आयकर अपीलीय अधिकरण
दिल्ली पीठ "ए", दिल्ली
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्रीअमिताभशुक्ला, लेखाकार सदस्यके समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A", DELHI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER&
SHRI AMITABH SHUKLA, ACCOUNTANT MEMBER

आअसं.5692 और5693/दिल्ली /2019(नि.व. 2007-08 और2008-09)
ITA Nos.5692 & 5693/Del/2019 (A.Ys.2007-08 &2008-09)

Bharti Airtel Ltd.,
Bharti Crescent,
1 Nelson Mandela Road,
Vasant Kunj, Phase-II, New Delhi 110070
PAN No. AAACB-2894-G ..... अपीलार्थी/Appellant

बनाम Vs.

Assistant Commissioner of Income Tax,
Circle 4(2), Room No. 398-D, CR Building,
IP Estate, New Delhi 110095 .....प्रतिवादी/Respondent

आअसं.6078 और6079/दिल्ली /2019(नि.व. 2007-08और2008-09)
ITA Nos.6078 & 6079/Del/2019 (A.Ys.2007-08 & 2008-09)

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PAN No. AAACB-2894-G .....प्रतिवादी/Respondent

Assessee by : S/Shri Rohit Jain, Deepesh Jain, Advocates and
Shri Shivam Gupta, Chartered Accountant
Department by: Shri Javed Akhtar, CIT(DR)

सुनवाई की तिथि/ Date of hearing : 10/03/2025
घोषणा की तिथि/ Date of pronouncement: : /06/2025

आदेश/ORDER

PER VIKASAWASTHY, JM:

These set of two cross appeals by the assessee and Revenuefor assessment years 2007-08 and 2008-09, respectively emanate from same set of facts and identical grounds have been raised by the assessee and Revenue in their appeals for respective assessment years, therefore, these appeals are taken up together for adjudication and are decided by this common order.

ITA No. 5962/Del/2019 (AY 2007-08): Assessee Appeal
ITA No. 6078/Del/2019 (AY 2007-08): Revenue Appeal

2. These cross appeals by the assessee and Revenue are directed against the order of Commissioner of Income Tax (Appeals)-2, New Delhi (hereinafter referred to as 'the CIT(A)') dated 30/4/2019.

3. The Revenue in its appeal assailed the order of CIT(A) on following grounds:-

> *"1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is right in deleting the addition of Rs. 25,35,96,279/- on account of disallowance of interest paid to ABN AMBRO Bank, Stockholm u/s 40(a)(i) of the I.T. Act, 1961.*
>
> *2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in restricting the disallowance of roaming charges paid u/s 40(a)(ia) of the I.T. Act, 1961 upto the amount payable ignoring the fact that the expenditure is covered under chapter XVIIB of the I.T. Act, Income Tax Act,1961(hereinafter referred to as 'the Act')."*

4. This is second round of litigation before the Tribunal for AY 2007-08. In the first round, the assessee was in appeal before the Tribunal in ITA No.

5636/Del/2011. The Tribunal vide order dated 11/3/2014 substantially decided appeal of the assessee but restored the issue of disallowance of interest paid to ABN Amro Bank, Stockholm, Sweeden (in short 'ABN Amro') u/s 40(a)(i) ofthe Income Tax Act,1961 (hereinafter referred to as 'the Act') to the Assessing Officer for the limited purpose with the following directions:

> *" 26. ……The taxability of interest isto be examined in the light of factual findings to be so arrived at, and in the lightof the applicable legal position as per the relevant provisions of the tax treatiesthat India has with the jurisdictions in which original lenders are resident in.Once again, we have to acknowledge the fact that learned counsel for theassessee has filed elaborate documentation in support of their stand about taxresidency status of beneficial owners of the interest paid by the assessee andhas also addressed the arguments on merits, but, in the absence of this aspectof the matter having been examined by the authorities below, we are notinclined to deal with the matter on merits. In our considered view, the rightcourse of action is to identify the factual aspects to be looked into, set out thelegal principles, and remit the matter to the file of the Assessing Officer foradjudication de novo by way of a speaking order, in accordance with the law andafter giving yet another fair and reasonable opportunity of hearing to theassessee. While doing so, the Assessing Officer shall specifically deal with all thecontentions of the assessee as the assessee may raise before him. We order so.*
>
> *27. Learned counsel has also raised some arguments, said to besupported bysome judicial precedents, on the question whether disallowance under section40(a)(i) can be made in a situation in which even if the foreign remittance hadtax withholding obligations under section 195 but the assessee had Bonafide reasons to believe that there were no tax with withholding obligations.However, as we have remitted the matter to the file of the Assessing Officer foradjudication on the basic question as to whether there were tax withholdingobligations, this aspect of the matter is academic at this stage. However, in theevent of the Assessing Officer coming to the conclusion that there was indeedtax withholding obligation, whether in part*

or in full, in respect of interestpayments, this aspect of the matter will also have to be adjudicated upon. Theassessee is at liberty to take up this aspect of the matter also, if so advised,before the Assessing Officer."

5. Shri Rohit Jain, appearing on behalf of the assessee narrating facts of the casesubmits, that this is a second round of litigation before the Tribunal. In the first round the Tribunal had restored the issue of disallowance of interest paid to ABN Amro u/s 40(a)(i) of the Act for limited purpose to consider assessee's plea of 'Bonafide' in not deducting TDS on interest payment. The assessee was incorporated on 07.07.1995 and since then isengaged in the business of telecommunication services, providing cellular, landline and broad band services.The assessee purchased telecom equipments from Swedish supplier, Ericsson. To fund purchase of the equipments, the assessee took advance term loan from ABN Amro. The assessee entered into four Facility Agreements with original lender (ABN Amro) for availing foreign currency term loans, which were guaranteed by Swedish Export Credit Guarantee Board (in short 'EKN'). The aforesaid loan facility was utilized by the assessee for the purpose of payment to Ericsson, Sweden, the supplier of telecom equipments. ABN Amro novated a portion of Facility Agreement-I and the entire Facility Agreement nos. II, III & IV.During the period relevant to assessment year under appeal, the assessee paid interest amounting to Rs.878,392,587/-to ABN Amro comprising of the followings:

Interest payable to novated lenders:		Rs.62,47,96,308/-
Interest paid to ABN Amro	:	Rs.25,35,96,279/-
	Total	Rs.87,83,92,587/-

Since ABN Amro had furnished Tax Residency Certificate (TRC) issued by Swedish Tax Authority (at page 159-160 of the paper book), the assessee on the

strength of said TRC did not deduct withholding tax on the payment of interest to the bank. The Assessing Officer (AO) in assessment order dated 31/1/2017 passed u/s 254/143(3)/144C of the Act disallowed assessee's claim of interest expenditure paid to ABN Amro Bank i.e. Rs.25,35,96,279/- u/s. 40(a)(i) of the Act and allowed the balance amount of Rs.62,47,96,308/-. The assessee had raised a plea of *bonafide* ignorance in not deducting tax at source, in light of TRC furnished by ABN Amro. The Assessing Officer in violation of Tribunal's specific direction to consider assessee's plea of bonafide, did not give any finding on the plea of 'bonafide'.

5.1. The assessee carried the issue in appeal before the CIT(A), the CIT(A) considering entire facts of the case, and following the decision in the case of *CIT vs. Nestle India Ltd. 243 ITR 435 (Delhi)* accepted assessee's plea of bonafide and deleted the disallowance. The ld. Counsel submits that the TRC issued toresident of a Contracting State is sufficient evidence that the person is a resident of that Contracting State, thus, the assessee had no reason to doubt or dispute the same. In support of his submissions, the ld. Counsel placed reliance on CBDT Circular no. 789 dated 13.04.2000 and the decision rendered in the case of ADIT vs Universal International Music BV, 141 TTJ 364 (Mumbai). The ld. Counsel for the assessee further submitted that considering TRCs issued by Swedish Tax Authorities, the assessee was under bonafide belief that the taxability of payments made to ABN Amro was to be determined with reference to the provisions of Article 11 of the Indo-Sweden DTAA, to the extent it was more beneficial as compared to the provisions of the Act.

5.2. The ld. Counsel pointed that the assessee came to know for the first time in the year 2008 during proceedings u/s. 201 of the Act, that ABN Amro is not a tax resident of Sweden. In proceedings u/s. 201 of the Act, the Department wrote to Swedish Tax Authorities regarding genuineness of Tax Residency Certificate.In response to the query raised by the Indian Tax Authorities,it was confirmed by the Swedish Tax Agency that the certificate was authentic and was made by the Swedish Tax Agency. The ld. Counsel vehemently defended findings of the CIT(A), in deleting the disallowance and prayed for dismissing appeal of the Revenue. The ld. Counsel to buttress his argument on the plea of 'bonafide' placed reliance on the decision rendered in the case CIT vs. Kotak Securities Ltd. 340 ITR 333 (Bom.)

6. Per contra, Shri Javed Akhtar representing the department strongly supporting the assessment order prayed for reversing findings of the CIT(A) on the issue. The ld. DR submits that the TRC issued by Swedish Tax Authorities only certify that ABN Amro Bank N.V, Stockholm, SwedenBranch is tax resident of Sweden and not the Bank. The worldwide income of the Bank is taxable in Netherlands, therefore, the assessee was under obligation to deduct tax at source at the time of payment of interest expenditure to ABN Amro Bank, Stockholm Branch. Further, the taxability of interest paid to ABN Amro was to be determined in light of India-Dutch DTAA and not Indo-Sweden DTAA. The CIT(A) has deleted the addition merely following the decision rendered in the case of Nestle India Ltd (supra), without examining factual position. In any case,the decision in Nestle India Ltd. (supra) is distinguishable on facts, hence, the ratio of said case would not apply to the instant case. The ld. DR placed reliance on the decision rendered in the case of *Google India P Ltd. vs. Joint Director of Income Tax (International*

*Taxation) 93 taxmann.com 183 (Bang-Trib.)*to contend that the plea of 'bonafide' has no place in determining disallowance u/s. 40(a)(i) of the Act. He also placed reliance on the decision rendered in the case of *St. John's Medical College Hospital vs. ACIT in ITA No. 321 to 324/Bang/2008* decided on 21.08.2009.

6.1. The ld. DR further submitted that if there was any confusion to the assessee or the assessee was not sure about the taxability of interest, the assessee could have approached the AO u/s. 195(2) of the Act. The assessee failed to show its *bonafide*, now the assessee cannot plead that the assessee was unaware of the fact that TDS was to be deducted on the payment of interest to ABN Amro.

7. Rebutting the submissions made on behalf of the Department, the ld. Counsel for the assessee reiterated that in light of TRC issued by Swedish Tax Authorities, the assessee had no occasion to raise any doubt that no TDS is required to be deducted in respect of payments to ABN Amro.

8. Both sides heard. The short issue for our consideration in the second round of litigation before us is the taxability of interest in the light of factual findings on tax residency status of beneficial owner of the interest paid by the assessee and also the assessee's plea of 'bonafide' in not deducting tax at source on interest payment to ABN Amro.

9. Before proceeding further, it would be imperative to refer to the findings of the Coordinate Bench in the First round of litigation before the Tribunal. The Coordinate Bench in a succinct manner has culled out the facts of the case and the transaction of advancing loan by ABN Amro to the assessee and its taxability with reference to relevant DTAA, vis a vis residential status of the Bank. For the

sake of ready reference, the findings of the Tribunal in the First round in ITA No.5636/Del/2011 (supra) are extracted herein below:

> *"22. So far as this ground of appeal is concerned, the relevant material facts, as culled out from material before us, are as follows. During the course of assessment proceedings, the Assessing Officer noticed that the assessee has paid a sum of Rs 87,83,92,587 as interest on borrowings to ABN Amro Bank, Stockholm branch (ABN-S, in short), but has not deducted any tax at source from the same. When Assessing Officer probed the matter further, he found that the assessee had acquired certain supplies of telecommunication equipment form Ericsson, a Sweden based company. This transaction involved large financing, and, as an export promotion measure by the Government of Sweden, export of equipment was facilitated by Swedish Export Credit Guarantee Board, i.e. Exportkreditnamnden (EKN, in short). ABN Amro Bank, Stockholm branch, was willing to enter into a contract for advancing this term loan, but EKN was to guarantee this loan, and the actual financing of the loan was to be done by certain other lenders. The assessee, for the purpose of arranging the borrowings to finance the purchase of equipment, entered into a multilateral agreements. The parties to these agreements were the assessee (the borrower), ABN Amro Bank Stockholm branch (the arranger) and the financial institutions actually funding the loan (the original lenders). These agreements were guaranteed by EKN. The assessee's case was that since the assessee made the payment of interest to ABN Amro Bank NV, Stockholm branch, and since, in terms of Article 11(3) of the India Sweden Double Taxation Avoidance Agreement (229 ITR Statute 11) any interest paid, on borrowings endorsed by EKN, to a Swedish resident is not taxable in India, the assessee was not required to withhold any taxes under section 195. The assessee had also produced a certificate dated 11th September 2002 from the Swedish tax authorities to the effect that ABN Amro Bank NV Branch, Stockholm, is " a company resident in Sweden within meanings of the convention to avoid double taxation between Sweden and India" and that "the company is registered for taxes as a firm under number 516401-9761". This plea was rejected by the Assessing Officer on the ground that the ABN Amro Bank NV was in fact a Dutch resident and it had a limited tax liability in Sweden in respect of its Swedish sourced income only. Reliance was also placed on the letter*

dated 17th April 2008 received from the Swedish Tax Authority, in terms of exchange of information provisions under the Indo Swedish tax treaty, which confirmed that the Stockholm branch of ABN Amro bank is liable to income tax Sweden within the meanings of the tax treaty, i.e. Article 7, and that it not a resident of Sweden as required by Article 4 of the treaty. It appears that the demands under section 201(1) r.w.s 195 were also raised on the assessee which are right now pending in appeal before this Tribunal. It was in this backdrop of facts that the claim of deduction for interest paid to ABN Amro Bank, amounting to Rs 87,83,92,587 was disallowed under section 40(a)(i). The assessee's objection, raised before the DRP, was also rejected. Aggrieved by the disallowance so made, the assessee is in appeal before us.

23. 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 position.

24. We find that so far as assessee's dealings with ABN -S are concerned, these are to be examined in accordance with the provisions of the India NetherlandsDouble Taxation Avoidance Agreement, rather than India Sweden DoubleTaxation Avoidance Agreement, for the reason that the ABN Amro Bank is a taxresident of the Netherlands and ABN Amro Bank's Stockholm branch is an integral part of the AB Amro Bank NV. ABN-S's taxability in Sweden is confined to the taxability of its profits in Sweden, whereas under Article 4(1) of Indo Swedish tax treaty, an enterprise can be treated as resident of Sweden only when, inter alia, such a person "under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature". Clearly, the mere fact that such profits of an enterprise are taxable in Sweden cannot lead to the conclusion that the enterprise is tax resident of Sweden. Elaborating upon the scope of expression 'liable to tax by the reason of domicile, residence, place of management or any other criterion of similar nature', a coordinate bench of this Tribunal, in the case of DCIT Vs General Electric Co plc [71 TTJ 973 (2001)] and speaking through one of us (i.e. the Accountant Member), has observed as follows:

> ***16. Art. 4(1) of the Indo-Dutch DTAA clearly provides that "for the purpose of this Convention, the term 'resident o f one of the states' means any person who, under the laws of that state, is liable to taxation therein by reasons of his***

domicile, residence, place of management or any other criterion of a similar nature". The requirements for fiscal domicile cannot be satisfied by mere liability to tax in that country, but as clearly provided by art. 4(1) of the Indo-Dutch DTAA, such a liability to taxation has to be on account of domicile, residence, place of management or any other criterion of a similar nature. The question, then, is as to what are the connotations of these terms and whether source taxability of dividend income per se can generate 'treaty entitlements' of the country in which such taxes on dividends have been paid. The wordings of art. 4(1) leave no doubt about the fact that merely because a person is tax-payer in one of the countries which are party to the Indo-Dutch DTAA, i.e. in India or in Netherlands, such a person cannot be treated as 'resident of one of the states' for the purposes of the DTAA. Coming to specific tests laid down in the DTAA, as far as 'domicile test' is concerned, in common law, 'domicile' has a somewhat restricted meaning, denoting a fixed and lasting attachment to a country or state with its own separate legal system—one only in each case—which initially is acquired by birth ('domicile by origin'), and capable of being altered later by a personal decision ('domicile by choice'). In the case before us, the assessee-companies were incorporated in United Kingdom and there is nothing on record to even remotely suggest that the assessee-company was domiciled in the Netherlands. Since there can only be one country of domicile and since the assessee-companies are already domiciled in United Kingdom by the virtue of its incorporation in that country, the assessee-companies cannot be said to be domiciled in the Netherlands. Coming to the 'residence test', it is admittedly not the assessee's case that the assessee -companies are residents of Netherlands. Similarly, it is also not in dispute that 'place of effective management' is United Kingdom and the case of the assessee-companies cannot even be covered by this criterion. That leaves us only with 'any other criterion of similar nature'. It may be useful to first refer to the principle of 'ejusdem generis' in interpretation of statutes. Simply stated, the principle of ejusdem generis is that where there are general words following particular and specific words, the general words will have restricted meaning which will be confined to the things of the same kind as specified. In other words, the general expression is to be read as 'comprehending only things of the same kind as that designated by preceding particular expressions, unless there is something to show that wider sense was intended. In the case before us, the principle of ejusdem generis have been incorporated in the text of the treaty provision itself, 'any other criterion' referred to in the treaty has to be restricted to the

genus of three earlier expressions i.e. domicile, residence and place of effective management. The key question, therefore, is whether 'earning of dividends earned from the Netherlands' can be said to belong to the same genus to which 'domicile, residence and place of effective management' belong ? No. doubt, as observed by Dr. Klaus Vogel in his Commentary to the Double Taxation Conventions, the term 'other criterion of similar nature' makes clear that the enumerated criterion of domestic law which attracts tax liability are no more than examples for the rule, but Dr. Vogel has further stated that, "The term should be understood to mean any locality-related attachment that attracts residence-type taxation." An illustration given in this commentary refers to "statutory seat which, under German law, serves as an alternative point of attachment in the absence of a place of management within the domestic territory." We are in considered agreement with Dr. Vogel's observation that 'any other criterion of similar nature' should be understood to mean any locality related attachment that attracts residence type taxation. In the light of these discussions, it is clear that only 'locality related attachment' ('locality related' being the genus to which expressions 'domicile' 'residence' and 'place of effective management' belong) can be covered by the scope of expressions 'any other criterion of similar nature' in terms of art. 4(1) of the Indo - Netherlands DTAA. We are also of the considered view that cases before us clearly fail on this test.

25. In view of the above discussions and bearing in mind the fact that ABN- Sdid 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(1) 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……"

10. Thus, the Tribunal after examining the facts gave an explicit finding that ABN Amro Bank, Stockholm Branch is an integral part of ABN Amro Bank, Netherlands. ABN Amro, Stockholm Branch cannot be treated as tax resident of Sweden, in terms of Article 4 of Indo-Sweden DTAA, hence, Indo-Sweden DTAA

will not apply. The transaction of payment of interest shall have to be examined in light of the provisions of Article 11(2) of Indo-Dutch Tax Treaty. In the backdrop of aforesaiddefinite findings of the Coordinate Bench, the assessee's plea of 'bonafide'fornon deduction of tax at source on payment of interest to ABN Amro is to be tested.

11. The assessee has built its plea of 'bonafide' only on the ground that TRC issued by Swedish Tax Authority indicated ABN Amro to be Tax resident of Sweden. The TRC issued by Swedish Tax Authority dated 11.09.2002 is at page 159-160 of the paper book. Except for the said TRC there is no other document on record to show that ABN Amro at any point of time had asked the assessee not to deduct tax at source on the payment of interest or deduct tax at source at concessional rate. The Revenue has been disputing non deduction of tax at source on payment of interest to ABN Amro right through.This is evident from the order passed u/s. 201(1) and 201(1A) of the Act dated 27.06.2008 for AYs 2003-04 to 2008-09. It is elementary that global income of the corporates/banks is taxable with reference to *'Rule of Residence'*. Article 4 of DTAA defines the term 'Resident'. In case of a person other than individual or to put it in simple words, in case of the corporates, the place of residence is determined with reference to 'place of effective management'. ABN Amro Bank is headquartered in Netherlands, thus its effective place of management is Netherlands, ABN Amro, Stockholm, Sweden is only a Branch of the Bank. The Branch is a Permanent Establishment of the Bank and an integral part of ABN Amro Netherlands. Therefore, ABN Amro, Stockholm, Sweden fails the test of Resident set out in Article 4(3) of Indo-Sweden DTAA.

The Swedish Tax Authorities vide letter dated 17.04.2008 has also clarified that ABN Amro Bank N.V is a Netherlands based bank and loan to the company in Indian is given by its Stockholm Branch. The Stockholm Branch of the bank is a permanent establishment, a Branch is liable to tax of its Branch profits. The Stockholm Branch is liable to Income Tax in Sweden within the meaning of the tax treaty of Article 7. It is not a resident as required by Article 4 of the Treaty. The Swedish Tax Agency fairly admitted that the information provided in certificate is not correct although the certificate was issued by Swedish Tax Agency.

12. The assessee has placed reliance on the decision rendered in the case of Kotak Securities Ltd.(supra) to support its plea of 'bonafide'. We find that the Hon'ble High Court accepted assessee's plea of 'bonafide' in the peculiar facts of the case, as both the Revenue and the assessee were under the bonafide belief for nearly a decade that tax was not deductible at source on payment of transaction charges. The Hon'ble Court in the backdrop of above fact held that no fault can be attributed to the assessee in non deduction of tax at source as for considerable period of time the Department was also of the view that no tax at source was required to be deducted. Whereas in the instant case it is the assessee alone who has been reiterating 'bonafide belief' of non deduction of tax at source based on TRC,whereas the consistent stand of the Department is that the assessee is liable to deduct tax on the interest payment made to ABN Amro. Thus, we find no merit assessee's plea of 'bonafide'.

13. Here we would also hasten to refer to observations of Tribunal in the case of Google India P Ltd. vs. JDIT (Int. Taxation) (supra) wherein the plea of bonafide

was rejected even after considering the decision rendered in the case of Kotak Securities Ltd. (supra) for the following reason:

> *"253……..A non- obstante clause is usually used in a provision to indicate that the provision should prevail despite anything to the contrary in the mentioned in such non-obstante clause. In case there is any inconsistency or a departure between the non-obstante clause and another provision, one of the objects of such a clause is to indicate that it is the non-obstante clause which would prevail over teh other clause [see CIT v. Navabharat Enterprises [1987] 31 Taxman 173/[1988] 170 ITR 332)(AP). Therefore, the plea of bona fide belief has no place in the non-obstante provisions of the Act."*
>
> For the aforesaid reason as well, the assessee's plea of bonafide is rejected.

14. In light of our above findings, the Revenue succeeds on ground no. 1 of appeal.

15. The ground no.2 of Revenue's appeal is with regard to restricting disallowance of roaming charges paid u/s. 40(a)(ia) of the Act. The assessee in its appeal, has also assailed the findings of CIT(A) on this issue, therefore, ground no. 2 of Revenue's appeal is decided alongwith the appeal of assessee.

16. The assessee in appeal has assailed the order of CIT(A), in confirming the disallowance u/s. 40(a)(ia) of the Act on roaming charges of Rs.247,31,57,620/- paid to other telecom operators.

17. The ld. Counsel for the assessee submits that the short issue in assessee's appeal is against confirming disallowance of roaming charges paid by the assessee to other telecom operators u/s. 40(a)(ia) of the Act. The ld. Counsel for the assessee submits that the issue has now been laid to rest by Hon'ble Jurisdictional

High Court in the case of *CIT vs. Tata Teleservices Ltd. in ITA No. 1417/2018 decided on 23.05.2022* and by Hon'ble Karnataka High Court in the case of C*IT vs. Vodafone South Ltd. 72 taxmann.com 347*. The Hon'ble High Courts have held that payment made by mobile service provider company to another mobile service provider company for utilization of roaming, mobile data and connectivity could not be termed as technical services, therefore, no TDS is deductable on such roaming charges. The Hon'ble Delhi Court in assessee's own case *CIT vs. Bharti Cellular, 319 ITR 139* has held that payment for use of services of other telecom operators via interconnect/port access would not fall within the preview of payments as provided u/s. 194J of the Act, therefore, not liable for deduction of tax at source. To further buttress his arguments, the ld. Counsel for the assessee placed reliance on the decision of Coordinate Bench of the Tribunal in assessee's own case *Bharti Airtel vs. ITO, 67 taxmann.com 223 (Delhi-Trib.).*

18. Per contra, the ld. DR vehemently defended the findings of AO and the order of CIT(A) to the extent disallowance made by the AO u/s 40(a)(ia) of the Act was confirmed. The ld. DR placed reliance on the decision of Madras High Court rendered in the case of *CIT vs. Dishnet Wireless Ltd. 165 taxmann.com 416* to contend that roaming charges paid by telecom company to other telecom operators constitutes fee for technical services u/s. 194J of the Act, hence, TDS is liable to be deducted on such payments. The ld. DR prayed for upholding the findings of the AO on this issue.

19. Both sides heard. The solitary issue raised by the assessee in appeal is with respect to assessee's obligation to deduct tax at source on the payments made for roaming charges to other telecom operators. During the period relevant to

assessment year under appeal, the assessee made payment of Rs.247,31,57,620/- on account of roaming charges to various operators. The AO held that the payments were made for technical services; hence, the assessee was liable to deduct TDS on such payments u/s. 194J of the Act. Since, no TDS was deducted by the assessee on the said payments the AO disallowed the payments invoking the provisions of section 40(a)(ia) of the Act. The assessee carried the issue in appeal before the CIT(A). The First Appellate Authority referred to the decision rendered in the case of Victor Shipping Services P Ltd. in ITA No. 122/2013(All. High Court) and held that the disallowance u/s. 40(a)(ia) of the Act can be made in respect of amount payable and not the amount paid and thus, restricted the disallowance to 30% of the amount payable. The Revenue in its appeal has assailed the findings of the CIT(A) to the extent relief granted on such payments, whereas, the assessee in its appeal has assailed the order of CIT(A) to the extent of disallowance confirmed.

20. The issue raised in assessee's appeal and ground no. 2 of appeal by the Department has been considered by Hon'ble High Courts and the Coordinate Benches of the Tribunal in assessee's own case as well as in the case of various other telecom operators in India. The substantial questions of law for consideration before the Hon'ble Delhi High Court in assessee's own case were:-

> *"(a) Whether the payments made by the assessee to the MTN/other companies for the services provided through interconnect/port/access/toll were liable for tax deduction at source in view of the provisions of section 194J of the Act.*
>
> *(b) Whether the Id. ITAT erred in holding that the payment for use of services for MTN/other companies via the interconnect/port/access/toll by the assessee*

would not fall within the purview of payments as provided for under section 194) of the Act, so as to be eligible for tax deduction at source."

The Hon'ble High Court after examining the technicalities and the expression,'fee for technical services' as appearing in section 194J of the Act concluded that the interconnect charges/port access charges cannot be regarded as fee for technical services, hence, no TDS was required to be deducted under section 194J of the Act. Thus, both the above questions were answered against the Revenue and in favour of the assessee.

21. The Hon'ble Karnataka High Court had occasion to consider similar issue in the case of CIT vs. Vodafone South Ltd. (supra). The substantial question of law for consideration before the Hon'ble High Court were:

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the assessee could not have been deemed as one in default for non-deduction of tax at source on roaming charges paid by it to other service providers when the Assessing Authority has rightly held as assessee in default due to no deduction of TDS as required under Section 194H and 194J of the Income Tax Act, 1961 (for short, 'the Act')?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the data link charges does not require any human intervention and that the charges received or paid on account of this is not technical fees and does not fall under purview of Section 194J of the Act even when the Assessing Authority rightly treated the payment made by Vodafone South Limited to various operators as 'technical services falling within the ambit of the provisions of Section 194J of the Act?"

The Hon'ble High Court after considering the decision rendered in the case of CIT vs. Bharti Cellular Ltd. (supra) held as under:-

"11. In our view, the contention is not only misconceived, but is on non existent premise, because the subject matter of the present appeals is not roaming

services provided by mobile service provider to its subscriber or customer, but the subject matter is utilization of the roaming facility by payment of roaming charges by one mobile service provider Company to another mobile service provider Company. Hence, we do not find that the observations made are of any help to the Revenue.

12. As such, even if we consider the observations made by the Apex Court in the case of Bharti Cellular Ltd.supra, ***whether use of roaming service by one mobile service provider Company from another mobile service provider Company, can be termed as "technical services" or not, is essentially a question of fact.*** *The Tribunal, after considering all the material produced before it, has found that roaming process between participating entities is fully automatic and does not require any human intervention. Coupled with the aspect that the Tribunal has relied upon the decision of the Delhi High Court for taking support of its view.*

13. In our view, ***the Tribunal is ultimately fact finding authority and has held that the roaming process between participating company cannot be termed as technical services and, therefore, no TDS was deductible. We do not find that any error has been committed by the Tribunal in reaching to the aforesaid conclusion.*** *Apart from the above, the questions are already-covered by the above referred decision of the Delhi High Court, which has been considered by the Tribunal in the impugned decision.*

14. In view of the above, we do not find that any substantial question of law would arise for consideration."

[Emphasized by us]

22. The Hon'ble Delhi High Court in the case of CIT vs. Tata Teleservices Ltd.(supra) again had an occasion to deal with a similar issue.In the said appeal by the Department, the substantial question of law for consideration before the Hon'ble High Courtwas:-

"Whether the ITAT was correct in holding that no TDS under Section 194J of the Income Tax Act was required to be deducted by the assessee on payment of interconnect user charges as it could not be categorized as fee for technical services?"

The Hon'ble High Court following the decision rendered in the case of CIT vs. Vodafone South Ltd. (supra) held that once the judgment rendered by Hon'ble Karnataka High Court in the case of Vodafone South Ltd. has been accepted by the Revenue and was not subject matter of appeal before the Hon'ble Apex Court, it is not open to the Revenue to challenge the correctness of the findings rendered in the said decision in the case of other assessee's without just cause. The Hon'ble High Courts, thus dismissed substantial question of law in appeal by the Revenue.

23. Thus, in light offacts of the present case and the decisions discussed above we have no hesitation in holding that disallowance u/s. 40(a)(ia) of the Act on account of non deduction of TDS in payment of interconnect/roaming charges to other telecom operators by the assessee is unjustified. Once the Department has accepted the position in the case of Vodafone South Ltd. (supra) it does not lie in the mouth of Department to challenge the accepted position now.

24. In the result, the findings of CIT(A) on this issue are reversed, ground no. 2 raised in the Department's appeal is dismissed and appeal of the assessee is allowed.

25. To sum up, the appeal of Revenue is partly allowed and appeal of the assessee is allowed.

ITA No. 5963/Del/2019 (AY 2008-09): Assessee Appeal
ITA No. 6079/Del/2019 (AY 2008-09): Revenue Appeal

26. The Revenue in appeal has assailed the order of CIT(A) on following grounds:-

> *"1. Whether on the facts and in the circumstances of the case and in law the Ld. CIT(A) is right in deleting the addition of Rs. 20,27,38,979/- on account of disallowance of interest paid to ABN AMBRO Bank, Stockholm u/s 40(a)(i) of the I.T. Act, 1961.*
>
> *2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in restricting the disallowance of roaming charges paid u/s 40(a)(ia) of the I.T. Act, 1961 upto the amount payable ignoring the fact that the expenditure is covered under chapter XVIIB of the I.T. Act, Income Tax Act,1961(hereinafter referred to as 'the Act')."*

27. The assessee in appeal for AY 2008-09 has assailed the finding of the CIT(A) in holding that the roaming charges paid by the assessee were on account of technical services provided by other telecom operators on which tax was required to be deducted at source u/s. 194J of the Act.

28. Both the sides unanimously accepted that the issue(s) raised in the respective appeals by the Revenue and the assessee in AY 2008-09 are identical to the one raised in appeals for AY 2007-08. Thus, the submissions made for AY 2007-08 would equally apply to the instant cross appeals.

29. Since, the grounds raised by the Revenue and the assessee in their cross appeals for AY 2008-09 are identical to the one raised in AY 2007-08 and such grounds emanates from identical set of facts, the findings given by us while adjudicating cross appeals for AY 2007-08 would *mutatis mutandis* apply to the

cross appeals for AY 2008-09. For parity of reasons, the appeal of the Revenue is partly allowed and appeal of the assessee is allowed.

Order pronounced in the open court on Monday the 09th day of June, 2025.

Sd/-	Sd/-
(AMITABH SHUKLA)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

दिल्ली/Delhi, दिनांक/Dated 09/06/2025

NV/-

<u>प्रतिलिपि अग्रेषितCopy of the Order forwarded to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT/CIT(A)
4. विभागीय प्रतिनिधि, आय.अपी.अधि., दिल्ली/DR, ITAT, दिल्ली
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar)ITAT, DELHI