

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**

ITA No.6274/Del/2017
Asstt. Year: 2011-12

DCIT, Circle-1(1)(1), INTL. TAXATION New Delhi.	Vs.	Bombardier (Singapore) PTE. Ltd. C/o PWC Pvt. Ltd. 11-A, Sucheta Bhawan, Gate No. 2, 1 st Floor, Vishnu Digambar Marg, New Delhi – 110 002
(Appellant)		(Respondent)

Department by:	Shri F.R. Meena, Sr. DR
Assessee by :	Shri Kanchun Kaushal, FCA Ms. Shruti Khimta, AR
Date of Hearing	01/12/2021
Date of pronouncement	01/12/2021

ORDER

PER SAKTIJIT DEY, J.M.

Captioned appeal by the Revenue arises out of order dated 2.7.2017 of learned Commissioner of Income Tax (Appeals)-42, New Delhi, pertaining to assessment year 2011-12.

2. The effective grounds raised in the appeal are as under:-

“1.1 That in the facts and circumstances of the case, and in law, the Ld. CITQA erred in reducing the attribution of profit to the Permanent Establishment, determined by the AO.

1.2 That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in admitting the additional evidence filed by the assessee in contravention of Rule 46A

1.3 That in the facts and in circumstances of the case, and in law, the Ld. CIT(A) erred in reducing the attribution of profit, after erroneously considering the adequacy of profit margin of Bombardier Transportation India Ltd., and that too for another year, while determining the income of the assessee, and without considering the functional profile of the assessee Permanent Establishment, and the decisions of the Honble High court in Rolls Royce (339 ITR 147) and LG Electronics (368 ITR401).

1.4 That in the facts and circumstances of the case, and in law, the Ld. CIT(A) erred in reducing the addition made by the AO, after relying on the decision of the CIT(A) in AYs 2009-10 and 2010-11 in this case.

3. Briefly, the facts are, the assessee is a non resident company registered and incorporated under the laws of Singapore and the tax resident of that country. As stated, the assessee is primarily engaged in providing design, installation, operation and maintenance services of transport systems to its group companies. For the assessment year under dispute, the assessee filed its return of income on 30.11.2011, declaring NIL income. In course of assessment proceedings, the Assessing Officer (AO) noticed that assessee had entered into an agreement with an Indian Company i.e. Bombardier Transportation India Ltd. ("BTIL") for providing marketing, sales, project management and business development services. For providing such services, the assessee has received a sum of Rs. 7,66,40,776/-. Whereas, the assessee has not offered the amount to tax in the return of income

filed. The AO was of the view that, since, the employees of the assessee had stayed in India for a period of 160 days in the relevant financial year for providing services, the assessee is deemed to have a Permanent Establishment (PE), in the nature of Service PE in India, in terms of Article 5(6) of the India-Singapore Double Taxation Avoidance Agreement ("DTAA"). Thus, the AO issued a show cause notice to the assessee to explain why the receipt from rendering services to BTIL should not be attributed to the PE in India.

4. In response to the show cause notice, the assessee submitted that the receipts are in the nature of reimbursement of cost incurred by the assessee. Further, it was submitted, since the Transfer Pricing Officer (TPO) has held the transaction between the assessee and BTIL to be at arm's length, no further attribution of profit can be made, even assuming that there is a service PE in India. Without prejudice, the assessee submitted that in assessment year 2009-10 the first appellate authority, under similar facts and circumstances, reduced attribution of profit to the PE to 10%. The AO, however, did not find merit in any of the submissions of the assessee and attributed income of Rs. 1,91,60,194/- to the PE in India based on number of days.

5. Against the assessment order so passed, assessee preferred an appeal before learned Commissioner (Appeals) contesting the decision of AO regarding existence of service PE as well as attribution of profit to the PE. After considering the submissions of the assessee, leaned Commissioner (Appeals), though, held that the assessee had a service PE in India in terms of Article 5(6) of the Tax Treaty, however, relying upon the decision of his predecessor in assessee's own case in assessment year 2009-10 and 2010-11, he held that attribution of profit to assessee's service PE in India should be computed at the rate of 10% of the amount received from BTIL.

6. Being aggrieved the revenue is before us.
7. We have considered rival submissions and perused the materials on record. Before us, it is a common point between the assessee and the Revenue that the issue is squarely covered by the decision of Hon'ble Tribunal in assessee's own case in assessment year 2009-10. In this context, learned Counsel for the assessee drew our attention to the relevant observations of the Tribunal in ITA No. 1315/Del/2014, dated 13.8.2018. For better clarity, we reproduce the same as under :-

"11. We have heard the rival submissions and also perused the relevant findings given in the impugned. In so far as whether there is a PE in India or not, the same has not been challenged by the assessee. Since, the employees of the assessee has undertaken the activities for period aggregating to 181 days during the relevant previous year, therefore, in terms of Article 5(6) of India Singapore DTAA it is held to be a service PE. The assessee-company which is incorporated and tax resident of Singapore had entered into an agreement with Bombardier Transportation India Ltd. to provide support services in the various areas as highlighted above. In consideration of the services rendered the assessee company had issued a debit note of BT India for the payment aggregating to Rs. 8,30,42,734/-. The assessee's contention before the authorities below had been that he did not charge any fee with the BT India and only recouped the cost incurred by it in the provision of said support. However, it was further contended that the profitability should be worked out on net basis because assessee was collecting the revenue on the services rendered by UK and Germany entitles also and assessee acted as pass through entity. These plea of the assessee has been turned

down by the Ld. CIT(A) against which assessee has not come in appeal before us and the same has been stated by the Learned Counsel that it has been accepted by the assessee. Now, the core issue is the attribution of profit which is to be made in the case of PE of assessee in India.

12. From the perusal of the assessment order, we find that the method and the manner in which Assessing Officer has attributed the profit is not only irrational but also quite arbitrary whereby he has considered the man-days spent by the assessee's personnel in India by dividing it from 365 days such a vanilla attribution based on man-days is not a correct approach because it has rightly been contended by the Learned Counsel that if the man days exceeds 365 days then it may lead to an absurd situation. The attribution has to be made considering the functions, assets and risk analysis undertaken by the assessee. The Ld. CIT(A) has required the assessee to furnish benchmarking analysis and TP study report. The assessee has worked out the average profit margin @ 8.95 to be under TNMM and OP/TC by taking PLI. It was also brought to the notice of the Ld. CIT(A) that in the case of Anolth.....con BT (Thailand) Ltd. which was undertaking similar transaction the TPO has adjusted profit margin of 10% on cost plus mark up. Ld. CIT(A) has adopted the attribution of profit margin @ 10% which is based on proper functions, assets and risk analysis and also considering the similar transaction of the group entity. Thus, we do not find any infirmity in the order of the Ld. CIT(A) for attribution of profit @ 10%. Accordingly, the ground raised by the Revenue is dismissed.”

8. There being no material difference in the factual position obtaining in the impugned assessment year, respectfully following the decision of the Coordinate Bench in assessee's own case, as referred to above, we uphold the decision of learned Commissioner (Appeals) by dismissing the grounds raised.

9. In the result the appeal of the Revenue is dismissed.

Order pronounced in the Open Court on 1st December, 2021.

Sd/-
(DR. B R R KUMAR)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 01/12/2021

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Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi