IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI

BEFORE SHRI G.D.AGRAWAL, HON'BLE VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.2241/Del/2012 to 2246/Del/2012
(A.Y.: 2004-05, 2005-06, 2006-07, 2007-08, 2008-09,2009-10)

M/s. Bharti Airtel Ltd. Airtel Centre, Plot No. 16, Udyog Vihar, Phase-IV Gurgaon PAN : AAACB2894G	vs	ITO (TDS) Ward-I(I), International Taxation New Delhi

Assessee by	**Sh. Ajay Vohra, Sr. Adv., Sh. Anshul Sachar, Adv., Sh. Karan Jain, CA**
Revenue by	**Smt. Aparna Karan, CIT(DR)**

Date of Hearing	**09.10.2018**
Date of Pronouncement	**27 .12.2018**

ORDER

PER BENCH:

All the six appeals are assessee's appeals and pertain to different assessment years as mentioned in the caption. The appeals are preferred against the common order dated 02.02.2012 passed by the Ld. CIT (Appeals)-XI, New Delhi wherein vide the impugned order, the Ld. CIT (Appeals) has upheld the orders of the Assessing Officer passed u/s 201 of the Income Tax Act, 1961 (hereinafter called 'the Act') treating the assessee to be 'assessee in default' for withholding of taxes from the payments made to ABN Amro Bank, Stockholm Branch.

Since the issue is common all the six appeals, the same were heard together and for the sake of convenience they are being disposed of together through this common order.

2.0 Brief facts of the case are that the assessee desired to purchase telecom equipments from a Swedish supplier M/s Ericsson which required substantial funding in foreign currency. The assessee sought foreign exchange credit facility to buy the telecom equipments from Sweden. ABN Amro Bank Stockholm Branch was willing to advance term loan in foreign currency to the assessee but the term loan was required to be guaranteed by the Swedish Export Credit Guarantee Board which had been set up by the Swedish Government in order to provide guarantee to the lenders in respect of the monies borrowed by buyer of equipments manufactured Swedish companies. Subsequently, the assessee entered into four Facility Agreements with ABN Amro Bank Stockholm which were guaranteed by the Swedish Export Credit Guarantee Board. Subsequently, the AMN Amro Bank novated a portion of the loans including all the rights and liabilities therein to five other parties. The assessee made payments to ABMN Amro Bank as per the following chart:-

Particulars	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
Interest payable to novated lenders	**73,75,996**	**3,35,37,700**	**12,69,33,829**	**18,36,09,195**	**84,35,58,169**	**5,99,87,588**
Arrangement/agency fee payable to ABN Amro Bank, Netherlands	-	-	**2,75,46,675**	**10,301,796**	**1,75,60,820**	-
Premium payable to EKN towards guaranteeing the Facility agreements	-	-	**21,05,44,166**	**6,22,00,389**	**8,95,68,494**	-
Interest payable to ABN Amro	**8,12,49,598 _**	**_ 11,38,28,052**	**14,11,24,052**	**2,94,98,584**	**20,27,38,979**	-
Total	**8,86,25,594**	**14,73,65,752**	**50,61,48,722**	**28,56,09,964**	**1,15,34,26,462**	**5,99,87,588**

2.1 The assessee did not withhold tax at source on the payments made to the ABN Amro Bank under a belief that the same was not liable to tax in India having regard to the provisions of Article 11(3) of the India Sweden Double Taxation Avoidance Agreement. However, the Assessing Officer initiated proceedings u/s 201(1) of the Act for non-withholding of tax from the payments made to ABN Amro Bank. Although, the assessee submitted before the Assessing Officer that the Swedish Tax Authorities had issued Tax Residency Certificate certifying that ABN Amro Bank was a tax resident of Sweden in terms of Double Taxation Avoidane Agreement between India and Sweden and, therefore, the payments made to ABN Amro Bank were not taxable in India, such submission did not find favour with the

Assessing Officer. Alternatively, the assessee also contended before the Assessing Officer that the interest received by ABN Amro Bank on behalf of other parties in whose favour the loans were novated were tax residents of Sweden/Mauritius and hence entitled to the benefit of provisions of Double Taxation Avoidance Agreement (DTAA) between India and Sweden/India and Mauritius as applicable and as such the interest to the extent payable to such novated loans were not liable to tax in India. However, the Assessing Officer proceeded to hold the assessee in default u/s 201(1) of the Act for the reason that ABN Amro Bank was allegedly not a tax resident of Sweden on the ground that the Swedish Tax Agency, in terms of Article 27 (Exchange of Information between India and Sweden) of the India Sweden DTAA, had stated that ABN Amro Bank was not a tax resident of Sweden. The assessee, thereafter, approached the Ld. Commissioner of Income Tax (Appeals) challenging the action of the Assessing Officer in holding the assessee as assessee in default but the assessee's appeals were dismissed by the Ld. Commissioner of Income Tax (Appeals) and now the assessee is before the ITAT challenging the order of the Ld. Commissioner of Income Tax (Appeals) for all the six years under consideration.

3.0 At the outset, the Ld. Senior Advocate Shri Ajay Vohra appearing on behalf of the assessee drew our attention to order of ITAT Delhi Bench in assessee's own case for assessment year 2007-08 in ITA 5636/Del/2016 and as reported in 161 TTJ 2383 (Delhi Tribunal) and submitted that the quantum appeal of the assessee had been restored to the file of the Assessing Officer in assessment year 2007-08 wherein the assessee was challenging the disallowance of interest paid to ABN Amro Bank which had been disallowed u/s 40(a)(i).

3.1 On a specific query from the Bench, both the parties before us agreed that the impugned interest in the quantum interest pertained to the same parties and the same loan for which the assessee has been held to be in default u/s 201 of the Act and against which the assessee was now in appeal before us. Both the parties fairly agreed that interest of justice would be served if these appeals were also restored to the file of the Assessing Officer in terms of the directions of the ITAT in assessee's own appeal for assessment year 2007-08 (supra).

4.0 Having heard both the parties and after duly taking into consideration the consensus of both the parties before us

that the appeals may be restored to the file of the Assessing Officer, we feel that it will be in the fitness of things if these six appeals are also restored to the file of the Assessing Officer.

4.1 It is seen that in the assessee's appeal for assessment year 2007-08 (supra) the ITAT had restored the quantum appeal to the file of the Assessing Officer with the following observations:-

"25. In view of the above discussions and bearing in mind the fact that ABN-S did not have any locality related attachment in Sweden which could lead to residence type taxation on global basis, in our considered view, ABN-S cannot be treated as tax resident of Indo Swedish tax treaty. Accordingly, the benefit of Article 11 (3) of Indo Swedish tax treaty cannot be applicable on the ground that the interest remittances are made to ABN-S. However, for the reasons we will now set out, the mere fact that the interest has been remitted to ABN-S and that the benefit of Article 11(3) of Indo Swedish tax treaty or benefit of Article 11(3) of the Indo Dutch tax treaty are not available in respect of these remittances, does not imply that the amounts so paid are taxable in India.

26. We find that there is no dispute about the fact That the ABN-S, was arranger of the loan and there were also other financial institutions termed as 'original lenders' who had actually financed this transaction. The role of the ABN-S, except to the

extent of financing of its own funds in this arrangement, was confined to that of a facilitator. We have also, noted that it is an undisputed position that .subsequently these loan agreements were novated and the original lenders came into direct agreements with the assessee. Under these, circumstances, in our considered view, the interest received by the-ABN-S, except to the extent received for the financing done by itself, was not entirely in his own right but merely as a conduit for making onwards payments to identified original lenders in a transparent manner. As we take note of these facts, it is also important to bear in mind the fact that the liability under section 201(11 r.w.s. 195, which has been invoked in this case for non deduction of tax at source from payments to ABN-S which is the bedrock of disallowance impugned in this appeal, is based on taxability of ABN Amro Bank @ 10% (before grossing up) under Article 11(2) of the Indo-Dutch Tax Treaty and by thus treating ABN Amro Bank as beneficial owner of the interest. It may be noted that under Article 11 of the Indo Dutch tax treaty, interest arising in one of the States and paid to a resident of the other State may be taxed in that other State. Article 11(2), however, provides that such interest may also be taxed in the State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest, the tax so charged shall not exceed 10 per cent of the gross amount, amongst other, in the cases of the interest on loans made or guaranteed by a bank or other financial institution carrying on bona fide banking or financing business. It is thus beyond doubt that the taxation of interest, even according to the revenue authorities, is being done in the hands of the beneficial owner. In

these circumstances, the authorities below were clearly in error in treating ABN Amro Bank as recipient and as beneficial owner of the entire interest paid by the assessee remitted to ABN-S. In our considered view, even though such interest is remitted to ABN-S. Since ABN-S has mainly acted as a conduit, it is to be treated as having been paid to the beneficial owners of such interest i.e. original lenders under the financing" arrangement - though through the ABN-S., The taxability of interest is to be examined in the light of factual findings to be so arrived at, and in the light of the applicable legal position as per the relevant provisions of the tax treaties that India has with the jurisdictions in which original lenders are resident in. Once again, we have to acknowledge the fact that learned counsel for the assessee has filed elaborate documentation in support of their stand about tax residency status of beneficial owners of the interest paid by the assessee and has also addressed the arguments on merits, but, in the absence of this aspect of the matter having been examined by the authorities below, we are not inclined to deal with the matter on merits. In our considered view, the right course of action is to identify the factual aspects to be looked into, set out the legal principles, and remit the matter to the file of the Assessing Officer for adjudication de novo by way of a speaking order, in accordance with the law and after giving yet another fair and reasonable opportunity of hearing to the assessee. While doing so, the Assessing Officer shall specifically deal with all the contentions of the assessee as the assessee may raise before him. We order so."

4.2 It is seen that the issue was restored to the file of the Assessing Officer with a direction to identify the factual aspect of the issue and determine as to whether the impugned income was taxable in India or not so as to bring the assessee within the mischief of section 40(a)(i) of the Act. The determination of this issue will essentially determine the issue whether the provisions of section 201 are attracted in this case. Accordingly, we restore all these six appeals to the file of the Assessing Officer to adjudicate the issue *de novo* after duly considering the order of the Tribunal in assessment year 2007-08 (supra) and also after providing sufficient opportunity to the assessee to present its case.

5.0 In the final result, all the six appeals stand allowed for statistical purposes.

Order pronounced in the open court on 27.12.2018

Sd/-	**Sd/-**
(G.D.AGRAWAL)	**(SUDHANSHU SRIVASTAVA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 27.12.2018
'GS'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ASSISTANT REGISTRAR

ITAT NEW DELHI