

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

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER  
AND  
SHRI KUL BHARAT, JUDICIAL MEMBER**

**ITA No.5663/Del/2018  
(Assessment Year: 2012-13)**

DCIT, Circle 1(1)(2),  
International Taxation,  
New Delhi.

vs. Bombardier Transportation GmbH,  
C/o PWC, Sucheta Bhawan,  
1<sup>st</sup> Floor, Vishnu Digamber Marg,  
New Delhi.

**(PAN : AADCB4031C)**

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Anmol Anand, Advocate  
Ms. Priya Tandon, Advocate

REVENUE BY : Shri Vizay B. Vasanta, CIT DR

Date of Hearing : 01.11.2023

Date of Order : 15.11.2023

**ORDER**

**PER SHAMIM YAHYA, ACCOUNTANT MEMBER :**

This appeal by the Revenue is directed against the order of the Id. CIT (Appeals)-42, New Delhi dated 01.06.2018 pertaining to the Assessment Year 2012-13.

2. Ground of appeal taken by the Revenue reads as under :-

“Whether on the facts & circumstance of the case the Ld. CIT (A) has erred in holding that the assessee company does not have a Permanent Establishment (PE) in India in the form of BTIN in respect of offshore supply of sub-assemblies without

appreciating the fact that the core business of the assessee was being carried out from the premises of BTIN.”

3. Brief facts of the case are that Bombardier Transportation GmbH ("BT-Germany") is a company registered and incorporated under the laws of Germany with its head office located at Schoneberger Ufer 1, 10785, Berlin, Germany. It operates in Rail transportation industry. The company is a tax resident of Germany as contemplated under Article 4 of the India-Germany Tax Treaty.

3.1 The assessee company along with the other consortium member entered into contracts with Delhi Metro Rail Corporation (DMRC) (Contract RS2 dated 19.07.2007, RS5 dated 06.07.2010 and RS7 dated 14.10.2011) for design, manufacture, supply, testing and commissioning of passenger rolling stock and with Mumbai Rail Vikas Corporation (MRVC) (dated 25.11.2011) for supply of propulsion control system.

3.2 During the year under consideration, onshore supplies of passenger rolling stock of INR 467 crores was made to DMRC. The rolling stock was purchased from Bombardier Transportation India Pvt. Ltd (BTIL) at the price at which it was sold to DMRC; accordingly no profit was earned thereon. Further, the appellant company also received advances in respect of offshore supply of goods made to MRVC in the subsequent years. Apart from onshore sale of rolling stock, the Appellant also made supplies of sub-assemblies of INR 30,11,72,389/- to BTIL.

3.3 Further, the assessee company rendered intermediary services to BTIL for marketing, project management etc. during the F.Y. 2011-12. It also earned interest income on unsecured loans (External Commercial Borrowing) provided to BTIL. The said receipts were offered to tax in the return of income filed for AY 2012-13.

3.4 Reference in this case was also made to the Transfer Pricing Officer to compute the Arm's Length Price of various international transactions entered into by the assessee with its associated enterprises. The Transfer Pricing Officer in his order dated 18.12.2015 passed u/s 92CA(3) of the Income-tax Act, 1961 (for short 'the Act'), has drawn no adverse inference in respect to the international transactions undertaken by the assessee during the year.

3.5 During the course of proceedings under Section 143(3) of the Act, the assessee was asked to explain that why the assessment for year under consideration may not be completed on the same lines as of the preceding AY 2011-12 wherein the sub-assemblies supplied to BTIL were attributed to the alleged Permanent Establishment ("PE") of the assessee in India. In response to the same, the appellant vide its submission dated 26.02.2016 furnished detailed explanations which are summarized as under:

- The Project Office ("PO") did not perform any role in the sale of subassemblies to BTIL. It merely acted as a pass through entity in respect of the onshore sales made by the assessee for the DMRC project. It was used to purchase certain portion of the supplies from BTIL and resell the same to DMRC at the value at which it was

purchased, thereby not incurring any gains/ losses from such transactions.

- BTIL cannot be alleged as the PE of the appellant in India with respect to the sale of sub-assemblies supplied to BTIL for the following reasons:
- Assessee company did not have any place of business in India.
- The sub-assemblies supplied to BTIL have been manufactured at the overseas manufacturing facility of the assessee.
- The sale of sub-assemblies had occurred outside India and payments have also been received outside India.

3.6 As regards, the sale of sub-assemblies, the AO held that it was related to the assessee's PE in India on the ground that the assessee had a fixed place PE in India in the form of BTIL. In other words, the AO held that the assessee has two fixed base PEs in India, first in the form of BTIL and the other in the form of the project office (PO). Further, the AO made attribution of 35% of gross profits to the Indian PE at BTIL.

4. Against the above order, assessee appealed before the Id. CIT (A). Ld. CIT (A) after elaborate consideration held that AO's action of holding Bombardier Transportation India Pvt. Ltd. as fixed place of the assessee company was not correct. The concluding order of the Id. CIT (A) in this regard read as under :-

“ I find that the AO has not assigned any specific functions to the project office in India. Therefore, the project office gets covered under paragraph 4 of Article 5 of DTAA. As regards, the treatment of BTIN as fixed place PE of the appellant by the AO, the appellant has relied on various decisions in the case of Ion Geophysical Corporation Vs. DCIT, Circle-2, Dehradun (72

taxman.com 298) (ITAT, Delhi), Caterpillar Global Mining Europe GmbH Vs. ADIT, Hyderabad (84 taxmaan.com 72) (Hyderabad Tribunal), ishikawajima Harima Heavy industries Ltd. (288 I R 408) (sq, LG Cables, Delhi 237 CTR 438 (Delhi HC). In view of the above, I find that the decision of AO, to hold BTIN as permanent establishment of the appellant company in respect of offshore sale of sub-assemblies, as discussed at para 5.11 does not confirm to the jurisprudence available on the issue of offshore sale. I find that the various judicial authorities have laid out that in the case of offshore supplies, the critical element is that whether the title has passed outside the country or not? If the title has passed outside India even in case of composite contract, the courts have held that such offshore sale cannot be charged to tax in India. Accordingly, I do not find merit in the decision of the AO to hold BTIN as fixed place PE of the appellant company.”

5. Against the above order, Revenue is in appeal before us. We have heard both the parties and perused the records.

6. Ld. Counsel of the assessee submitted that the issue is covered by the decision of ITAT in the assessee's own case in ITA No.1390/Del/2015 for AY 2010-11 vide order dated 14.07.2023 wherein ITAT had held that Bombardier Transportation India Pvt. Ltd. (BTIL) is not PE of the assessee in India and accordingly, since there is no PE of the assessee in India, the offshore supply of sub-assemblies to BTIL/income from intermediary services cannot be taxed in India.

7. Per contra, ld. DR for the Revenue did not dispute this proposition that this issue is covered in favour of the assessee in assessee's own case.

8. We find that ITAT in assessee's own case (supra) has held as under :-

“13. Thus, the issue which arises for consideration is whether BTIL can be considered to be a fixed place PE of the assessee so as to attribute profit on receipts from offshore supplies. Undisputedly, DMRC has awarded the Contract, termed as RS2 Contract, to a consortium formed by the assessee and BTIL, an Indian company. As per the terms of Contract with DMRC, the scope of work between the Consortium partners, i.e., the assessee and the BTIL is well defined. The scope of work of the assessee is as under:

- BTG will be responsible for design, vehicle integration and setting up production for all trains (off shore and indigenous).
- BTG will supply trains and components manufactured offshore and indigenous.
- BTG will provide training to DMRC officials in Europe and also undertake integrated testing and commissioning of Trains on the Section of Service trails.
- BTG will provide unit exchange spares, Mandatory Spares, Recommended Spares, Consumable Spares for a period of three years, special tools, testing and diagnostic equipment.
- BTG will be responsible for warranty during the Defects Liability Period (DLP)
- BTG will be responsible for the transfer of production know-how to enable the local partner to produce indigenous trains.
- BTG will be responsible for Transfer of Technology for Carbody & Bogies, if the option is exercise by DMRC.

13. Whereas, the scope of work of BTIL is as under:

- BT India will support BTG to procure and supply trains and components manufactured in India.
- BT Indian will support BTG in local procurement for components and goods as well as in testing and commissioning.
- BT India will support BTG to arrange for incidental services like insurances, local and overseas transportation, clearance at port, unloading at DMRC.
- BT India will support BTG to manage project site and warranty sites in Delhi during DLP.
- BT India will support BTG in Training of DMRC official and Transfer of Technology, if required.

14. The payment to be made to the assessee and BTIL under the contract is in pursuance to the Cost Centre profit under the Contract. As per the Consortium Agreement between the assessee and BTIL, the assessee is responsible for the following activities:

- Preliminary and general requirement for rolling stocks and design of rolling stock.
- Offshore manufacture, factory testing, inspection, marine insurance upto port in India etc.
- Offshore training.

15. The responsibility of BTIL is as under:

- Indigenous manufacture, factory testing, inspection and discharge, transit insurance
- Inland transportation of offshore manufactured train in India.
- Inland transportation of indigenous manufactured train in India.
- Integrated testing and commissioning.
- Onshore training etc.

16. The cost attached to the scope of work assigned to the Consortium partners have been put under different cost centres in the Contract with DMRC. Cost Centre B relates to offshore manufacture and shipping to India, which is the responsibility of the assessee. Whereas, Cost Centre D relates to inland transportation in India, delivery and testing in the depot of offshore manufactured trains. The activity under Cost Centre D is the responsibility of BTIL. It is further observed, the Consortium partners have raised separate invoices on DMRC according to the scope of work and falling under specific Cost Centres and payments have been made separately by DMRC to the consortium partners. While, the assessee has been paid the cost for all offshore work, such as, designing, planning, offshore manufacture and supply, offshore training etc. BTIL has been paid for all onshore activities. It is a fact on record that the payments received under Cost Centre D have been offered to tax in India by BTIL. In fact, the transaction between BTIL and the assessee have been subjected to transfer pricing analysis by the Transfer Pricing Officer (TPO) and adjustment was suggested to the Arm's Length Price (ALP). Thus, on a conjoint reading of the contract between the DMRC and the consortium partners and the Consortium Agreement would make it clear that not only the scope of work under the contract given to Consortium partner is well defined but the cost relating to such scope of work has also been specifically demarcated under different cost centres.

17. Thus, it can be safely concluded that though DMRC executed a single contract with the Consortium partners, however, the scope of work to be performed by each of Consortium partner has been well defined and demarcated. Therefore, essentially the contract is a divisible Contract. On a careful perusal of observations of learned DRP, it is observed that learned DRP has misconstrued the terms of the agreement between the DMRC and the Consortium partners as well as the terms of the Consortium Agreement. Learned DRP has erroneously assumed that the activities under Cost Centre D are also performed by the assessee. Whereas, factually and in terms of the contract, such activities falling under Cost Centre D were not only performed by BTIL but the profits from such activities have been offered to tax by BTIL. Therefore, in our view, the receipts from offshore supply of rolling stock cannot be taxable in India as the transfer of title over the goods has taken place outside India.

18. The next issue arising for considered is whether BTIL constitutes a fixed place PE of the assessee in India. As per Article 5(1) of India – Germany Tax Treaty, a fixed place PE means a fixed place of business

through which the business of an enterprise is wholly or partly carried on. For construing BTIL as fixed place PE of the assessee in India, the burden is on the department to establish firstly, that the premises of BTIL was used by the assessee to carry out its business and secondly, the premises of BTIL was at the disposal of the assessee. Though, it is the allegation of the Revenue Authorities that the expatriate employees of the assessee have visited India frequently during the year under consideration and have stayed in India for carrying out their activities by utilizing the premises of BTIL. However, these are in the nature of bald allegations without being backed by any evidence brought on record to establish that the expatriates were utilizing the premises of BTIL. As held by Hon'ble Supreme Court in case of ADIT Vs. E-Funds IT Solutions Inc. (supra), the burden is entirely on the Revenue to establish the existence of PE. Even, no documentary evidence has been brought on record by the Revenue to establish the disposal test so as to determine BTIL as the fixed place PE of the assessee in India. Nothing has been brought on record by the Revenue to demonstrate that the premises of BTIL were given at the disposal of the assessee. In this context, we rely upon the decision of the Hon'ble Supreme court in case of Formula One World Championship Ltd. Vs. CIT (supra).

19. It is further relevant to observe, in assessee's own case in assessment year 2012-13, learned Commissioner (Appeals), being conscious of the observations of learned DRP with regard to BTIL constitutes a fixed place PE of the assessee in India, has held that BTIL is not the PE of the assessee. In fact, while considering identical nature of dispute in case of Bombardier Transportation Sweden AB Vs. DCIT (supra), the Coordinate Bench, while considering the dispute relating to offshore supply made under a somewhat similar Contract with DMRC held that receipts from offshore supplies cannot be taxed in India in view of the ratio laid down by the Hon'ble Supreme Court in case of Ishikawajma Harima Heavy Industries Ltd. Vs. DIT, 158 Taxman 259.

20. At this stage, it is relevant to observe, learned DRP, while coming to conclusion that BTIL constitutes fixed place PE in India, has relied upon the decision of the Tribunal in case of Nortel Networks India International Inc. However, the decision of the Tribunal stands reversed by the Hon'ble Jurisdiction High Court in Nortel Networks International Inc. Vs. DIT [2016] 386 ITR 253 (Delhi). Thus, analyzing the facts and materials on record in the touchstone of the ratio laid down in the judicial precedents cited before us, we are of the view that none of the conditions of fixed place PE as enshrined under Article 5(1) of India – Germany tax treaty stand satisfied to construe BTIL as the PE of the assessee in India. Thus, in view of our aforesaid conclusion, we hold that the attribution of profit qua the receipts from offshore supplies to the alleged fixed place PE in the form of BTIL is unsustainable as, in our view, BTIL cannot be construed as PE of the assessee in India.”

9. Respectfully following the precedent as above, we do not find any infirmity in the order of Id. CIT (A) in this regard, hence we uphold the same.

10. In the result, this appeal filed by the Revenue stands dismissed.

**Order pronounced in the open court on this 15<sup>th</sup> day of November, 2023.**

**Sd/-  
(KUL BHARAT)  
JUDICIAL MEMBER**

**sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER**

**Dated the 15<sup>th</sup> day of November, 2023  
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)-42, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT  
NEW DELHI.**