

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI [THROUGH VIDEO CONFERENCE]**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 859/DEL/2016
[A.Y 2011-12]**

**Bombardier Transportation Sweden AB Vs.
A-4, Greater Kailash,
Part-I, New Delhi.**

**The D.C.I.T
International Taxation,
Circle - 1(1)(2),
New Delhi.**

PAN: AAACI 0233 Q

[Appellant]

[Respondent]

**Assessee by : Shri Deepak Chopda, Adv
Shri Anmol Anand, Adv
Ms. Priya Tandon, Adv**

Revenue by : Shri Raman Chopda, CIT-DR

Date of Hearing : 27.10.2020

Date of Pronouncement : 29.10.2020

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

With this appeal, the assessee has challenged the correctness of the order dated 21.01.2016 framed under section 143(3) read with section 144C(13) of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short].

2. Ground Nos.1 and 2 are general in nature and need no separate adjudication.

3. Ground No. 3 is on existence of Association of Persons.

4. In his written submissions, the ld. counsel for the assessee has categorically mentioned that this ground is academic in nature. On such concession, we do not find it necessary to adjudicate upon this ground for academic interest. Ground No. 3 stands dismissed.

5. Grounds No. 4 to 6 relate to taxation of intermediary services.

6. The assessee is aggrieved by the treatment of Rs.1,16,81,407/- received on account of intermediary services as being taxable as 'fees for technical services'.

7. Representatives of both the sides were heard at length. Case records carefully perused.

8. Facts emanating from the assessment record show that during the year under consideration, the appellant had rendered intermediaries services like marketing, sales, business development, project management, customer services etc. to Bombardier Transportation India Ltd [BTIN] and received fees for intermediary services amounting to Rs.1,16,81,407/. At this stage, it would be pertinent to mention that the appellant company is registered and incorporated under the laws of Sweden and is a non-resident and tax resident of Sweden.

9. The appellant is engaged in the business of manufacturing of train control and signalling systems for mass transit system. During the year, the appellant entered into international transactions with its Associated Enterprises [AE]. The case was referred to the Transfer

Pricing Officer [TPO] and the TPO, vide his order dated 19.01.2015 has drawn no adverse inference with respect to international transactions carried out by the appellant and, therefore, no adjustment was made to the taxable income.

10. As mentioned elsewhere, the appellant has received fees for intermediary services amounting to Rs. 1,16,81,407/-. The Assessing Officer asked the assessee to show cause as to why revenues received from intermediary services may not be taxed in India as FTS.

11. In its reply, the appellant stated that it is a HUB entity for the Rail Control Solutions [RCS] businesses of bombardier group and it houses functional heads for various functional areas like administration, procurement, engineering, quality, program management and marketing, each catering to worldwide RCS business. It was pointed out that the appellant had rendered intermediary services to BTIN during the year. Agreement with BTIN was furnished and it was pointed out that it does not satisfy any mark up to be retained by the appellant with respect to services rendered by BTIN.

12. Explaining as to why FTS is not applicable, the assessee stated that it has claimed benefit of provisions of Article 12 of India Sweden Double Taxation Avoidance Agreement [DTAA] since they are more beneficial to it.

13. The assessee also placed reliance on Protocol 7 of the treaty according to which, if the scope of taxability of FTS is restricted on account of agreement between India and a third state, which is a member of OECD, then such limited scope would apply to Swedish treaty in the same manner. In the light of this, reliance was placed on Portuguese Treaty wherein the scope of FTS is restricted on account of requirement of 'Make Available' clause.

14. The entire submissions of the assessee were rubbished by the Assessing Officer who was of the firm belief that the nature of intermediary services provided by the appellant to BTIN are not disputed and thus are admittedly in the nature of FTS as per provisions of the Act. The Assessing Officer was of the opinion that it is not only technical knowledge or skill that must be made available, but even common place 'experience', 'know-how' or 'processes' if made available can result in taxability of FTS. The Assessing Officer was of

the firm belief that even development and transfer of technical plan or technical design may result in FTS becoming taxable.

15. Drawing support from the decision of the Tribunal of Bangalore Bench in the case of Bovis Land Lease [India] Private Limited, the Assessing Officer held that the revenue earned by the assessee from intermediary services rendered to BTIN are taxable in India.

16. Objections were raised before the DRP but were of no avail.

17. Before us, the ld. counsel for the assessee reiterated what has been argued before the lower authorities.

18. It is the say of the ld. counsel for the assessee that on identical set of facts, in assessee's own case for A.Y 2010-11, the CIT(A) vide order dated 07.06.2016 and further in A.Y 2012-13, vide order dated 31.03.2018, has categorically observed that the said intermediary services rendered by the appellant to BTIN does not satisfy the 'Make Available' clause and does not amount to FTS. The ld. counsel for the assessee further pointed out that the order of the CIT(A) for A.Y. 2010-

11 was not appealed by the revenue or by the appellant before the Tribunal and hence, has attained finality.

19. Per contra, the ld. DR strongly supported the findings of the Assessing Officer. It is the say of the ld. DR that import of findings given by CIT(A) in A.Y 2010-11 is immaterial, as MFN benefit has been allowed by the Assessing officer this year.

20. The ld. DR vehemently stated that 'Make Available' clause enables to use technology and as the appellant is involved in guidance of the projects, the said services have been made available to the recipient services. Referring to Article 12(3) of India Sweden Tax Treaty, the ld. DR strongly submitted that the services rendered by the appellant are covered under the treaty as FTS. The main contention of the ld DR is that certain services like guidance and advice installation and management of equipment supply cannot be considered as managerial services and hence FTS. The ld. DR concluded by saying that certain services are managerial services and certain services are technical services.

21. We have given thoughtful consideration to the rival submissions and have carefully perused the orders of the authorities below. There is no dispute that during the year under consideration, the appellant has rendered services like marketing, sales, design development, project management customer services etc. and has received fees amounting to Rs. 1.16 crores which have not been offered for tax in the return of income. It is equally true that the appellant is HUB entity for RCS business of Bombardier group and accordingly, the appellant rendered intermediary services to BTIN.

22. Since the appellant is a tax resident of Sweden, it is entitled to benefits of Indo Sweden DTAA and protocols thereof, and Protocol 7 of the Treaty provides scope of taxability of FTS which is restricted on account of agreement between India and a third state. We find that under the India Portuguese Treaty, scope of FTS is restricted on account of requirement of 'Make Available' clause.

23. On this basis, the CITA in A.Y 2010-11, has categorically observed that the said intermediary services rendered by the appellant to BTIN does not satisfy the 'Make Available' clause and does not amount to FTS.

24. In our considered opinion, the technical or consultancy services rendered should be aimed at and result in transmitting technical knowledge, etc., so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Technology will be considered 'made available' when the person acquiring the service is enabled to apply the technology.

25. The fact that the provision of the service that may require technical knowledge, skills, etc., does not mean that technology is made available to the person purchasing the service. In our considered view, payment of consideration would be regarded as 'fee for technical/included services' only if the twin test of rendering services and making technical knowledge available at the same time is satisfied. For this, we derive support from the decision of the Hon'ble Karnataka High Court in the case of De Beers India Minerals Private Limited 346 ITR 467.

26. In consideration of totality of facts, we are of the opinion that the intermediary services rendered by the appellant do not make available any technical knowledge, skill etc to BTIN and BTIN is not a equipped to apply technology contained in services rendered by the appellant. Therefore, the intermediary services provided by the appellant to BTIN do not tantamount to FTS and accordingly, shall not be taxable in India. Accordingly, Ground Nos. is 4 to 6 taken together, are allowed.

27. Ground Nos. 7 to 15 relate to existence of Permanent Establishment [PE].

28. This grievance relates to the fact that the DRP has enhanced the income of the appellant on account of PE in India.

29. Facts on record show that during the proceedings before the DRP, the DRP examined clauses from the agreement with DMRC as well as Consortium Agreement between the Appellant and BTIN and observed that the appellant has PE in India in the form of BTIN. Having held that BTIN is the PE of the appellant in India, the DRP attributed

the income earned by the appellant from offshore supply of goods and equipment to the PE on gross basis.

30. Before us, the ld. counsel for the assessee vehemently stated that the DRP has grossly erred in not appreciating the fact that the supplies made under BS-02 Agreement were offshore supplies and the same were not taxable in India. It is the say of the learned counsel for the assessee that the DRP has further erred in observing that the contract between DMRC and Consortium consisting of the appellant and BTIN is interlinked, intervened and indivisible.

31. The learned counsel for the assessee further pointed out that for holding BTIN as PE in India, the DRP concluded that the PE was instrumental since the stage of bidding, negotiations, signing of contract, preparation of designs and plans, management, delivery of train signalling systems and final delivery to DMRC and the warranty of equipment etc.

32. The learned counsel vehemently stated that the entire findings of the DRP are based upon incorrect facts, in as much as, the DRP has considered Rs.-02 contract whereas the correct contract was BS-02

which was design, manufacture, supply, installation testing and commission of train control and signalling systems. The learned counsel for the assessee concluded by stating that the disposal test has not been satisfied as no place of disposal was available to the appellant in India and for this proposition, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Formula One World Championship Ltd 80 Taxmann.com 347.

33. Per contra, the ld. DR strongly supported the findings of the DRP. It is the say of the ld. DR that since it is composite contract, therefore, there has to be attribution. The ld. DR pointed out that as per the contract, liability was fastened jointly and severally and the same profit has to be attributed for supply made to India by the appellant.

34. Referring to the findings of the DRP at Pages 18 & 19 of its order, the ld. DR pointed out that the seconded employee of Bombardier Transportation Sweden who has been seconded to Bombardier India and is overall responsible for entire delivery including mechanical and electrical equipment and commissioning of the train and ensuring BT standard in all testing activities prior delivery of train in connection

with the contract with DMRC. The ld. DR rested his submissions on the following findings of the DRP:

- “1. There is a Expat employee who is being paid a very high salary of Rs.7,35,26,751. This shows that his job is of paramount importance for the contract with DMRC and his job responsibilities as defined in the appointment letter include coordination with DMRC engineers for completion of contract.
2. He has overall technical responsibility for the entire scope of delivery including electrical and mechanical equipments.
3. He is also required to provide Technical support during train commissioning in New Delhi, ensure BT standards in all testing activities prior to the delivery of the trains to the customer.
4. The contractor is responsible for shipment of goods to India.
5. The contractor is responsible for all legal requirements, duties,- dues, taxes, and other such requirements and expenditure required for the importation of the works, the equipment, spare parts and other items to be supplied under the contract into Delhi.
6. The contractor shall clear the works, the equipment, the spare parts and other items to be supplied under the contract through Delhi customs/India sea port in accordance with all Government of India enactments.

7. Further, as per the terms and conditions of the contract, the contractor is responsible for inland transportation in India, delivery and testing in the depot of all offshore equipment

8. Thus, the responsibility of BT Sweden is to transport all offshore equipment in India up to the site of DMRC in Delhi and thereafter carry out the entire testing of the equipment in the depot of DMRC.

9. The cost entries show that the entire activities from preliminary planning till transfer, of technology is an integrated activity.

10. The role of BTIN in overall functioning and execution of the contract from bidding to supplies and post supply activities is definitely significant for the BT Sweden.

11. The activities relating to delivery of offshore manufacture equipment at the nominated sites and thereafter testing and commissioning are activities which are completed with active and coherent participation by BT Sweden and BTIN and utilization of the premises of BTIN by BT Sweden

12. For the same contract in respect of RS2 project there is a project office existing in India.

13. The cases of Ishikawajima and Hyundai heavy industries are not applicable as the contract in the Case of the assessee is a composite indivisible contract.

14. As per the terms and conditions of the contract, it is clear that the assessee is working with DMRC on a composite contract."

35. We have given thoughtful consideration to the rival contentions and have carefully perused the relevant documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules. The undisputed fact is that the supplies made under the BS-02 agreement were off shore supplies. The Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd 158 Taxman 259 has categorically held that only such part of the income as is attributable to the operations carried out in India can be taxed in India. Same view was taken by the Hon'ble High Court of Delhi in the case of Nortel Networks India International Inc & Ors 386 ITR 0353.

36. We have also considered the agreement between the appellant and BTIN. We find that as per this MOU, scope of work between the appellant and BTIN are clearly bifurcated. The relevant part reads as under:

"WHEREAS BT Sweden, BT India and their subsidiaries/affiliates as a fully integrated group are desirous and possess full capability to effectively execute the Project.

WHEREAS in view of the prescribed 'eligibility criteria as detailed in Clause A 5.2 (b) of Instructions to Tenderers('ITT) of DMRC Tender BS02 document, BTSweden has been selected as the Lead Member for the above Project ofDMRC and BT India has been designated to act as the local Indian member of the consortium - . - .

Now MoU will cover the following: '

Purpose/ Area of the MoU

1.1 The purpose, of the MoU (hereinafter referred to as the 'Purpose') Is to provide as follows:

» BT Sweden will get as the Lead Member

• BT India will be a local Indian member

• Broadly identify parts of the Project to be undertaken by BT Sweden as the lead member under the Eligibility Criteria and those to be undertaken by BT India as local Indian member.

2. Scope of work of BT Sweden and BT India

The respective parts of Project to be undertaken by BT Sweden and BT India are as follows:

Parts of Scope to be undertaken by BT Sweden

2.1 BT Sweden will be responsible for the 'off-shore' portion of the contract*

2.2 BT Sweden *will* supply;

- Automatic Train Protection ('ATP')/(ATO) o Computer Based Interlocking
- Parts of Coded Audio Frequency Track Circuits «Parts of Automatic Train Supervision ('ATS')
- Main Line Point machines etc.

2.3 BT Sweden will undertake offshore training.

Parts of Scope to be undertaken by BT India ,

2.4 BT India shall be responsible for all'on-shore activities

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2.5 BT India will procure and supply other equipment available locally such as Cables, ATS work stations, servers, Mimic Panel, LEO Signals, Depot Point Machines, Audio Frequency Track Circuits for depot, Parts of coded Audio Frequency Track Circuits, wayside hardware directly to DMRC.

2.6 BT India will provide major local support for application/ adaptation for Signaling & Train Control System.

2.7 BT India will be responsible for installation, testing and commissioning under the guidance/ instruction of BT Sweden.

2.8 BT India will arrange for Incidental services like Insurance, local & overseas transportation, clearance at port, unloading at port, unloading at DMRC, salting up a local site office in Delhi.

2.5 BT India will manage project sites, Warranty /Maintenance service sites in Delhi.

2.10 BT India will be responsible for providing onshore Training to the officials of DMRC.

2.11 The percentage participation of BT Sweden is 50% and the percentage participation of BT India is 50%.

2.12 Irrespective of the joint and several liability towards DMRC for any default by any party, the party not responsible for the respective default will have the right to be indemnified by the other party,

3. Co-operation Principles . -

3.1 It is clarified that the proposed arrangements between ~_ scope shall be on 'principal to principal' basis.

3.2 The co-operation defined in this MoU is on an exclusive basis and shall be subject to BT internal policies and guidelines.

3.3 In the event of contract, this MoU will be further elaborated for detailed clarity of scope split In meeting the overall project requirement

3.4

3.5 The detailed interfaces and scope of supply & services is defined after taking into consideration each entities' experience and capabilities while considering the requirement of the tender document of DMRC and in particular the need to involve suitable local partners.

14. The date of letter of acceptance is 17-09-2007 while the MoU is dated 11-10-2007. Thus, the MoU between B T Sweden and BUN has been signed after the contract has been accepted

37. As mentioned elsewhere, the appellant does not have any place of business in India and all business activities with respect to offshore supplies are carried outside India. The equipment supply has been manufactured at overseas manufacturing facility of the appellant and sale of equipment has occurred outside India and payment has also been received by the appellant and outside India.

38. We find that during the DRP proceedings, the DRP was misdirected in considering the contract RS 02. This contract is between BTIN Bombardier Transportation, Germany and DMRC and for this contract, Bombardier Transportation Germany has raised invoices on BTIN for offshore manufacture and supply of equipment whereas the

contract under consideration is between DMRC and Consortium the appellant and BTIN towards offshore supply train control and signalling equipment.

39. We further find another error in the findings of the DRP wherein it has considered Conny Linusson a seconded employee of Bombardier Sweden. The error is that the said seconded employee was for Rs. 02 contract and not BS 02 contract, which is under consideration. We have also gone through the agreement between BTIN and Conny Linusson which fortifies the fact that Conny Linusson for Rs. 02 contract with DMRC.

40. In our considered opinion, the entire findings of the DRP are based on erroneous appreciation of wrong facts and on such erroneous appreciation of wrong facts, the DRP held that BTIN is the PE of the appellant in India without appreciating the true facts that the appellant has no place of disposal in India in the office of BTIN from where the appellant could have conducted its business in India.

41. Before parting, it would not be out of place to consider and appreciate the statement showing computation of total Income tax.

The relevant part of the computation of Income tax is as under:

i)	Fees for intermediary services	- Rs. 1,16,81,407/-
ii)	Fees for product management program	- Rs. 24,85,023/-
iii)	Fees for engineering work	- Rs. 1,99,03,046/-
	Total	- Rs. 21,31,96,890/-

42. The return of income of the assessee shows the net returned income at Rs. 20,15,15,483/- which has also been acknowledged by the Assessing Officer in the first para of his assessment order. This clearly shows that only fees for intermediary services amounting to Rs. 1,16,81,407/- has not been included in the total income and all other receipts have been shown by the appellant in its return of income as taxable. Therefore, it cannot be said that the appellant has not shown any income from the entire transactions in India.

43. Though the ld. DR has strongly objected to this computation of income stating that since the return was filed electronically, this computation was not before the Assessing Officer. In our view, this objection of the ld. DR is without any basis, in as much as, once the

return of income is selected for scrutiny assessment the Assessing Officer calls for hard copy of the return along with computation of income. In our view no Assessing Officer could proceed in another assessment proceeding without looking into the returned income qua its computation.

44. Considering the facts in totality, and also the fact that the TPO has examined the international transactions and has accepted the same to be at ALP, we do not find any merit the additions made by the DRP. We accordingly, direct the Assessing Officer to delete the addition of income attributable to PE amounting to Rs. 60,99,630/-. Grounds Nos. 7 to 14 taken together are allowed.

45. In the result the appeal filed by the assessee in ITA No. 859/DEL/2016 is allowed.

The order is pronounced in the open court on 29.10.2020.

Sd/-

[SUCHITRA KAMBLE]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 29th October, 2020

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	.10.2020
Date on which the final order is uploaded on the website of ITAT	.10.2020
Date on which the file goes to the Bench Clerk	.10.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	