

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

**BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
DR. BRR KUMAR, ACCOUNTANT MEMBER**

**ITA No. 1930/Del/2023
Assessment Year: 2020-21**

Alstom (Thailand) Ltd. (formerly
known as Bombardier
Transportation Signal (Thailand)
Limited Thailand.
No. 724, Phase 3, GIDC,
Vadodara, Gujrat.
PAN: AADCB5702A
(Appellant)

Versus ACIT, Circle 1(1)(2),
International Taxation,
Delhi.
(Respondent)

Assessee by : Sh. Shashwat Bajpai, Adv.
Revenue by : Sh. Vizay B. Vasanta, CIT-DR

Date of hearing : 18.10.2023
Date of pronouncement: 30.10.2023

ORDER

This is an appeal by the assessee against final assessment order dated 29.04.2023 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961, pertaining to assessment year 2020-21, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. Ground No. 1, being general in nature, does not require adjudication. Whereas, in ground No. 2, the assessee has challenged taxability of receipts from offshore supplies, based on allegation of the revenue authorities that the assessee has a supervisory permanent establishment (PE) under the provisions of Article 5 of India-Thailand Tax Treaty. In ground No. 3, the assessee has challenged taxability of receipts from engineering services as royalty.

3. Briefly, the facts are, the assessee, earlier known as Bombardier Transportation Signal (Thailand) Limited, is a non-resident corporate entity, incorporated under the laws of Thailand and a tax resident of Thailand. As stated by the Assessing Officer, the assessee is engaged in the business of manufacturing of train control and signalling systems for mass transit system. The assessee formed a consortium with Bombardier Transportation India Limited (BTIN) and entered into a contract with Delhi Metro Rail Corporation (DMRC) on 05.09.2013 for design, manufacture, supply, installation, testing and commissioning of train control and signalling system. In terms with the contract, the assessee made offshore supply of goods and equipments to DMRC from outside India. During the year under consideration, the assessee

had received an amount of Rs.21,02,08,336/- on such supply. The assessee did not offer such receipts to tax in India claiming that the transfer of title in goods have passed to DMRC outside India and the assessee had no PE in India. The Assessing Officer, however, was not convinced to the submissions of the assessee. He observed that the assessee had a service PE in India, through which, it executed the contract. Accordingly, out of the receipts from offshore supplies, the Assessing Officer attributed 10% of the total receipts as profits of the PE and accordingly, brought an amount of Rs.2,10,20,833/- to tax. Though, the assessee objected to the draft assessment order before learned DRP, however, following their direction in assessment year 2016-17, learned DRP rejected assessee's contention. Accordingly, the final assessment under challenge was passed.

4. Before us, learned counsel appearing for the assessee submitted that the issue is squarely covered by the decision of the Tribunal in assessee's own case in assessment years 2016-17, 2018-19 and 2019-20. In this context, he placed on record order dated 31.08.2023 passed in ITA No. 726/Del/2023 and others.

5. Learned Departmental Representative fairly agreed that the issue is covered by the decision of Tribunal. However, he relied upon the observations of the Assessing Officer and learned DRP.

6. Having considered rival submissions, we find, while deciding identical issue, the Tribunal in the order referred to above, has held as under :

"9. It is noticed from the assessment orders for the assessment years 2013-14, 2014-15, 2015-16 and assessment year 2017-18 that this issue of as to whether the off shore supplies of equipment and providing engineering services qualify to tax with reference to the DTAA with Thailand has also been examined in the proceedings under section 143(3) r.w.s. 144C of the Act and the Assessing Officer accepted that these incomes are not liable to tax. The relevant observations of the Assessing Officer in these assessment years are as under:-

Assessment Year : 2013-14 :

"M/s Bombardier Transportation Signal (Thailand) Ltd. (hereinafter referred to as "assessee") e-filed its return of income on 29.11.2013 declaring total income of Rs.5,62,36,850/-The assessee filed a revised return on 31.03.2015 declaring Nil income. The case was selected for scrutiny under CASS and a notice u/s 143(2) of the Income Tax Act 1961 ("the Act") was issued to the assessee on 31.08.2015 Further, a notice u/s 142(1) of the Act along with detailed questionnaire was issued to the assessee on 20.10.2015 In response to various notices, Sh Arvind Rajan and Ms. Chinu Bhasin CAs, authorized representatives of the assessee attended the assessment proceedings from time to time and filed necessary information and details. Written submissions and documents were considered. The case was discussed with the authorised representatives of the assessee.

2. The assessee company is registered and incorporated under the laws of Thailand and engaged in the business of manufacturing and supply of train signaling systems. Assessee's receipts from services

provided by it in India and its taxability was examined in the light of provisions of the Act and India-Thailand DTAA. After considering replies and documents filed by the assessee its income as shown in the revised return of income is accepted.

3. Assessment is, accordingly made on Nil income. Credit for prepaid taxes is allowed after due verification. Detail of computation of tax and interest charged as provisions of law is given in the enclosed ITNS-150 which is part of this order. Issue necessary forms.”

Assessment Year : 2014-15 :

“M/s Bombardier Transportation Signal (Thailand) Ltd. (hereinafter referred to as the assessee) e-filed its return of income on 28.11.2014 declaring Nil income. The case was selected for scrutiny under CASS and a notice u/s 143(2) of the Income Tax Act, 1961 ("the Act") was issued to the assessee on 31.08.2015. Further, a notice u/s 142(1) of the Act along with detailed questionnaire was issued to the assessee on 08.04.2016. In response to various notices, Sh. Aditya Gupta and Ms. Chinu Bhasin, CAs, authorized representatives of the assessee attended the assessment proceedings from time to time and filed necessary information and details. Written submissions and documents were considered. The case was discussed with the authorised representatives of the assessee.

2. The assessee company is registered and Incorporated under the laws of Thailand and engaged in the business of manufacturing and supply of train signaling systems. During the year assessee has provided engineering related services to M/s Bombardier Transportation India Limited (BTIN). Assessee's receipts from services provided by it in India and its taxability is examined in the light of provisions of the Act and India-Thailand DTAA. After considering replies and documents filed by the assessee, its income as shown in the return of income is accepted.

3. Assessment is, accordingly, made on Nil Income. Credit for prepaid taxes is allowed after due verification. Detail of computation of tax and interest charged as provisions of law is given In the enclosed ITNS-150 which is part of this order. Issue necessary forms.”

Assessment Year : 2015-16 :

“M/s Bombardier Transportation Signal (Thailand) Ltd. (hereinafter referred to as the assessee and BT-Thailand) e-filed its return of income on 29.11.2015 declaring Nil income. The case was selected for scrutiny under CASS and a notice u/s 143(2) of the Income Tax Act, 1961 ("the Act") was issued to the assessee on 04.04.2016.

Further a notice u/s 142(1) of the Act along with detailed questionnaire was issued to the assessee on 01.07.2016. In response to various notices, Sh. Aditya Gupta and Ms. Chinu Bhasin, CAs, Authorized Representatives of the assessee attended the assessment proceedings from time to time and filed necessary information and details. Written submissions and documents are considered. The case was discussed with the authorised representatives of the assessee.

2. The assessee company is registered and incorporated under the laws of Thailand and engaged in the business of manufacturing and supply of train signaling systems. The assessee had entered into an agreement namely "CS03" with Delhi Metro Rail Corporation (DMRC) wherein BT-Thailand along with the other members of the consortium would design, manufacture, supply, install, test and commission train control & signaling system. During the year under consideration, BT-Thailand made offshore supplies to DMRC. The transfer of ownership/title to DMRC in respect of all supply transactions has taken place outside India. Accordingly, the income accruing by virtue of these offshore supply transactions is not taxable in India. After considering replies and documents filed by the assessee, its income as shown in the return of income is accepted."

Assessment Year : 2017-18 :

M/s Bombardier Transportation Signal (Thailand) Ltd (hereinafter referred to as "assessee") has e-filed its return of income for Assessment Year 2017-18 on 29.11.2017 declaring total income of Nil. The case was selected for scrutiny under CASS. The scrutiny CASS selection reason is- High ratio of refund to TDS relating to section 195A notice u/s 143(2) of the Income Tax Act, 1961 ("the Act") was issued on 27.08.2018 to the assessee. Further a notice u/s 142(1) of the Act along with detailed questionnaire was issued to the assessee electronically on 12.04.2019. In response to reminder notice issued was 22.05.2019. In response to various notices issued through the assessment module of ITBA/otherwise, compliances/submissions were made by the assessee electronically / manually. The submissions and documents made by the assessee electronically/manually were examined.

2. The assessee is registered and incorporated under the laws of Thailand with its head office located at 3354/16-19, 6th floor, Manorom Building Rama 4 Road, Klinton Klungtoey Bangkok, Thailand. It is a subsidiary of Bombardier Transportation Holdings (Thailand) Ltd. The assessee is a tax resident of Thailand as contemplated under Article 4 of the India-Thailand Tax treaty. The assessee had entered into an agreement namely "CS03" with Delhi

Metro Rail Corporation (DMRC) wherein BT-Thailand along with the other member of the consortium would design, manufacture supply etc train control & signaling system. During the year under consideration assessee received payment from DMRC towards offshore supplies and offshore services incidental and inextricably linked to these supplies. Further during the year under consideration assessee had provided engineering services to Bombardier Transportation India Pvt. Ltd. (BTIN).

3. Correctness of assessee's income from various sources is verified in respect of DTAA provisions of India Thailand during the assessment proceedings. After considering the facts and circumstances of the case assessee's income as shown in the return is accepted.

4. Assessment is accordingly made at NIL income. Detailed computation of tax and interest charged as per provision of law is given in the enclosed ITNS-150 which is part of this order. Necessary forms are issued.”

10. Therefore, it is noticed that while completing assessment of the assessee for the assessment years 2013-14 to 2015-16 and also for the immediately succeeding assessment year to the assessment year under consideration i.e. 2017-18 the Assessing Officer thoroughly examined the taxability of the income received by the assessee on off shore supplies made to DMRC and the engineering services provided to BTIN with reference to the DTAA between India and Thailand and the conclusion was drawn by the Assessing Officer that these incomes are not taxable. This consistent approach was departed by the Revenue for the assessment years 2016-17, 2018-19 and 2019-20 for one reason or the other, which, in our view, is not justified. The ratio of the decision of the Hon'ble Supreme Court in the case of Radhasoami Satsang Vs. CIT (supra) wherein the apex court rejected the plea of the Revenue that res judicata does not apply to tax matters and held that where the facts are identical there is no change in law, the judicial authorities are bound by the decision of the previous year applies to the present case. Therefore, on this ground alone we direct the Assessing Officer to delete the addition made towards off shore supplies and also for providing engineering services accepting the stand of the assessee that they are not taxable under DTAA between India and Thailand.

11. Even on merits the case of the appellant is covered by the decision of the Tribunal in assessee's group company, namely, Bombardier Transportation Sweden AB Vs. DCIT [(2021) 125 taxmann.com 277] wherein the Delhi Tribunal held as under:-

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

30. Before us, the Id. 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 12 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 Id. DR strongly supported the findings of the DRP. It is the say of the Id. DR that since it is composite contract, therefore,

there has to be attribution. The Id. 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 Id. 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 13 with the contract with DMRC. The Id. 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 off shore equipment in India up to the site of DMRC in Delhi and there after carry out the entire testing of the equipment in the depot of DMRC.

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

10. The role of BT1N 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 there after 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 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 Indiah 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 provide 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: 17 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) or 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 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 20 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.”

12. The decision squarely applies to the assessee’s case. Thus, even on merits the addition made towards off shore supplies is liable to be deleted.

13. The facts are similar/identical for the assessment years 2018-19 and 2019-20. Therefore, the decision taken for the assessment year 2016-17 applies to mutatis mutandis for these two assessment years also. We order accordingly.”

7. There being no difference in the factual position in the current assessment year, respectfully following the decision of coordinate Bench, we hold that the addition made by the Assessing Officer on account of attribution of profit in relation to receipts from offshore supplies is not taxable in India. Accordingly, the Assessing Officer is directed to delete the addition.

8. In so far as the addition of royalty income is concerned, it is observed that the addition has been made by the departmental authorities on a completely factual misconception that the receipts from BTIN towards engineering services is royalty income for use of process of equipment.

9. Having heard rival contentions, we find, while deciding assessee's appeals for assessment year 2016-17, 2018-19 and 2019-20 in the order referred to above, the coordinate Bench has also addressed this issue and held that the receipts are not in the nature of royalty. There being no difference in the factual position in the current assessment year, respectfully following the decision of the coordinate Bench, we delete the additions. Grounds are allowed.

10. In the result, appeal is allowed.

Order pronounced in the open court on 30/10/2023.

Sd/-

(DR. BRR KUMAR)
ACCOUNTANT MEMBER

Sd/-

(SAKTIJIT DEY)
VICE-PRESIDENT

Dated: 30.10.2023

*aks/-