IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "I" BENCH, AHMEDABAD

[Coram: Pramod Kumar AM and S S Godara JM]

ITA No.555/Ahd/2016
Assessment Year: 2013-14

Dy. Commissioner of Income Tax
International Taxation, Baroda. .....Appellant

Vs.

Bombardier Transportation India Pvt. Ltd. .....Respondent
Plot No.724, Phase-III, GIDC Savli,
Post: Manjusar, Vadodara – 391 775.
[PAN – AAACA 5584 C]

Appearances by:

Mahesh Shah and Madhusudan *for the appellant*
Kanchal Kaushal, Piyush Chawla and Dhaval Trivedi *for the respondent*

Date of concluding the hearing : 04.10.2016
Date of pronouncing the order : 03.01.2017

O R D E R

Per Pramod Kumar AM:

1. By way of this appeal, the Assessing Officer has challenged correctness of the order dated 21.12.2015, passed by the learned CIT(A)-13, Ahmedabad, in the matter of assessment under section 201(1) & 201(1A) r..w.s. 195 of the Income Tax Act, 1961, for the assessment year 2013-14.

2. Ground no. 1 is general in nature and does not call for any specific judication by us.

3. In ground no. 2, the Assessing Officer has raised the following grievance:

> **The learned CIT(A) has erred on facts and in law in holding that the payment of Rs.9,19,96,649/- made towards various IT support services received from the Holding Company and associated enterprises of the group concerns are not in the nature of Fee for Technical Services (FTS).**

4. So far as this grievance of the assessee is concerned, the relevant material facts are like this. The assessee before us is a wholly owned subsidiary of Bombardier

Transportation (Holdings) Singapore Pte Ltd, a part of Bombardier Group, and is engaged in the business of manufacturing and supply of rail transportation system, which includes traction, auxiliary converters, vacuum circuit breakers, control electronics, signaling equipment, coaches and bogies for metro trains. During the course of scrutiny of TDS returns, the Assessing Officer noticed that the assessee has made payments, aggregating to Rs 9,19,96,649 to Bombardier Transportation Canada Inc (BTCI, in short). The details of these payments are as follows:

Service Units Text	(USD)	(INR)	TDS	Nature of service
Finance System - Maneja	48,711	2,647,306	NO	ERP application used at Maneja site of the company by employees in Finance department to do accounting and reporting of all financial transactions
HR Connect	45,321	2,463,072	NO	Common standard HR platform used throughout BT, which enables employees and managers to modify their personnel data through employee self-service (ESS) and manager self-service (MSS). It is the sole HR IT database that feeds all other systems in 'HR. Additionally, HR Conned defines clear points of contacts and reduces interfaces. This reduces the HR workload (reduces uncertainties to discuss due to common access to standardized data, common processes to provide consistent HR services, efficient data management, even clearer definition of roles and responsibilities) and thus frees resources and provides data for a faster and better HR service.
Intens	4,716	256,283	NO	Intens is a 3-tier application framework used to do scientific calculations in the fields of engineering.
Kronos India	123,436	6,708,397	NO	Kronos is a Time and Attendance system used to record time and attendance of all employees of the company. In oilier words in conjunction with "time clocks" all blue and white collar employees in the company can record their attendance time into a timesheet by using this equipment. This is the new version resulting from the consolidation of '3 previous instances and will 'be the basis for future deployments.
LN DB Locomotives ï Freight Division	89,324	4,854,528	NO	Lotus Notes server used by employees in the Locomotives Division of the company to communicate with various stakeholders and to receive and send e-mails both internally within the company and also to external people and also to access, as and when required, information stored on the server database.
				Lotus Notes server used by employees in the Mainline / Passenger Division of the company to communicate with various stakeholders and to receive and send

LN DB Mainline Division	140,759	7,649,869	NO	e-mails both internally within the company and also to external people and also lo access, as and when required, information stored on the server database
LN DB Rail Control Solutions-Division	10,945	594,850	NO	Lotus Notes server used by employees in the Rail Control Solutions (RCS) Division of the company to communicate with various stakeholders and to receive and send e-mails both internally within the company and also to external people and also to access, *as* and when required, information stored on the server database
LOGOS	7,912	429,995	NO	It is Customer Claim Management tool / database used by employees in the Mainline Division, of the company vi/.. as and when any claim is filed by any customer against the company, employees working in project management function of the mainline division have to record and enter the details of that claim in this database.
Maximo ï DB MAXPPC	28,511	1,549,481	NO	It is a Enterprise Asset Management solution that has unique industry solutions for various business processes. This flexible solution provides a single platform to deliver asset lifecycle and maintenance management from end-to-end across the enterprise.. Consisting of six core modules -- Materials, Procurement, Asset, Work, Service and Contract, Maximo Asset Management-provides a comprehensive answer for asset management
Other global adjustments	40	2,154		
PPC Serialisation	54	2,940		Bar Coding application used to check and control the inventory
PPRS	25,955	1,410,564	NO	Project Management application, used to keep and archieve all records and database separately for each customer project/ contract pertaining to all divisions of the company other than RCS. All records and documents relating to each project viz. customer agreement, financial information, all customer correspondences, customer claims/ disputes, minutes of the meetings, etc. are archieved and kept in this database for future reference purpose
Pé é China	1,375	74,716	NO	Project Management application used to keep and archieve all records and database separately for each customer project/contract in the RCS division of the company.
				It is a Version Control tool, a Change Management tool and a Requirement Package used as Configuration Tool in Engineering, Software development and maintenance for the software that - support all the products. Used in the

PVCS ï Vaesteras	56,390	3,064,656	NO	Field support as well as in new products development. Engineers use it from their desktops and from remote connections, all around the world for all software related work products (releases-working source files).
QT ï India	2,451	133,185	NO	Programming Tool
SAP ï SPRINT	9,363	508,880	NO	SAP Sprint is a transfer program used to print output from a remote location using *a* Microsoft Windows operating system
SAP Global FORE	26,519	1,441,245	NO	Finance Global consolidation system used by-employees in Finance department of the company for reporting financial results of the company and also to maintain contract wise financial summary viz. sales, cost gross margin, overheads, Net margin, etc.
VCM Template Solution	221,003	12,010,931	NO	SAP Value Change Management (VCM) system for Asia
Sales Force	14,798	804,215	NO	Customer Relationship Management./ Sales system to identify, handle and report possible opportunities/ leads in the market, enter detailed information about customer and requirements of the customer and other identified Key Performance Indicators
E3 ï Global	20,286	1,102,485	NO	ECAD Application; electrical engineering software; software suite that offers solutions for numerous industries (among others machinery and plant engineering, equipment cabling, automotive, railways, special vehicles)
Bar Coding	9,634	523,555	NO	Bar Coding application for PPC Maneja site of the company used to do inventory management viz. keep record of all the inventory of raw material, finished goods, etc. at the site. It is an efficient way to keep a check and control on the inventory in the site.
Payroll System ï India	14,323	778,400	NO	HR Payroll System for India - containing data base of all employees of the company .and used to prepare the monthly payroll of all Indian employees
PRO BT Global	22,773	1,237,637	NO	MS Project Server 2010 and project professional managed by GPM MS Project Server 2010 and project professional
Visual Factory India	21,624	1,175,186	NO	Tool to supervise manufacturing operations at Savli Site
Office Support	2,244	121,931	NO	Office support viz. PDF writer etc.
EB PPC Vaesteras	10,059	546,661	NO	Database for Mainline division of the company used for storing engineering related documents between the divisions

Depreciation ï 2011-8947 Segregation of	477	25,929	NO	Depreciation of Project management application
Depreciation ï 2012-4062 EPPM Template F	55	3,002	NO	Depreciation of Project management application
PDM Metaphase	11,603	630,593	NO	Product Data Management (PDM) tool PDM enhancements & bug fixing for PDM LAE division Project Scope; Â Fit Gap and Blueprint for PDM stabilization / optimisation ÂDeployment of template functionalities as agreed between Business and IS Â Change management for the adaptation to the template processes Â Template localization based on legal or contractual requirements Â Data migration from legacy applications to PDM (if applicable) Â Post go live support Â Change Management Â Decommissioning of the legacy system (if: applicable)
Project Costs	653,346	35,507,617	NO	Internal BT cost viz. salaries, other overheads, etc. of employees working in IS/IT department to globally manage IS/IT operations
Infrastructure Application	68,750	3,736,383	NO	Purchase of other small consumables required to run the business.
Total	**1,692,754**	**91,996,649**		

5. These payments, as evident from the nature of payments set out above and as was claimed by the assessee, were towards information system support services at a group level and has been charged from the appellant based on costs incurred towards consumption of various service elements by the appellant. The cost for each service element is determined by (a) applying an explicitly given price to the number of units of service consumed, or (b) calculating the share of globally incurred cost based on defined keys. The stand of the assessee was that these payments were in the nature of reimbursements and cannot partake the character of income in the hands of the recipient concerned. It was also contended that unless there is a transfer of all or any of the rights (including granting of any licence) in respect of copyright of a literary, artistic or scientific work, taxability under section 9(1)(vi) could not be invoked and there was no such transfer of right in this case. The assessee further clarified that in the context of Indo Canadian tax treaty, only such payments as have an element for use of IPRs could be considered as royalties, but then the present payments are for standard facilities. It was

also explained that the BT Canada has not received any payments for commercial exploitation of copyright embedded in the applications. The Assessing Office, however, rejected this stand and proceeded to hold that these amounts are taxable as royalties under section 9(1)(vi) of the Income Tax Act as also under article 12(3) of the India Canada Double Taxation Avoidance Agreement (Indo Canadian tax treaty, in short; (1998) 229 ITR (St) 44]. He was of the view that the impugned payments are in covered by the consideration for ñuse or right to use any industrial, commercial or scientific equipmentòwhich was taxable under section 9(1)(vi) read with Explanation 2(iva) as also article 12(3)(b) of the Indo Canada tax treaty. The Assessing Officer, after a detailed analysis of the payments, was of the view that a major portion of the payment is for the use or right to use industrial, commercial or scientific equipment, while remaining cover the use of various processes for which access has been granted by the assessee companyò He thus held that the assesse ought to have withheld tax at source @10% from these payments. Accordingly, a demand under section 201(1) r.w.s. 195 was raised on the assessee. Aggrieved, assessee carried the matter in appeal before the CIT(A) who upheld the plea of the assessee and deleted the impugned tax withholding demand. While doing so, in a very well reasoned order, learned CIT(A), inter alia, observed as follows:

> **2.10.13 I have carefully considered the facts of the case, the submissions of the appellant and the impugned order of the AO. The fundamental submission of the appellant is that the IT support services are not in the nature of 'Royalties' as no right to use of any equipment/secret process is conferred upon the appellant. The relevant provisions under the Act relating to taxation of income from royalty income are as follows:**
>
> **Section 9(1)(vi) income by way of royalty payable by-**
> **-------**
> **(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India ;**
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> **Explanation 2. - For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—**
>
> **(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;**
> **----------**

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;

Explanation 4. - For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

Explanation 5 - For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not -
(a) the possession or control of such right, property or information is with the payer;
(b) such right, property or information is used directly by the payer;
(c) the location of such right, property or information is in India."

The term royalty has been defined in the India-Canada DTAA as under
"3. The term 'royalties' as used in this Article means :
(a) payment of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work including cinematograph films or work on film tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; and
b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 from activities described in paragraph 3(c) or 4 of Article 8.

The software application/services such as e-mail database, control tools, bar coding solutions, HR Payroll System, finance reporting, applications for recording time & attendance etc. used by the appellant are primarily in the nature of applications for data processing or warehousing wherein the appellant does not get control/power of use/disposal of hardware or server involved. No use or right to use of any equipment or process is conferred upon the appellant. The appellant is merely granted a facility and the consideration for the same cannot be construed as royalty.

Therefore, going by the principles as elucidated by the Technical Advisory Group of the OECD and the commentaries of renowned authors as well as the judicial precedents relied upon by the assesses, as referred to above, it

is apparent that the provision of software services cannot be said to be transactions for use of or right to use either any "process" or "equipment" by the appellant so as to render the amounts payable by the appellant to BT-Canada as "royalties" under the I.T. Act or the DTAA. The transactions are merely in the nature of provision of standard services. When we see from the perspective of the DTAA, it is trite that for any consideration to be taxed as 'royalties', it has to be first showed that the customer/payer has a 'right to use' of an right, information or property and secondly, such right, information or property should be in the nature of Intellectual Property Rights such as patent, formula, secret process, copyright or any other similar property. In the light of the various judicial decisions relied upon by the appellant, it is clear that amendment in domestic law does not affect the provisions of the tax treaty and even otherwise the said payments cannot be taxed in India subsequent to the amendments in the Act as the primary condition of right to use of equipment or process is not being fulfilled. Having said so, in the absence of right to use of equipment or the cloud server, the concept of cloud computing also cannot be invoked to tax the above said payments as royalties. There are enough judicial reliance that can placed on this proposition including the landmark judgement of the Hon'ble Supreme Court in the case of Azadi Bachao Andolan vs. UOI 263 ITR 706 (SC) where it has been unequivocally held that the interpretation given under the DTAAs ought to be given even where it is inconsistent with the provisions of the I.T Act. On going through the items for the purpose of which payments have been made by the appellant clearly shows that there was no 'use of' or 'right to use of' any right, property or information by the appellant. The nature of these items are clearly licensed softwares and applications, the cost of which has been incurred by BT-Canada and later recouped from the appellant. The Hon'ble Delhi High Court in Director of Income-tax vs. Infrasoft Ltd. [2013] 264 CTR 329 and Nokia Networks Oyj [2013] 358 ITR 259 has unequivocally held that payment towards software for self-use is nothing but consideration towards a copyrighted article but not towards right to use the embedded copyright. Strictly speaking, use of a copyright in a software for the purpose of commercial exploitation in terms of reproduction, sub-lisence etc. only would tantamount to royalties. Further, none of the payments have also been made towards use of any industrial, commercial, or scientific equipment.

In view of discussion above, I am of the considered view that the payment made by the Appellant for the provision of IT support services cannot be taxed as 'Royalties' under the beneficial provisions of Article 12 of the India-Canada DTAA. Further, as stated in the earlier ground of appeal in the light of the Apex Court decision in GE India Technology Centre Pvt. Ltd. [2010] 327 ITR 456 (SC) wherein it has been held that payment made to a non-resident will be subject to withholding of tax u/s. 195(1) of the Act only if the

sum payable is 'chargeable to tax ' in India in the hands of non-resident, the appellant was not per se obliged to deduct any tax at source u/s 195 of the Act in the absence of any component of income involved. Thus, there existed no liability of the appellant to deduct any TDS u/s 195 (1) of the I.T. Act. This ground of appeal is allowed accordingly.

6. Aggrieved by the relief so granted by the CIT(A), the Assessing Officer is in appeal before us.

7. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal positon.

8. We find that the related payments made by the assessee to BT Canada were in the nature of reimbursements, and, as evident from the details taken to record earlier in this order, there were specific cost allocations which were borne by the assessee. These payments, by no stretch of logic, could be viewed as payments for right to use the equipment. The assessee was entitled to certain services, during rendition of which even if certain equipment were to be used, but that by itself did not result in any use of or right to use the equipment by the assessee. The service may involve use of equipment but that does not vest right in the assessee to use the equipment. Even if a part of consideration can be said to be on account of use of equipment by breaking down all the components of economic activity for which consideration is paid, it is neither practicable, nor permissible, to assign monetary value to each of the segment of this economic activity and consider that amount in isolation, for the purpose of deciding character of that amount. Similarly, even if the payment is to be considered as payment for use of software, as is the settled legal position as on now, unless there is no transfer of copyright, there cannot be any occasion to hold it as royalty. In any event, so far as the transaction between the assessee and the BT Canada is concerned, it is simply in the nature of reimbursement of expenses incurred by BT Canada, on behalf of the assessee, and it has no income element so far as BT Canada is concerned. During the course of hearing before us, when we put this proposition to the learned Departmental Representative, he did not have much to say beyond placing reliance on the stand of the Assessing Officer. We also find that this issue is also covered, in favour of the assessee, by a coordinate bench decision of this Tribunal which has, in the case of Kotak Mahindra Primus Ltd vs DDIT [(2007) 11 SOT 578 (Mum)] wherein it was observed by the bench that ñ**The Indian company does not have any control over, or physical access to, the mainframe computer in Australia. There cannot, therefore, be any question of payment for use of the mainframe computer. It is indeed true that the use of mainframe computer is integral to the data processing but what is important to bear in mind is the fact that the payment is not for the use of mainframe computer per se, that the Indian company does not have any control over the mainframe computer or physical access to the mainframe computer, and that the payment is for act of specialized data processing by the Australian company. Use of mainframe computer in the course of processing of data is one of the important**

aspects of the whole activity but that is not the purpose of, and consideration for, the impugned payment being made to Australian company. The payment, as we have observed earlier, is for the activity of specialized data processing. It is neither practicable, nor permissible, to assign monetary value to each of the segment of this economic activity and consider that amount in isolation, for the purpose of deciding character of that amount. Therefore, neither the impugned payment can be said to be towards use of, or right to use of, the mainframe computer, nor is it permissible to allocate a part of the impugned payment, as attributable to use of, or right to use of, mainframe computer. Accordingly, the provisions of art. 12(3)(b) cannot have any application in the matter." Going by this logic even if one proceeds on the basis that any equipment is used in rendition of these services, such a payment, or part thereof, cannot be treated as payment for use of equipment. Revenueôs case is thus acceptable as payment for use of equipment. In any case, the details furnished by the assessee also support the fact of reimbursement. When recipient does not have any income embedded in the related payment as reimbursement, there cannot be any occasion for deduction of tax at source under section 195. In view of these discussions, as also approving the reasoning adopted by the CIT(A), we uphold the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

9. Ground no. 2 is thus dismissed.

10. In ground no 3, the Assessing Officer has raised the following grievance:

> **The ld. CIT(A) has erred on facts and in law in holding that the payment of Rs.7,21,21,518/- made towards providing of services to use of equipment and right to use equipment received from the Holding Company and associated enterprises of the group concerns are not in the nature of Royalty.**

11. So far as this ground of appeal is concerned, the relevant material facts are like this. During the course of verification of TDS returns, the Assessing Officer noticed that the assessee has made payments of Rs 6,80,54,110, on account of Administration, Marketing, Procurement and CCR Services and Rs 40,67,408, on account of Human Resources Services, to BT Canada. These services were rendered by BT Canada, at the group level, to the assessee under a contract. These services were in several categories- namely, (a) finance an accounting, (b) group taxation, (c) engineering, (d) human resources, (e) marketing and strategic planning (f) management support (g) HR back office; (h) legal, (i) corporate office fees, (j) supply management, (k) communication, (l) bids, (m) intellectual property (n) six sigma and (j) others. There is no dispute, however, about the nature of services inasmuch as all these services are in the nature of management support and advisory services. On these facts, the Assessing Officer was of the view that these services result in ñpassing on suitable knowledge, skill

and experience during the course of execution of these servicesò which itself ñmakes available experience and skill of the non resident to the assessee which gets hit by the mischief of definition of fees for technical services in the DTAAò The Assessing Officer was also of the view that ñthe service of technical input, advice, expertise etc rendered by the non resident company are technical in nature as provided for definition in the DTAA and not merely a standard serviceò All along in the discussions, the Assessing Officer emphasized on the technical inputs and benefits to the assessee which leads to the services being technical in nature and making available benefits of these services to the assessee. It was thus held, without giving any findings to the effect that there was a transfer of technology inasmuch as the assessee was enabled to perform the same services in future without recourse to the service provider, that the fees for these services is covered by the definition of ófees for technical servicesôin the Indo Canadian tax treaty. Accordingly, the assessee was held to have committed a default in not deduction tax at sources from these payments, @ 15%, under section 195 of the Act. The resultant demand under section 201 r.w.s. 195 was, therefore, raised by the Assessing Officer. Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A) upheld the grievance of the assessee and deleted the impugned demand on the basis of following reasoning:

> **2.9.9 I have carefully considered the facts of the case/ the submissions of the appellant and the impugned order of the AO. As per the agreement between BT-Canada and the appellant, the services include common services towards Finance and Accounting, Group Taxation, Engineering, human resource, Marketing and Strategic Planning, Management Support, Others, HRSSO, Legal, Corporate Office Fees, Supply Management, Communication, Bids, Intellectual Property, Six Sigma. The services rendered by the appellant may at best be categorized as 'technical' in nature under domestic law. However, under the treaty, the qualifying words 'make available' are of significance and hence, if any technical or consulting service is not making available technology to the service recipient, the same cannot suffer TDS u/s.195(1) of the I.T. Act. The AO has not established how 'make available' clause has been satisfied other than stating that the services rendered by BT-Canada would invariably lead to imparting of suitable skill sets/knowledge in the hands of the appellant in the area in which these services are rendered with consequent improvement in the performance of the local employees. In my considered opinion, such finding based on conjectures is too farfetched and contrary to the legal jurisprudence on the concept of 'make available'.**
>
> **From the perusal of the agreement with BT-Canada and the annexures thereto, the nature of services are such that these do not enable the service recipient to make use of the said technical or managerial services independently. More so in the instant case where such services have been availed by the appellant regularly year on year, there is no scope of**

appellant being equipped enough to carry out such services/functions on its own. More importantly, there is no training involved under the agreement neither has there been any material evidence to prove so. Merely because the appellant benefits out of the services being provided by BT-Canada which is common for the Bombardier Group as a whole, would not automatically bring these services within the purview of 'making available' any technology to the employees of the appellant for them to further apply this technology in their routine business operations. The case laws referred by the appellant buttress the argument put forward by the appellant that the services rendered by BT-Canada are in effect towards the proper functioning of the appellant's business operations and alignment with the Bombardier group's global best practices. Such arrangements are not uncommon among various multi-national enterprises and have also been favourably considered by the following decisions:

• Bharti AXA General Insurance Co. Ltd (234 CTR 62)
• Bovis Lend Lease (India) Pvt. Ltd. vs. ITO [2010] 127 TTJ 25 (Bang.)
• Invensys Systems Inv. V. DCIT 317 ITR 438 (AAR)

Furthermore, recently the Ahmedabad Tribunal in the case of Shell Global Solutions International BV vs. Income Tax Officer in I.T.A. No.1283/Ahd/2010 dated November 10, 2015 held that consideration received by Shell Global for rendering services to an Indian co. under the Basic Refinery Package i.e. services in the nature of best practice manuals, guidelines, newsletters, etc. developed by assessee based on its expertise/ experience in running refineries and services like undertaking site inspection, technical/organizational review of processes, providing recommendations etc. could not to be taxed as fees for technical services ('FTS' } under India-Netherlands DTAA. It was observed that none of them involve transfer of technology and absent 'make available' of technology the same cannot be taxed as Fees for technical service. This case is squarely applicable on the facts of the present matter and hence, the action of the AO in concluding that BT Canada is making available technology to the appellant is incorrect and liable to be reversed.

Further, the Ahmedabad Bench of the Tribunal observed in the case of Income-tax Officer (International Taxation), Vadodara v. Denial Measurement Solutions (P.) Ltd. {[2014] 52 taxmann.com 443 (Ahmedabad - Trib.)}, that the condition precedent for invoking the "make available" clause is that the services should enable the person acquiring the services to apply technology contained therein. It further held that unless there is a transfer of technology involved in technical services the "make available" clause is not satisfied. Thus payment made by assessee, engaged in business of manufacturing ultrasonic meters, to a US company towards calibration and

testing of equipment, could not be treated as, fee for technical services' due to non-compliance with make available cause.

Further, Ahmedabad Tribunal, in the case of ITO, International Taxation- II v. Veeda Clinical Research (P.) Ltd. {[2013] 35 taxmann.com 577}, held that the training services rendered by the service provider were general in nature as the training is described as 'in house training of IT staff and medical staff' and of 'market awareness and development training'. Clearly, this training does not involve any transfer of technology and fees for same was not taxable as fees for technical services as per article 13 of India-UK DTAA. The law is settled so far as the connotations of 'make available' clause in the definition of fees for technical services in the contemporary tax treaties are concerned. It is held to be a condition precedent for invoking this clause that the services should enable the person acquiring the services to apply technology contained therein. The Tribunal observed that there are two non-jurisdictional High Court decisions, namely Delhi High Court in the case of DIT v. Guy Carpenter & Co. Ltd. [2012] 346 ITR 504/207 Taxman 121/20 taxmann.com 807 and Karnataka High Court in the case of CIT v. De Beers India (P.) Ltd. [2012] 346 ITR 467/208 Taxman 406/21taxmann.com 214 in support of this proposition, and there is no contrary decision by the jurisdictional High Court or by the Supreme Court. Therefore, unless there is a transfer of technology involved in technical services extended by the UK based company, the 'make available' clause is not satisfied and, accordingly, the consideration for such services cannot be taxed under article 13 (4) (c) of India-UK tax treaty.

In view of discussion above and respectfully following the above stated decisions of the jurisdictional Tribunal and plethora of rulings from various Courts & Tribunals, I am of the considered opinion that the impugned payment for support services does not warrant to be characterized as 'fee for technical services' under India-Canada DTAA. Further, in view of the decision of the Apex Court in the case of GE India Technology Centre Pvt. Ltd. [2010] 327 ITR 456 (SC) wherein it has been held that payment made to a non-resident will be subject to withholding of tax u/s. 195(1) of the Act only if the sum payable is 'chargeable to tax' in India in the hands of non-resident, the payer was not per se obliged to deduct any tax at source u/s 195 of the Act in the absence of any component of income involved. Thus, where the sum payable to BT-Canada did not consist any income chargeable to tax in India, there existed no liability of the appellant to deduct TDS u/s 195(1) of the I.T. Act. The AO is directed to grant the relief accordingly. The ground of appeal is accordingly allowed.

12. Aggrieved by the relief so granted by the CIT(A), the Assessing Officer is in appeal before us.

13. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal positon.

14. We find that the relevant provisions in the Indo Canadian tax treaty, which govern the taxability of fees for technical services, are as follows:

> **Article 12: Royalty and fees for included services**
>
> **4. For the purposes of this Article, 'fees for included services' means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :**
>
> > **(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or**
> >
> > **(b) make available technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design.**

15. We find that so far as taxability under Article 12, i.e. with respect to 'Royalties and fees for included services' is concerned, we find that Article 12(4) provides that, "The term "fees for technical included services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services : (a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or (b) make available technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein". In order to invoke article 12(4)(a) it is necessary that such services should õmake availableò technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design The services provided by BT Canada were simply management support or consultancy services which did not involve any transfer of technology. It is not even the case of the Assessing Officer that the services were such that the recipient of service was enabled to perform these services on its own without any further recourse to the service provider. It is in this context that we have to examine the scope of expression ómake availableô

16. As for the connotations of make available clause in the treaty, this issue is no longer *res integra*. There are at least two non-jurisdictional High Court decisions, namely

Hon'ble Delhi High Court in the case of DIT Vs Guy Carpenter & Co Ltd ([(2012) 346 ITR 504 (Del)] and Hon'ble Karnataka High Court in the case of CIT Vs De Beers India Pvt. Ltd [(2012) 346 ITR 467 (Kar)] in favour of the assessee, and there is no contrary decision by Hon'ble jurisdictional High Court or by Hon'ble Supreme Court. In De Beers case (supra), Their Lordships posed the question, as to "what is meaning of make available", to themselves, and proceeded to deal with it as follows:

> **The technical or consultancy service rendered should be of such a nature that it "makes available" to the recipient technical knowledge, know-how and the like. The service 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. In other words, to fit into the terminology "making available", the technical knowledge, skill?, etc., must remain with the person receiving the services even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it.**
>
> **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. 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, within the meaning of paragraph (4)(b). Similarly, the use of a product which embodies technology shall not per se be considered to make the technology available. In other words, 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.**

17. As we have noted earlier, it is not even the case of the Assessing Officer that the assessee, i.e. recipient of services, was enabled to use these services in future without recourse to BT Canada. The tests laid down by Hon'ble Court were clearly not satisfied. There mere fact that there were certain technical inputs or that the assessee immensely benefited from these services, even resulting in value addition to the employees of the assessee, is wholly irrelevant. The expression 'make available' has a specific meaning in the context of the tax treaties and there is, thus, no need to adopt the day to day meaning of this expression, as has been done by the Assessing Officer.

18. In view of these discussions, and as we concur with the well reasoned findings of the learned CIT(A), we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter on this count as well. The order of the CIT(A) stands confirmed.

19. Ground no. 3 is thus dismissed.

20. Ground no. 4 and 5 are general and do not call for any adjudication by us.

21. In the result, the appeal is dismissed. Pronounced in the open court today on 3rd day of January, 2017.

Sd/-	*Sd/-*
S S Godara	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

Ahmedabad, the 3rd day of January, 2017

Copies to:
(1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad