

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

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

ITA.No.4243/Del/2015
Assessment Year: 2008-09

ACIT, Circle-5(1), New Delhi. (Appellant)	vs	Bombardier Transportation India Ltd. 3 rd Floor, B-Wing, Somdutt Chambers-1, 15, Bhikaji Cama Place, New Delhi-110066 PAN-AAACA5584C (Respondent)
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ITA.No.4575/Del/2015
Assessment Year: 2008-09

Bombardier Transportation India Pvt.Ltd. Hotel Holiday Inn., Business Centre, Aero City, Delhi International Airport, New Delhi. PAN-AAACA5584C	vs	Addl. CIT, Range-3, New Delhi.
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Department by: Sh. Sanjay I. Bara, CIT DR
Sh. H.K.Choudhary, CIT DR
Assessee by: Sh. Vishal Kalra, Adv. & Ms. Reena Malik, CA

Date of hearing: 29/07/2019
Date of order : 01/08/2019

ORDER

PER K. NARASIMHA CHARY, J.M.

Aggrieved by the order dated 16.04.2015 for the Assessment Year
2008-09 passed by the Commissioner of Income-tax (Appeals)-44, New

Delhi, {"CIT(A)"} both the revenue and assessee preferred appeals. For the sake of convenience, we dispose them off by a common order.

2. Brief facts of the case are that the assessee ("Bombardier Transportation India Private Limited") is a Company incorporated in India under the provisions of Companies Act, 1956 and is a wholly owned subsidiary of Bombardier Transportation (Holdings) Singapore Pte. Ltd. It is associated with the Indian Railways as a component supplier for propulsion and signalling systems. In the Propulsion and Control ("PPC") business, the assessee manufactures traction/auxiliary converters, vacuum circuit breakers, control electronics and tap changers and trades in transformers and gear case. In the Rail Control Systems ("RCS") business, the assessee is engaged in the supply and installation of signalling equipment. Further, during the captioned Assessment Year ("AY"), the assessee was amongst the first Company that had been awarded a contract by Delhi Metro Rail Corporation ("DMRC") for supply of Metro trains for Phase II of Delhi Metro project under its Mainline and Metros ("MLN") business.

3. The Bombardier Group is headquartered in Montreal, Canada. The Group is headed by a President and is complemented by officers such as Vice President Finance, Vice President Legal Affairs and Vice President Human Resources ("Group Management") etc. The Group themselves are organized into divisions. The worldwide management activities for each of these sub-divisions are centralized in departments known as HUBs. The HUB entities for the PPC, RCS and MLN divisions are Bombardier Transportation Switzerland AG ("BT Switzerland),

Bombardier Transportation Sweden AB ("BT Sweden) and Bombardier (Singapore) Pte Ltd. ("BT Singapore) respectively.

4. During the Financial Year 2007-08, the following international transaction entered into by the Tax payer with its Associated Enterprises ("AEs) are under dispute:

Sl No	Nature	Amount in Rs.
1	Administration Services	78,180,520
		53,578,812
2	Marketing, Business Development, Product Planning & Bid Governance	
3	Operations	10,069,934
4	Procurement	6,379,980
5	Engineering Services	9,448,491
6	IS/IT	14,508,253
		172,165,990

5. In this Financial year, the assessee had entered into agreements with its AEs, namely, BT Switzerland, BT Sweden, BT Singapore and Bombardier Transportation Canada ("BT Canada) for availing the various administrative and intermediary intra-group services. The AEs, based on the drivers such as percentage of sales, percentage of material and percentage of head count etc. allocated the service charges and recovered them on a cost-to-cost from the AEs on the basis of agreements. Accordingly, in the AY 2008-09, the assessee made a payment of Rs.50,429,652/- to BT Canada, Rs.30,861,538/- to BT Switzerland, Rs.80,145,408/- to BT Singapore and Rs.10,729,413/- to BT Sweden, in relation to the receipt of various intra group services.

6. The assessee in its TP documentation had benchmarked the

aforementioned international transaction of receipt of intra-group services received from BT Switzerland and BT Canada by applying Transactional Net Margin Method ("TNMM") as the most appropriate method and using profit level indicator ("PLI") of Operating Profit/Sales ("OP/Sales"). The assessee was selected as the tested party and comparable companies were used. A summary of the benchmarking approach adopted by the assessee is:

S. No	Nature of Transaction	Most Appropriate	Profit Level Indicator(PLI)	Tax payer's	Average Result
1	Availing of intermediary	TNMM	Operating Profit	38.90%	13.29%
2	Availing of administrative				

7. Based on the said analysis, the TPO concluded that the margin earned by the assessee was higher than that of the comparable companies, and accordingly, the international transactions of the assessee were demonstrated to be at arm's length. Further, with regard to intra-group services received from BT Singapore and BT Sweden, the Assessee has compensated these entities on a cost to cost basis. Thus, applying the other method, the services were demonstrated to be at arm's length.

8. In view of the international transaction reported by the assessee, matter was referred to the Ld. TPO under section 92CA(1) of the Income Tax Act, 1961 (for short "the Act") for determination of the

arm's-length price of the international transaction.

9. During the course of transfer pricing proceedings, the Ld. TPO approached the entire assessment in a predetermined mechanical fashion without taking cognizance of the submissions and various documents/evidences placed on record by the assessee. By order dated 28/10/2011, Ld. TPO accepted all the other international transactions to be at arm's length, however, computed the Arm's Length Price ("ALP") of intra-group services at Rs.13,395,072 (as against the payment made by the assessee to the AEs of Rs.172,165,990/-) applying Comparable Uncontrollable Price ("CUP") Method. Learned Assessing Officer accordingly passed the assessment order dated 06/02/2012 making disallowance of Rs.15,87,70,939/- pursuant to the orders passed by the Ld. TPO.

10. Assessee challenged the order before the Ld. CIT(A), who partially upheld the transfer pricing adjustment made by the TPO. Accordingly, the adjustment amount proposed by the TPO and relief granted by CIT(A) in respect of each of the intra group services is as follows:

S.No.	Nature	Amount(Rs)	Allowed by TPO	Allowed by CIT(A)	Adjustment Amount
1	Administrative Services	78,180,520	-		78,180,520
2	Marketing, Business Development, Product Planning & Bid Governance	53,578,812	13,395,073 (12,510,645 + 884,428)	24,994,515	15,189,224
3	Operations	10,069,934	-	4,027,974	6,041,960
4	Procurement	6,379,980	-	6,379,980	-
5	Engineering Services	9,448,491	-	-	9,448,491
6	IS/IT	14,508,253			14,508,253
	Total	172,165,990	13,395,073	35,402,469	123,368,448

11. By way of grounds No. 1.1 to 1.7, assessee assails the rejection of TNMM for benchmarking intra-group services received by the assessee in PPC division as incorrect and submits that the intra-group services received by the assessee from its AEs (both at the Hub and Group level) have benefitted the operational site business of PPC division of the assessee by providing strategic guidance as well as rich technical expertise; and that since all the transactions in the PPC division are closely integrated i.e. these are undertaken essentially for the purposes of manufacturing and sale of PPC equipment's, the assessee has applied combined transaction approach and selected TNMM as the most appropriate method for determination of the ALP including the intra-group services availed from its AEs. It is further submitted that the operating profit margin of the assessee i.e. 38.90% is much higher than that of the comparable companies i.e. 13.29% under the PPC division. Grievance of the assessee is that the Ld. TPO and CIT(A) summarily rejected the assessee's detailed benchmarking analysis provided in the contemporaneous TP documentation and held that the TNMM does not reliably measure the arm's price of the international transaction for receipt of intra-group services without providing any cogent or valid reasons for the same. According to the assessee, the principle of aggregation is a well-established rule in transfer pricing analysis, which seeks to combine all closely linked transactions wherein arm's length price can be determined for a number of transactions taken together. Ld. AR refers to the OECD Guidelines which recommend an aggregated benchmarking approach in situations where the underlying transactions

are closely linked to the core business operations.

12. Order in ITA No.1626/Del/2015 for Assessment Year 2010-11 in assessee's own case, is brought to our notice wherein the Delhi Bench of Tribunal accepted all the intra-group services received by the assessee except for payment made by the assessee related to President and his team, human resources, Six sigma and operation and quality & other services. Ld. AR summarized the amount of payments made by the taxpayer against the above services during the Assessment Year 2008-09:

S.No.	Nature of Service	Amount(in Rs.)
1.	Human Resources	5,390,375
2.	Quality	184,269
3.	Six Sigma	352,617
	Total	5,927,261

13. For this purpose, Ld. AR placed reliance on the decision of the Hon'ble jurisdictional Delhi High Court (Hon'ble HC) in the case of Sony Ericsson Mobile Communication India Pvt. Ltd (374 ITR 118) wherein it has been stated that "aggregation of transactions is desirable and not merely permissible, if the nature of transaction(s) taken as a whole is so inter-related that it will be more reliable means of determining the arm's length consideration for the controlled transactions; that there are often situations where separate transactions are intertwined and linked or are continuous that they cannot be evaluated adequately on separate basis; and that secondly, the controlled transaction should ordinarily be based on the transaction actually undertaken by the AEs as has been struck by them.. ."

14. Ld. AR submitted that there is incorrect application of CUP method, inasmuch as the Ld. TPO has selected CUP method as the most appropriate method for determining the ALP of intra-group services as nil by holding that either the services were not needed by the assessee or no benefit was received by it or that the services were itself not received by the assessee. By placing reliance on the decisions of the Hon'ble Delhi High Court in the case of CIT vs EKL Appliances Ltd. [2012] 345 ITR 241 (Del) wherein it was held that the TPO cannot hold the value of a transaction to be 'Nil', he argued that the expenses cannot be disallowed by arriving at 'Nil' ALP. Reliance, in this regard is placed.

15. According to the Ld. AR, Ld. TPO cannot determine whether there is a service from which the assessee benefits and therefore, he cannot determine the ALP of payments made by assessee to AE at NIL without application of mind.

16. Reliance is also placed on the decision of the Hon'ble Delhi High Court in the case of M/s CIT vs. Cushman & Wakefield (India) Pvt. Ltd. ([2015] 277 CTR 368 (Delhi)) wherein it was held that every international transaction requires a separate and proper benchmarking analysis (including CUP analysis) and merely making a statement or a hypothesis that a transaction is not at arm's length without providing any comparable data to validate the same, does not conclude that the transaction is not in compliance with the arm's length standard as laid down under the Indian TP Regulations.

17. Basing on the commercial necessity of services received, it is

submitted by the Ld. AR that since the assessee was engaged in the business of highly sophisticated technical equipment and large value critical contracts, it was imperative for the assessee to obtain expertise and specialist knowledge, guidance and support in various operational functions for the execution of its India business. For this purpose, the assessee obtained various intra-group services from its AEs who have rich experience of the group's business practices and could leverage on the synergies of globalization and pooled resources.

18. Ld. AR argues that, in order to substantiate and validate the intra-group services availed from the AEs and the benefits derived thereon, the assessee had submitted a plethora of voluminous documentary evidences before the Ld. TPO and CIT(A), but the Ld. TPO and CIT(A) selectively analyzed the documentary evidences and held that only a few of the services were actually received by the assessee without providing any cogent or valid reasons.

19. By placing reliance on the decision in the case of Avery Dennison (India) Private Limited [ITA Appeal No. 5404 (Delhi) of 2018] Ld. AR argued that the services, by their very nature, are intangible and therefore, the evidences regarding availing such services and benefits received as a result of availing such services can be best demonstrated by narration and descriptions as evidenced by supportive emails, which deserves to be considered.

20. Turning to the appeal filed by the Revenue, against the relief provided by the Ld. CIT(A) in respect of intra group services received by

the assessee during the said year which include the Marketing, business development, product planning and bid governance, Operations; and procurement, Ld. AR submitted that the assessee had filed voluminous submissions and evidences in the nature of agreements, invoices, cost allocation sheets and email correspondences demonstrating the receipt of such services and the associate benefits received by the assessee from its AEs before the Ld. CIT(A) and considering the same the Ld. CIT(A) granted relief, and therefore, the same does not invite any interference by this Tribunal.

21. Ld. DR brought to our notice that for Assessment Year 2010-11 this issue has been considered by the Tribunal vide order dated 14/9/2017 in a detailed manner and in the facts and circumstances of the case, it would be desirable to follow the decision in assessee's own case for the Assessment Year 2010-11 which requires factual verification as to the actual rendering of the services in the light of such a decision.

22. Ld. AR, though vehemently contended that excluded services cannot be considered as shareholding services, lastly contended that if for any reason the Tribunal reaches a conclusion to follow the order passed by a coordinate Bench in assessee's own case for the Assessment Year 2010-11, then the amount of payments, namely, Rs.53,90,375/- towards human resources services, Rs.1,84,269/- towards quality services and Rs.3,52,617/- towards Six Sigma services in relation to the excluded services during the Assessment Year 2008-09 may be considered.

23. We have gone through the record in the light of the submissions made on either side in both the appeals. So far as the benchmarking of the ALP for the services in dispute, the decision of a coordinate Bench of this Tribunal for the Assessment Year 2010-11 is relevant. In the process of this decision, a coordinate Bench of this Tribunal, after noticing the binding precedents of the Hon'ble jurisdictional High Court in the case of CIT verses EKL applications Ltd 345 ITR 241, Sony Ericsson Mobile Communications India Private Limited vs. CIT 374 ITR on 18 and CIT vs M/s Cushman and Wakefield (India) Private Limited in ITA No. 475/2012 besides the decision of the Tribunal in the case of Corning SAS-India branch office vs DDIT in ITA No. 548/Del/1582 taxmann.com 444 upheld the addition to the extent of payment related to management support by President and his team, human resources, Six Sigma and operation and the quality and other services; that the international transaction in respect of payment on account of other services are required to be benchmarked by clubbing with the other international transactions and for that reason set aside the orders of the authorities below in respect of the determination of ALP of those services and remanded the matter to the file of the Ld. TPO/learned Assessing Officer to determine the ALP accordingly.

24. The Tribunal further held that when the order of the Ld. TPO and learned Assessing Officer or merged in the order of the Ld. DRP/CIT, as the case may be, then the question of jurisdiction of Ld. TPO/Ld. AO would be no more relevant particularly when the reference is not under challenge and on that score the Tribunal did not find any infirmity in the

orders of the authorities below on the question of jurisdiction to reject the claim of the international transaction. In this respect, we find from the order that the coordinate Bench considered the question of jurisdiction of the Ld. TPO and held that if the Ld. TPO come to the conclusion that no actual services were received by the assessee, then it is in the domain of the Ld. TPO to determine the ALP at nil.

25. In the given set of facts and circumstances, we are of the considered opinion that it is just and reasonable to follow the decision of the coordinate Bench for the Assessment Year 2010-11, set aside the issue to the file of the Ld. TPO/learned Assessing holding that the international transaction in respect of payment on account of other services are required to be benchmarked by clubbing with other international transactions and for that reason set aside the orders of the authorities below in respect of the determination of ALP of those services. Ld. TPO/learned Assessing Officer will determine the ALP of the services by keeping in view the observations of the coordinate Bench of this Tribunal for the Assessment Year 2010-11, after giving an opportunity of being heard to the assessee.

26. In the result, both appeals are allowed for statistical purpose.

Pronounced in open court on this 1st August, 2019.

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

sd/-
(K. NARSIMHA CHARY)
JUDICIAL MEMBER

Dated: 01 /08/2019

Amit Kumar

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

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Approved Draft comes to the Sr.PS/PS	
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Date on which file goes to the Head Clerk.	
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Date of uploading on the website	