

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

**BEFORE SHRI G.S. PANNU, VICE-PRESIDENT  
AND  
SHRI SAKTIJIT DEY, VICE-PRESIDENT**

ITA Nos.6723, 6724 & 6725/Del/2017  
Assessment Years: 2012-13, 2013-14 & 2014-15

Bombardier Transportation (Holdings) Singapore Pte. Ltd., C/o- Pricewaterhouse Coopers Pvt. Ltd., 11A, Sucheta Bhawan, Vishnu Digamber Marg, New Delhi	<b>Vs.</b>	DCIT, Circle-1(1)(2), International Taxation, New Delhi
<b>PAN :AAECB4803D</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by	Sh. Ravi Sharma, Advocate Sh. Anubhav Rastogi, CA
Department by	Sh. Sanjay Kumar, Sr. DR

Date of hearing	01.08.2023
Date of pronouncement	30.10.2023

**ORDER**

Captioned appeals by the assessee arise out of three separate orders of learned Commissioner of Income Tax (Appeals)-42, New Delhi, pertaining to assessment years 2012-13, 2013-14 and 2014-15.

2. The major issue, which is common in all these appeals, is relating to taxability of certain amounts received by the assessee

from M/s. Bombardier Transportation India Ltd. ('BTIL'), an Indian group entity, as Fee for Technical Services ('FTS') under section 9(1)(vii) of the Income-tax Act, 1961 (in short 'the Act') as well as under Article 12(4) of India – Singapore Double Taxation Avoidance Agreement ('DTAA').

3. Briefly the facts relating to this issue, being more or less common in all these appeals, are, the assessee is a non-resident corporate entity incorporated under the laws of Singapore and is a tax resident of Singapore. The assessee is a part of Bombardier Transportation group and is stated to be engaged in transportation business and provides full range of transportation equipments. The Bombardier Transportation group had entered into different contracts with Delhi Metro Rail Corporation ('DMRC'). The Bombardier Transportation group has different departments/hubs, such as, Mainline & Metros (MLM), Rail Control System ('RCS') and Propulsion ('PPC'). Under the MLN hub, BTIL is engaged in manufacturing/supply of coaches and bogies for metro trains. Under RCS, BTIL is engaged in supply and installation of signaling equipment which includes supply of relay and relay groups, audio frequency track circuits (in sets & individual modules) and traffic management system. Under

Propulsion hub, BTIL manufactures traction/auxiliary converters, vacuum circuit breakers, control electronics and tap chargers and trades in transformers and gear case.

4. To enable BTIL to undertake the aforesaid activities, necessary support services were provided by three different hub entities. Support services relating to MLN is provided by the assessee. The support services relating to RCS is provided by Bombardier Sweden. Whereas, support services relating to Propulsion is provided by Bombardier Switzerland. In terms with above, the assessee had entered into hub cost sharing with BTIL and other group companies, whereunder, it provides services in the nature of administration, marketing and sales, bids, engineering, quality, procurement, project management, program management etc. For providing such services, the assessee had earned certain receipts from BTIL in the assessment year under dispute. In the return of income filed for the assessment years under dispute, the assessee did not offer such receipts to tax, pleading that they are not in the nature of FTS under Article 12(4) of India – Singapore DTAA. Further, it was submitted by the assessee that, since, it does not have a Permanent Establishment (PE), the receipts cannot be taxed as business income.

5. The Assessing Officer, however, was not convinced with the submissions of the assessee. After examining the nature of services provided by the assessee and other details, the Assessing Officer was of the view that not only the services rendered qualify as managerial/technical/consultancy services, but while rendering such services, the assessee has also made available technical knowledge, know-how, skill etc. to BTIL. Thus, he concluded that the receipts are in the nature of FTS, both under the provisions of the Act as well as under India – Singapore DTAA. Being aggrieved with the decision of the Assessing Officer, the assessee preferred appeals before learned first appellate authority, however, the assessee was unsuccessful in its attempt.

6. Before us, learned counsel appearing for the assessee submitted that the services rendered may qualify as managerial or technical or consultancy services, however, that is not enough to treat it as FTS under the provisions of Article 12(4) of India – Singapore DTAA as the conditions of Article 12(4)(b) are not satisfied. Drawing our attention to the said Article, learned counsel submitted that in course of rendition of services, if the assessee makes available technical knowledge, know-how, skill etc. to the service recipient so as to enable him to independently

apply such technical knowledge, know-how, skill etc. in future without the aid and assistance of the service provider, then only it can be treated as FTS. He submitted, in the facts of the present appeal, the department has failed to establish that while rendering services to BTIL, the assessee had made available technical knowledge, know-how, skill etc., which had enabled BTIL to perform such services independently without the aid and assistance of the assessee. He submitted, while examining identical issue in case of Bombardier Transportation Sweden, which provided similar nature of services to BTIL, the Tribunal has held that the receipts from providing such services do not qualify as FTS due to non-fulfillment of make available condition. In this context, he drew our attention to order dated 29.10.2020 passed by the Tribunal in ITA No.859/Del/2016.

7. He submitted, in case of BTIL itself, when an issue arose relating to liability to deduct tax at source on similar nature of payments made to another group entity in Canada providing identical nature of services, the Tribunal has held that since the nature of services provided do not make available any technical knowledge, know-how, skill etc. to the service recipient, the receipts would not qualify as FTS. Thus, he submitted, due to

parity of facts between the case of the assessee and cases decided by the Tribunal, the issues arising in these appeals are squarely covered. Without prejudice, he submitted that due to non-fulfillment of make available condition, the receipts do not qualify as FTS. For such submission, he relied upon a number of other decisions.

8. Learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned first appellate authority.

9. We have considered rival submissions in the light of the decisions relied upon and perused the materials available on record. Undisputedly, in the assessment years under dispute, the assessee had provided certain management support services to BTIL, an Indian group entity and earned certain receipts. The dispute is with regard to the nature and character of such receipts. While the assessee has claimed that the receipts are not in the nature of FTS under Article 12(4)(b) of India – Singapore DTAA due to non-fulfillment of make available condition, the departmental authorities have negated such claim of the assessee and held that the receipts would qualify as FTS under Article 12(4)(b).

10. As discussed earlier, BTIL is executing certain works of DMRC under various contracts. For executing such work, BTIL requires need based management support services. For providing such services, the Bombardier Transportation group has set up three different hubs, which provide services relating to specific work undertaken by BTIL in pursuance to contracts with DMRC. On a perusal of hub cost sharing agreement entered into by the assessee with the BTIL, it is observed that the services rendered are intermediary services, such as, administration (includes controlling, finance, general management, senior management, human resources, legal, contracts, performance management office, structured finance and continuous improvement), marketing and sales, bids, engineering, quality, procurement, project management, program management etc. Such services are provided and received on cost to cost basis.

11. It is observed, another group entity i.e. Bombardier Transportation Sweden has provided similar nature of services to BTIL under a different agreement. In case of Bombardier Transportation Sweden, the departmental authorities, being of the view that the services rendered qualify as FTS, brought it to tax. When the issue came up before the Tribunal, it was held that

since, in course of rendition of such services, the assessee had not made available any technical knowledge, know-how, skill etc. to BTIL the fees received would not qualify as FTS under treaty provisions. In our view, due to parity of facts, the decision of the Coordinate Bench squarely applies to the present appeal.

12. Pertinently, proceedings under section 201 of the Act was initiated in case of BTIL for alleged failure to deduct tax at source on certain payments made to Bombardier Canada, which according to the Assessing Officer, being in the nature of FTS, required withholding of tax at source. When the matter came up before the Tribunal in DCIT Vs. Bombardier Transportation India Pvt. Ltd. (payer of service charges) (2017) 77 taxman.com 166, the Tribunal after going through the nature of services received and whether make available condition was satisfied, ultimately concluded that while rendering such services, the service provider has not made available technical knowledge, know-how, skill etc. Therefore, payment would not qualify as FTS. On a perusal of the aforesaid decision of the Coordinate Bench, it is observed that the nature of services provided by Bombardier Transportation Canada were far wider in scope than the services provided by the assessee. However, on examining the facts the Tribunal having

found that the make available condition has not been satisfied, treated the payments not be in the nature of FTS.

13. In the facts of the present appeal, after perusing the facts and material on record, we are convinced that the departmental authorities have failed to factually establish through cogent evidence that in course of rendition of services, the assessee has made available technical knowledge, know-how, skill etc. to BTIL so as to enable BTIL to employ/use such technical knowledge, know-how, skill etc. independently without the aid and assistance of the assessee.

14. That being the factual position emerging on record, in our considered opinion, the receipts would not qualify as FTS under Article 12(4)(b) of the tax treaty. Therefore, we conclude that the additions made by the Assessing Officer treating the receipts as FTS are unsustainable. Grounds raised on the issue are allowed.

15. In ITA No. 6724/Del/2017, the assessee has raised one more ground relating to levy of interest under section 234D of the Act.

16. Having considered rival submissions, we direct the Assessing Officer to verify assessee's claim and decide it after providing an opportunity of being heard to the assessee.

17. In ITA No. 6725/Del/2017, the assessee has raised one more issue relating to certain additional claim in respect of an item of income offered to tax.

18. Briefly the facts are, out of the total receipts of Rs.10,03,96,651/- received from BTIL, the assessee offered to tax an amount to Rs.2,21,83,742/- in the return of income by treating it as FTS. However, in course of assessment proceedings, the assessee made a claim that such income was inadvertently offered to tax in the return of income, though, it was not taxable under Article 12(4)(b) of the tax treaty. The Assessing Officer, however, rejected the claim of the assessee on the ground that it was made through revised return of income. Though, assessee raised a specific ground before learned first appellate authority, he did not render any specific finding on such ground as he endorsed Assessing Officer's decision that the receipts are in the nature of FTS.

19. Before us, learned counsel appearing for the assessee has not made any specific submission qua the aforesaid issue. Since, the assessee has itself offered the amount to tax in the return of income, it requires to be examined the exact nature and character of the receipts. Thus, in absence of relevant facts, we are not in a

position to address the issue. However, considering the fact that neither the Assessing Officer, nor the first appellate authority have considered assessee's claim on merits, we are inclined to restore this issue to the Assessing Officer for fresh adjudication after providing due and reasonable opportunity of being heard to the assessee. Ground is allowed for statistical purposes.

20. In the result, ITA No.6723/Del/2017 is allowed, whereas, ITA No.6724 & 6725/Del/2017 are partly allowed.

***Order pronounced in the open court on 30<sup>th</sup> October, 2023***

***Sd/-***  
**(G.S. PANNU)**  
**VICE-PRESIDENT**

***Sd/-***  
**(SAKTIJIT DEY)**  
**VICE-PRESIDENT**

Dated: 30<sup>th</sup> October, 2023.

RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi