liaison Office/Godowns/Warehouse or any other office or fixed place of business in India. The royalty payment made by JCB India for Financial Year 2010-11 to JCB Heavy Products is in consideration of Technology Transfer Agreements entered into between JCB India to the assessee. JCB Heavy products has granted exclusive, non transferable license to JCB India to manufacture, assemble, use and sell excavator. Prima facie there is no question of JCB Heavy products, being considered to have a Permanente Establishment in India as it has no office of any sort (Branch/project or Liaison office) in India. The assessee has not provided any technical services in India during the Financial Year 2010-11. It has only earned royalty from JCB India which was duly offered to tax on gross basis in India. The Ld. AR further submitted that there were no expatriates in India during Financial Year 2010-11. The Ld. AR further reiterated that the company does not have any office or fixed place of business in India. The

Company is earning royalty income from India which is taxable on gross basis, therefore, it is not required to maintain books of accounts under Section 44AA of the Income Tax Act, 1961. Further, as per Provisions of Section 44AB of the Act every person carrying on business is required to file a tax audit report along with the tax return wherein his business receipts exceed Rs. 6 million during Financial Year 2010-11. In the present case, no tax audit report has been obtained by the Company following the decision of the Delhi Tribunal in case of Snam Progetti Spa vs. JCIT 95 TTJ 424 and the Mumbai Tribunal in the case of CIT vs. Continental Gumi Works 50 TTJ 607 wherein it has been held that tax audit report is not required to be filed wherein the assessee is liable to tax on a gross basis.

6. The Ld. DR submitted that this aspect of whether the income was Fees for Technical Services or not has not been looked in detail by the Assessing Officer as well but the Ld. DR submitted that the Assessing Officer has given a categorical finding why these are Fees for Technical Services.

7. We have heard both the parties and perused all the relevant materials available on record. The Assessing Officer concluded that the assessee has a service PE in India through which it is carrying out its business in India and the royalty received by the assessee from JCB India is effectively connected to the PE. The Assessing Officer held that once it is established that there exists a PE and that there are receipts which are attributable to such PE, it needs to be seen as to how much of the receipts can be attributable to such PE. In the instant case, Rule 10(iii) of the Income Tax Rules, 1962 was invoked and held that 20% of the receipts represent the expenses exclusively incurred by the PE of the assessee in India. In other words, 80% of the receipts accruing to the assessee is to be taxed at the prevailing tax rate applicable to the foreign companies. Thus, the Assessing Officer held that an amount of Rs.12,54,49,786/- (80% of 15,68,12,232/-) is taxable at the rate applicable to foreign companies for business income, i.e. 40% and hence taxed accordingly.

The amount of Rs.18,01,674/- was taxed at 40%. Further, the amount of rectification work i.e. Rs.22,52,093/- was taxed similarly i.e. 20% of the receipts were treated as representing the expenses incurred wholly and exclusively by the Permanent Establishment of the assessee in India. From the perusal of these observations of the Assessing Officer, it can be seen that while arriving at this conclusion, the Assessing Officer mentioned that the assessee was not able to explain as to for what reason and purpose such rectification was carried out. No documentary evidence in support of the same was furnished so as to corroborate its claim that such receipts were merely reimbursements. What benefit was extended by the assessee or what services were exactly provided by the assessee to the payers of such 'rectification of work' was not elaborated by the assessee. And therefore, the Assessing Officer held that these are Fees for Technical services receipts. After going through the records, we observed that the assessee has provided the details of rectification and rework in respect of component export services activity, but the Assessing Officer has not at all discussed the same while giving the findings. Therefore, it will be appropriate to remand back this issue to the file of the Assessing Officer/TPO for proper adjudication in consonance with the evidences filed by the Assessee before the Assessing Officer/TPO. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Thus, Ground No. 1 and 2 are partly allowed for statistical purpose. As regards to Ground No. 3 and 4, the same are consequential in nature, hence, these grounds are not adjudicated upon at this juncture. Ground No. 3 and 4 are dismissed.

8. In result, appeal of the assessee is partly allowed for statistical purpose.

**Order pronounced in the Open Court on 05<sup>th</sup> day of March, 2020.**

**Sd/-  
(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER**

**Sd/-  
(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

Dated: 05/03/2020  
*Priti Yadav, Sr. PS/R.N\**

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	15.01.2020
Date on which the typed draft is placed before the dictating Member	21.01.2020
Date on which the typed draft is placed before the Other Member	.01.2020
Date on which the approved draft comes to the Sr. PS/PS	.01.2020
Date on which the fair order is placed before the Dictating Member for pronouncement	.01.2020
Date on which the fair order comes back to the Sr. PS/PS	05.03.2020
Date on which the final order is uploaded on the website of ITAT	05.03.2020
Date on which the file goes to the Bench Clerk	05.03.2020
Date on which the file goes to the Head Clerk	