

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'D' NEW DELHI  
(Through Video Conferencing)**

**BEFORE,  
SHRI R.K. PANDA, ACCOUNTANT MEMBER  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.4185/Del/2018  
(ASSESSMENT YEAR: 2012-13)**

DCIT, Circle-1(2)(1), International Taxation, Room No.409, 4 <sup>th</sup> Floor, Civic Centre, New Delhi-110055	Vs.	Bombardier Transportation Sweden AB, C/o-Amit Gupta, Head of Taxation at Bombardier Transportation India Ltd. Novotel Pullman Commercial Tower, 3 <sup>rd</sup> Floor, Aerocity, New Delhi- 110037 <b>PAN-AADCB4208M</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA No.4448/Del/2018  
(ASSESSMENT YEAR: 2012-13)**

Bombardier Transportation Sweden AB, C/o-Amit Gupta, Head of Taxation at Bombardier Transportation India Ltd. Novotel Pullman Commercial Tower, 3 <sup>rd</sup> Floor, Aerocity, New Delhi-110037 <b>PAN-AADCB4208M</b>	Vs.	DCIT, Circle-1(2)(1), International Taxation, Room No.409, 4 <sup>th</sup> Floor, Civic Centre, New Delhi-110055
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant By	<b>Sh. Deepak Chopra, Advocate</b> <b>Sh. Anmol Anand, Advocate</b> <b>Ms. Priya Tandon, Advocate</b>
Respondent by	<b>Sh. Raman Chopra, CIT-DR</b>
Date of Hearing	<b>25.11.2020</b>
Date of Pronouncement	<b>27.11.2020</b>

### **ORDER**

#### **PER SUDHANSHU SRIVASTAVA, JM:**

ITA No.4185/Del/2018 is the Department's appeal preferred against the order passed by the Ld. Commissioner of Income Tax (Appeals)-42, New Delhi {{CIT (A)}} vide order dated 31.03.2018 for Assessment Year 2012-13, whereas, ITA No. 4448/Del/2018 is the Assessee's Cross Appeal for the same year.

2.0. The brief facts of the case are that the assessee company is registered and incorporated under the laws of Sweden. The assessee is a non-resident under the provision of Income Tax Act, 1961 (hereinafter called as 'the Act') and is a tax resident of Sweden in terms of Article-4 of India Sweden Tax Treaty. It is engaged in the business of manufacturing of train control and signaling systems for mass transit system.

2.1. The return of income was filed declaring an income of Rs.53,49,38,090/-. Thereafter, the return of income was revised declaring income of Rs.52,87,88,420/-. The case was selected for scrutiny and since during the year under consideration, the assessee had entered into international transactions with its Associated Enterprises ('AE'), the case was referred to the Transfer Pricing Officer (TPO) for determination of Arm's Length Price ('ALP') under section 92CA(1) of the Act. The TPO, vide order dated 18.12.2015, drew no adverse inference with respect to the international transactions entered into by the assessee and, therefore, no adjustment to taxable income was made in this regard.

2.2. Further, during the course of assessment proceedings, it was noticed that the assessee had entered into contracts with Delhi Metro Rail Corporation Limited ('DMRC') and Bombardier Transportation India Limited ("BTIN"). It was observed by the Assessing Officer that consortium consisting of the assessee along with BTIN has entered into a contract BS 02 on 12.10.2007 with

DMRC for design, manufacture, supply, installation, testing and commissioning of train control and signaling system. During the year under consideration, the assessee had made offshore supply of train control and signaling equipment to DMRC from outside India. It was the assessee's claim that it had no Permanent Establishment ('PE') in India and as such, the resultant income from supply was not liable to be taxed in India as the title in goods had been transferred outside India. The assessee was asked to explain why BTIN may not be treated as the PE of the assessee as it was held in earlier assessment years and had also been upheld by the Ld. Dispute Resolution Panel ('DRP'). It was the assessee's claim that with reference to the clauses of the Memorandum of Understanding, it was clear that BTIN was neither acting on behalf of BT-Sweden nor it legally bound BT-Sweden towards DMRC in respect of any work performed by it. It was submitted that it was merely participating in the consortium as an independent member and that the same cannot be taken as constituting PE in India through which the business of the assessee was being undertaken. It was

also the assessee's submission before the Assessing Officer that the equipments supplied to DMRC had been manufactured at its overseas manufacturing facility and further the sale of equipment had also occurred outside India and payments had also been received outside India and, therefore, in view of the provisions of India-Sweden Tax Treaty the income would not be taxable in India in absence of PE in respect of the offshore supply of train control and signaling equipment to DMRC under Contract BS02. The Assessing Officer was not convinced with the submissions of the assessee and observed that the facts were identical to the facts in AY 2011-12 and in view of the findings of the Ld. DRP in AY 2011-12, BTIN was held to be PE of the assessee in India in respect of Contract BS02 with DMRC. The Assessing Officer proceeded to make an addition of Rs.27,30,829/- being income attributable to the PE.

2.3. During the course of assessment proceedings, it was further observed by the Assessing Officer that the assessee had rendered intermediary services like marketing, sales, business

development, project management, customer services etc. and had received fees for intermediary services amounting to Rs.1,44,09,831/-. The assessee was asked to explain why these revenues may not be taxed in India as Fee for Technical Services ('FTS') like in the immediately preceding year. It was the assessee's submission before the Assessing Officer that the assessee was the HUB entity for the Rail Control Solutions businesses of Bombardier group and it housed functional heads for various functional areas like administration, procurement, engineering, quality, control program management and marketing, each catering to worldwide Rail Control Solutions business. It was also submitted, while referring to the agreement with BTIN, that there was no markup by the assessee in respect of the services rendered to BTIN. The assessee also claimed benefit of provision of Article 12 of India-Sweden Double Taxation Avoidance Agreement and submitted that in the instant case, rendering of intermediary services by the assessee does not 'make available' any technical knowledge, skill etc to BTIN and, therefore, FTS was not taxable in India. However,

the Assessing Officer did not accept the contention of the assessee and proceeded to make addition of Rs.1,44,09,831/- to the returned of income of the assessee on account of FTS.

2.4. Aggrieved, the assessee preferred an appeal before the Ld. First Appellate Authority who was pleased to partly allow the appeal of the assessee by holding that the fee received by the assessee for intermediary services could not be taxed as Fee for Technical Services. For this the Ld. CIT (A) agreed to the submissions of the assessee that in view of the status of the Most Favoured Nation to the OECD Members Countries, definition of FTS as given in Indo-Portugal Double Taxation Avoidance Agreement, may be imported to India Sweden Double Taxation Avoidance Agreement and, thus, satisfaction of 'make available' condition was to be a necessary requirement even for India-Sweden DTAA. The Ld. CIT (A) also referred to the First Appellate Authority's order in Assessment Year 2010-11, wherein, his predecessor had also deleted similar addition by holding that the intermediary services provided by the assessee to BTIN were in the nature of managerial

or administrative support and did not satisfy the 'make available' test.

2.5. However, the Ld. CIT (A) upheld the action of the AO in holding that BTIN be considered Permanent Establishment of the assessee in India. For this, the Ld. CIT (A) also relied on the directions of the Ld. DRP for AY 2011-12, wherein, the Ld. DRP had upheld the findings of the AO/TPO in this regard with respect to PE in India. While dismissing the assessee's appeal, the Ld. CIT (A) also observed that there was no change of facts from Assessment Year 2011-12 to the present year in appeal.

2.6. Aggrieved with the order of the Ld. CIT (A), now both the assessee as well as the Department has approached this Tribunal and have challenged the orders of the First Appellate Authority by raising the following grounds of appeal:-

Grounds of Appeal of ITA No.4185/Del/2018

1. *Whether on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in holding that in view of MFN status to the OCED member countries, definition of FTS as given in*

*Indo-Portugal DTAA may be imported in Indo-Sweden DTAA, without there being any notification to this effect u/s 90(1) of the IT Act, 1961 and thus holding that satisfaction of 'make available' condition is a necessary requirement even for India Sweden DTAA, thereby concluding that payment for managerial services cannot be taxed as 'Fee for Technical Services'?*

### Grounds of Appeal of ITA No.4448/Del/2018

1. *That on the facts and in the circumstances of the case and in law, the order passed by the Commissioner of Income-tax (Appeals) ["CIT (A)"] under section 250 of the Income-tax Act, 1961 ("Act"), to the extent prejudicial to the Appellant, is bad in law and void ab-initio.*

#### Existence of an Association of Persons ("AOP")

2. *That the Assessing Officer ("AO") grossly erred in law in concluding the existence of an AOP between the Appellant and Bombardier Transportation India Ltd. ("BTIN"), in respect of their contract with Delhi Metro Rail Corporation ("DMRC").*

#### Re : BTIN forms a "Fixed Place Permanent Establishment" of the Appellant in India.

3. *That the CIT (A) erred in upholding the action of the AO in treating BTIN as a "Fixed Place Permanent Establishment" ("Fixed Place PE") of the Appellant company under Article 5(1) of the Indo-Sweden DTAA.*
4. *That the AO/CIT (A) erred in concluding the*

*existence of Fixed Place PE solely by relying upon the DRP Directions for AY 2011-12 and without independently analysing the facts for the year under consideration.*

5. *That the AO/CIT(A) failed to appreciate that the Appellant Company supplied the goods to DMRC outside India during the year under consideration, income whereof, as per the prevalent jurisprudence, was not taxable in India.*
6. *That AO/ CIT (A) erred in examining the provisions of PE when under the domestic law itself taxability was not established given the provision of Explanation 1 to section 9(1), there being no activity relating to sale of goods in India.*
7. *That the CIT (A) erred in observing that since DMRC had the right to reject goods sold by the Appellant, the title in such goods passed in India and hence income from such supply was taxable in India.*
8. *That the CIT(A) failed to appreciate that the basis on which it had arrived at the conclusion of existence of PE in India i.e. bidding for contract, signing of contract, preparation of drawings etc., were not activities relating to the period under consideration and hence the conclusion of existence of PE on such basis was bad in law.*
9. *That the CIT(A) erred in observing that BTIN was dependent upon the Appellant company for all the technical know and that the Appellant was controlling and monitoring the activities of BTIN in respect of "BS-02" contract.*
10. *That the CIT (A) failed to appreciate that BTIN*

*was separately charging/billing DMRC for all the services rendered by it and all the receipt to BTIN from "BS-02" Contract had been duly offered to tax in India by BTIN.*

11. *That the CIT (A) erred in repeatedly referring to the "RS-2" contract in complete ignorance of the fact that the contract under consideration was "BS-02", i.e., the contract for train controlling and signalling system between DMRC and the consortium consisting of the Appellant and BTIN.*
12. *That the CIT (A)/ AO erred in attributing 35% of the gross profits from the supply of goods to DMRC as attributable to the alleged marketing and other activities of BTIN in India, which activities were never carried out during the year under consideration by BTIN.*
13. *That the CIT (A) erred in concluding that basis the additional risk, there was a requirement to attribute additional income to the PE.*
14. *That without prejudice, the CIT (A)/AO grossly erred in applying the Gross Profit Ratio instead of Net Profit Ratio, for calculating the profits attributable to alleged PE in India.*
15. *That the CIT (A) grossly erred in selectively relying on the decision of the Hon'ble High Court of Delhi in DIT v. Ericsonn AB [2011] 16 taxmann.com 371 (Delhi).*
16. *That without prejudice, the AO/ CIT (A) erred in holding that there existed a PE of the Appellant in India given the conclusion of the AO that there existed an AOP of the Appellant in India and as such there could not be parallel findings of AOP*

*and PE in absence of CIT(A) not adjudicating on the issue of existence of an AOP.*

*Re: Consequential Grounds*

17. *That the AO has erred in initiating penalty proceedings under Section 271(l)(c) read with Section 274 of the Act.*

3.0. At the outset, the Ld. Authorized Representatives submitted that both the issues stood covered in favour of the assessee by the order of this Tribunal for Assessment Year 2011-12 in ITA No.859/Del/2016 vide order dated 29.10.2020. He drew our attention to the relevant paragraphs of the order of the Tribunal in this regard.

4.0. Per contra, the Ld. CIT-DR fairly accepted that both the issues stood covered by the order of the Tribunal in principle. He further submitted that the assessee should also confirm that there was no employee sent to India and seconded for the work in contract BS02.

5.0. We have heard the rival submissions and have also perused the material on record and we agree with the submissions

of the Ld. AR that both the issues stand covered in favour of the assessee by the order of the Co-ordinate Bench of this Tribunal in Assessment Year 2011-12 in assessee's own case in ITA No.859/Del/2016, vide order dated 29.10.2020.

5.1. As far as the Department's appeal, bearing No.4185/Del/2018 is concerned which challenges the action of the Ld. CIT (A) in holding that payments for intermediary services cannot be taxed as Fees for Technical Services, it is seen that the issue is squarely covered in favour of the assessee by the order of the Tribunal as aforesaid in paragraphs 21, 22, 23, 24, 25 and 26. These paragraphs are being reproduced hereunder for ready reference:-

*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.”*

5.1.1. Accordingly, in view of the order of the Co-ordinate Bench in assessee's own case for Assessment Year 2011-12, respectfully following the same, we dismiss the grounds raised by the Department by upholding the findings of the Ld. CIT (A).

6.0. In the result, the appeal of the Department stands dismissed.

7.0. As far as the assessee's appeal bearing no. 4448/Del/2018 is concerned, it challenges the action of the Ld. CIT (A) in upholding the existence of PE of the assessee in India. It is seen that this issue also came up

before the Co-ordinate Bench of this Tribunal in Assessment Year 2011-12 and this issue was also decided in favour of the assessee vide paragraphs number 35, 36, 37 and 44. These paragraphs are being reproduced hereunder for ready reference:-

*“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 HarimaHeavy 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 eh 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 India 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 .*

*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.*

*2.9 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 ond 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.*

**XXXXXXXXXXXX**

*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.*

7.0.1           Therefore, on identical facts and in view of the order of the Co-ordinate Bench on the issue being in favour of the assessee in assessee's own case in Assessment Year 2011-12, we are in agreement with the contentions of the Ld. AR. However, the only thing remaining to be verified is whether there was no secondment of any employee to India for the contract BS-02. The AO/TPO is directed to verify the same and if no such secondment of any employee is there, the AO/TPO is

to delete the addition with respect to PE. The AO/TPO shall allow adequate opportunity to the assessee in this regard.

8.0. In the result, the appeal of the assessee stands allowed for statistical purposes.

9.0. In the final result, the appeal of the Department stands dismissed and appeal of the assessee stands allowed for statistical purposes.

Order pronounced on 27/11/2020.

Sd/-

Sd/-

**(R.K. PANDA)**  
**ACCOUNTANT MEMBER**

**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

Dated: 27/11/2020

*Shekhar*

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI