

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI
BEFORE SHRI MAHAVIR SINGH, JM AND SHRI G. MANJUNATHA, AM

आयकर अपील सं./I.T.A. Nos. 4609, 4610 & 4611/Mum/2016
(निर्धारण वर्ष / Assessment Years: 2009-10, 2011-12 & 2010-11)

Bajaj Eco Tec Products Limited (Now merged with Bajaj Hindustan Sugar Limited) 2 nd Floor, Bajaj Bhavan, 226, Nariman Point, Mumbai-400 021	बनाम/ Vs.	The Income-tax Officer (TDS)-3, (International Taxation), Scindia House, Ballard Pier, Mumbai-400 038
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACCB 8572 B		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Kirit Kamdar/ Shri Parth Achwal
प्रत्यर्थी की ओर से/Respondent by	:	Shri Rajat Mittal

सुनवाई की तारीख / Date of Hearing	:	22.05.2018
घोषणा की तारीख / Date of Pronouncement	:	08.06.2018

आदेश / ORDER

Per G. Manjunatha, A. M.:

These three appeals filed by the assessee are directed against separate, but identical orders of the Id. Commissioner of Income Tax (Appeals)-55, Mumbai dated 29.03.2016 for the assessment years 2009-10, 2010-11 and 2011-12. Since the facts are identical and issues are common, for the sake of convenience these appeals were heard and disposed of by this common order.

2. The assessee has raised common grounds of appeal for all the three assessment years. For the sake of brevity, the grounds of appeal raised in assessment year 2009-10 are extracted below:

Order under section 201(1)/ 201(1 A) passed by the Income-tax Officer (TDS) (International Taxation). Noida ('ITO Noida') without any jurisdiction:

1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) [the CIT(A)¹] erred in not accepting the contention of the appellant that the order under section 201 (1)/201(1 A) of the Act has been passed without jurisdiction and hence is bad in law.

2. On the facts and in the circumstances of the case and in law, the CIT(A) erred in not appreciating the fact that the ITO Noida had, vide letter dated 27 November 2012, itself transferred the records pertaining to the impugned proceedings to the Income-tax Officer in Mumbai ('ITO Mumbai').

3. On the facts and in the circumstances of the case and in law, the CIT(A) erred in not appreciating the fact that the records were transferred to ITO Mumbai since the foreign remittance related to the impugned transaction pertained to the Mumbai office of the appellant.

Deductibility of tax at source under section 195 in respect of payments made to the Singapore branch of ICICI Bank Limited, which is a tax resident of India:

4. On the facts and in the circumstances of the case and in law, the CIT(A) erred in not appreciating that there is no failure on part of the appellant to deduct tax at source in respect of payment made to ICICI Bank Limited, and accordingly the appellant is not an assessee in default.

6. On the facts and in the circumstances of the case and in law, the CIT(A) erred in not appreciating that the provisions of section 195 of the Act do not apply to the payments made to a person who is resident in India.

7. On the facts and in the circumstances of the case and in law, the CIT(A) erred in not appreciating that the payment of interest was made to the foreign branch of the ICICI Bank Limited, which is a resident of India as per the provisions of section 6(3) of the Act, and hence the provisions of section 195 are not applicable.

8. On the facts and in the circumstances of the case and in law, the CIT(A) erred in ignoring the certificate dated 27 April 2011 issued by the Joint Commissioner of Income-tax (OSD) -3(1), Mumbai stating that global income of the ICICI Bank Limited including that of its offshore branch in Singapore is chargeable to tax under the PAN AAACI1195H in Mumbai, India.

9. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) erred in ignoring the contention of the appellant that, as per the provisions of section 194A(3)(iii) of the Act, there is no requirement to deduct taxes at source on the payment of interest made to ICICI Bank Limited, being a banking company under the Banking Regulation Act, 1949.

3. The brief facts of the case are that, it appears from the record that the assessee company had paid interest totaling to Rs.11,69,45,505/- for the assessment years 2009-10 to 2011-12 on foreign currency loan called External Commercial Borrowings lent by a group of financial institutions arranged by the arranger, i.e., ICICI Bank Ltd., offshore branch, Singapore aggregating, US Dollars 20 million. The Assessing Officer has taken up proceedings u/s. 201(1)/201(1A) of the Income Tax Act, 1961 on the basis of Form 15CA and 15CB filed by the assessee to furnish the payments made to a non resident to ascertain the applicability of provisions of section 195 of the Income Tax Act, 1961. Accordingly, a show cause notice dated 12.12.2011 was issued and asked as to why the provision of section 195 shall not be applied for interest payments made to ICICI Bank Ltd., offshore branch, Singapore. In response to the show cause notice, the assessee submitted that it has borrowed external commercial borrowings from ICICI Bank Ltd. which has a branch in Singapore. Therefore, any interest payment made to ICICI Bank Ltd., Singapore branch is payment made to a resident, which is covered u/s. 194A(3)(iii) of the Income Tax Act, 1961 and, hence, the question of deduction of tax at source does not arise. The assessee further submitted that the ICICI Bank Ltd is a banking company to which Banking Regulation Act, 1949 applies and since the provisions of section 194A(3)(iii) of the Income Tax Act, 1961 exempts such entities from deduction of tax at source, there was no default on the part of the assessee in deduction of tax on interest payment to ICICI Bank Ltd., Singapore branch.

4. The Assessing Officer after considering the submissions of the assessee held that the assessee has failed to deduct tax at source as per section 195(1) on interest payment made to ICICI Bank Ltd., Singapore branch for the assessment years 2009-10 to 2011-12, aggregating to Rs.11,69,45,505/- and, hence, held the assessee deemed to be in default u/s. 201(1) and 201(1A) and computed short deduction of tax u/s. 201(1) for Rs.11,69,45,505/- and interest u/s. 201(1A) for Rs.40,14,192/- aggregating to Rs.1,57,08,743/-. The relevant portion of the order of the Assessing Officer is extracted below:

"The assessee's logic is that ICICI Singapore branch is governed under the Banking Regulation Act, 1949 and in this way it is a resident person. This is not correct from any angle as the payments have been made to ICICI Singapore who is non-resident and every procedure adopted as laid down in Rule 37BB. Surprisingly, in the details, the assessee had shown as paid to ICICI Mumbai. As per section 9(1)(v) of the Act, this income accrues and arises in India and paid to the non-resident bank through the procedure laid down for foreign remittance, hence undoubtedly it was a foreign remittance.

The execution of agreement by the assessee with ICICI Bank Ltd. Singapore states that in case of mandatory withholding, the borrower will be obliged to gross up such payments such that the recipient would receive the same amount as if no such deduction had been applied. The documentation charges and payment would be in US dollars. The assessee has uploaded 15CA and 15CB to the bank, therefore, these payments are evidently foreign payments and provisions of section 195(1) are applicable as it is an income deemed to accrue or arise in India as per Section 9(1)(v) of the IT Act. Recent insertion of Explanation to section 9(1) from 1.4.2010 further confirms the income of non resident will be deemed to accrue or arise in India whether or not the recipient has any establishment in India or rendered services in India.

On going through the explanation and reply of the assessee it is perceived that the assessee's ground for non-deduction of TDS is entirely based upon section 194A(3)(iii) which is not applicable in the present case and cannot be accepted as the provisions of section 194A are exclusively meant for payment to a resident while the interest has been paid to the non-resident entity. Hence, quoting of section 194A(3)(iii) does not help the assessee.

It is seen that loan was sanctioned and disbursed by the ICICI Singapore branch in US dollars to whom it is paying regular interest through foreign mode. More so,

the agreement is executed between the assessee and ICICI Bank, Singapore branch. However, to make it crystal clear, that these interest payments are liable for TDS, the provisions of section 195(1) are reproduced as under-

Section 195(1):-

"Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act, (not being income chargeable under the head 'Salaries' shall at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force."

Section 195(2):-

"Where the person responsible for paying any such sum chargeable under this Act (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine (by general or special order) the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable."

First of all, the assessee has failed to deduct TDS which it was obliged to do so as per section 195(1), secondly while taking the decision of not deducting TDS, it has not applied and taken order u/s 195(2). Even, no lower/ no deduction certificate u/s 197 has been produced.

Thus, if there was any confusion about the applicability or non-applicability of TDS, the assessee had to approach the Assessing Officer to make the things clear. From the facts and circumstances of the case, it is observed that the assessee has already decided and presumed that no TDS is applicable on these interest payments.

The issue of establishment and rendering of service too stand decided in the Act through the Explanation as given in above para.

From the above facts, it is ample clear that interest payment to the non-resident bank was chargeable to tax in India. The objection of section 195 is justifiable as it seeks to avoid a revenue loss as a result of tax liability in the hands of a foreign resident by deducting the same from payment made to them at source. This fact further confirms that before making payments, the assessee has adopted every procedure of foreign remittance like uploading Form No.15CA/15CB as required u/s 195(6) of the Act r.w.r, 37BB of the IT Rules for the purpose, therefore it is established that the status of ICICI Singapore is non-resident and resident person. Furthermore, the assessee too failed to apply as required u/s 195(2). The rationale behind this is that the person responsible for making the payment cannot determine the income chargeable to tax India. The payer cannot act as an Assessing Officer when the sum paid to the non-resident is chargeable to tax in

India. This view has been upheld by the Hon'ble Supreme Court in the case of GE India Technology Pvt. Ltd. 327 ITR 456.

As in this case, the orders are being passed for FY 2008-09 to 2010-11 it is pertinent to make it clear that the proceedings are not time barred in view of provisions of section 201(3) of the IT Act which is applicable for payment to resident only. The matter in question relates to the non-resident However, the provisions of section 201(3) are reproduced as under;

(3) No order shall be made under sub-section (1), deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of-

(i) two years from the end of the financial year in which the statement is filed in a case where the statement referred to in section 200 has been filed;

(ii) four years from the end of the financial year in which payment is made or credit is given, in A Y other case:

Provided that such order for a financial year commencing on or before the 1st day of April, 2007 may be passed at any time on or before 31st day of March, 2011.

8. A plain reading of the above provision clarifies that the limitation is imposed only for payments made to residents and there is absolutely no limitation for payments made to non-residents. The Hon'ble Finance Minister while explaining the intent has clarified as under:-

"f. Providing time limits for passing of order u/s 201(1) holding a person to be an assessee in default-

Currently, the Income Tax Act does not provide for any limitation of time for passing an order u/s 201(1) holding a person to be an assessee in default. In the absence of such a limit, dispute arises where these proceedings are taken up or completed after substantial time as elapsed. .

In order to bring certainty on this issue, it is proposed to provide for express time limits in this Act within which specified order u/s 201(1) will be passed.

It is proposed that an order u/s 201(1) for failure to deduct the whole or any part of the tax as required under this Act, if the deductee is a resident tax payer shall be passed within two years from the end of the financial year in which the statement of tax deduction is filed by the deductor. Where no such statement is filed, such order can be passed up till four years from the end of the financial year in which the payment is made or credit is given. To provide sufficient time for pending cases, it is proposed to provide that such proceedings for a financial year beginning from 1st April 2007 and earlier years can be completed by the 31st March, 2011.

However, no time limits have been prescribed for order under sub-section (1) of section 201 where -

- The deductor has deducted but not deposited the tax deducted at sources, as this would be a case of defalcation of government dues.
- The employer has failed to pay the tax wholly or partly under sub-section (1A) of section 192, as the employee would not have paid tax on such perquisites.
- The deductee is a non-resident as it may not be administratively possible to recover the tax from the nonresident

It is proposed to make these amendments effect from 1st April, 2010. Accordingly, it will apply to such orders passed on or after the 1st April, 2010."

Considering the facts and circumstances of the case, it is held that the assessee has failed to deduct withholding tax as per section 195(1) on the interest payments made to non-resident person viz. ICICI Singapore during FYs 2006-07 to 2010-11 as mentioned below and therefore, treated an assessee deemed to be in default u/s 201 (I)/ 201(1A) of the IT Act. As the assessee has furnished of PAN of ICICI Singapore, the TDS rates @ 10% will have to be applied. As the issue involved is common in each year, a combined order is being passed for the sake of brevity. The short deduction u/s 201[1) and interest u/s 201(1A) are worked out as under:-

Sr. No.	FY	Interest (amount in Rs.)	Short deduction u/s 201(1)	Interest 201(1A)	Total
1	2008-09	64007496J	6400750J	2688315	9089065
2	2009-10	31082778	3108278	932483	4040761
3	2010-11	21855231	2185523	393394	2578917
Total		11,69,45,505	1,16,94,551	40,14,1921	1,57,08,743

5. Aggrieved by the assessment order, the assessee preferred an appeal before the Id. Commissioner of Income Tax (Appeals). Before the Id. Commissioner of Income Tax (Appeals), the assessee has taken a legal plea challenging the jurisdiction of Assessing Officer in passing the order u/s. 201(1)/201(1A) of the Income Tax Act, 1961. The assessee also filed elaborate written submissions on the issue of applicability of provisions of section 195 of the Act, towards interest payment to ICICI Bank Ltd., Singapore branch and reiterated its submissions made before the Assessing Officer. The assessee further submitted that the Assessing Officer was incorrect in applying the

provision of section 195 of the Act, without appreciating the fact that the interest paid to ICICI Bank Ltd., Singapore branch is payment made to a resident which is very clear from the fact that the office of Jt. CIT (OSD)-3(1), Mumbai has issued a letter dated 27.04.2011 clarifying the status of ICICI Bank Ltd., Singapore branch, as per which the ICICI Bank Ltd. branch is an Indian resident company in terms of section 6(3) of the Act, and the global income of the ICICI Bank Ltd., including the offshore branches is chargeable to tax in India. The assessee further submitted that since it has made payment to a resident assessee, in terms of the provision of section 194A(3)(iii) any interest paid to a banking company does not come within the purview of section 195 and, hence, there is no default in deducting the TDS on interest payments.

6. The Id. Commissioner of Income Tax (Appeals) after considering the relevant submissions of the assessee rejected the legal plea taken by the assessee, challenging the jurisdiction of the Assessing Officer to pass the order u/s. 201(1)/201(1A) of the Act, by holding that irrespective of the place from where remittances were made, the jurisdiction starts from the place where the statutory forms were uploaded and if the assessee made a mistake while uploading the statutory forms, thus giving jurisdiction to the ITO(TDS), Noida, it is assessee's mistake when the Assessing Officer assumed jurisdiction because the forms were uploaded on a valid TAN registered with the Noida TDS office over which the ITO(TDS) had jurisdiction. Insofar as the applicability of provision of section 195 of the Income Tax Act, 1961 is concerned, the Assessing Officer referred to the submissions of the assessee and also letter dated 31.01.2007 issued by the ICICI Bank

Ltd., Singapore branch to the assessee and its annexure observed that it is very crystal clear that the ICICI Bank Ltd. acted as an arranger cum facility agent cum conduit for lending of funds by various lenders either located in Singapore and/or in United Kingdom and was definitely not a lender from whom the assessee borrowed funds and the actual lenders were various parties located in Singapore and/or UK to whom interest was paid by the assessee through the medium of ICICI Bank Ltd. in India and Singapore. The Id. Commissioner of Income Tax (Appeals) further observed that, thus it is clear that interest payment totaling to Rs.11,69,45,505/- was made to various lenders in Singapore and/or UK and/or anywhere in the world in respect to funds lent in India through the medium of ICICI Bank Singapore. Therefore, the provision of section 195 of the Act is clearly applicable and the assessee failed to deduct the applicable TDS and hence, the Assessing Officer was right in holding the assessee as an assessee in default u/s. 201(1)/201(1A) of the Act. The relevant portion to the order of the Id. Commissioner of Income Tax (Appeals) is extracted below:

7.3 Facts of the case emerging from the order dated 30/3/2012 and assessee's submissions are as follows:-

7.4 Terms & Conditions governing the borrowing of ECB funds by the assessee and the letter dated 31/1/2007 of ICICI Bank Limited Singapore branch regarding the Syndicated Term Loan of US \$ 20 million are very relevant and throw light on the exact relationship between the assessee, ICICI BANK Ltd. and the lenders and the nature of transactions and are as follows:

Letter dated 31/1/2007 of ICICI Bank Limited Singapore branch:-

*"January 31, 2007 CAL-IBG-SGP-QUI
Bajaj Eco-Tec Products Ltd.
Bajaj Bhawan,*

2nd Floor, Jamnalal Bajaj Marg,
226, Nariman Point,
Mumbai-400021

Kind Attn : Mr. Himanshu Shah

Dear Sir,

Subject: Syndicated term loan of USD 20.0 million

We refer to our discussions on the proposed syndicated term loan of USD 20.0 million to Bajaj Eco Tec Products Ltd. (the 'company') in relation to capital expenditure for setting up plants for manufacturing of Medium Density Fibreboard (MDF) and Particleboard (PB).

ICCI Bank Ltd, Singapore Branch (the 'Arranger') is pleased provide you herewith the proposal for a USD 20.00 million syndicated term loan/facility ('the facility') for your consideration as more particularly outlined in the summary of terms and conditions ('summary') as attached with this letter.

Please note that the proposal for the Facility is subject to the provisions and terms outlined in the summary. This letter and the summary are strictly confidential and may not be shown or divulged to or used as a base for any discussions or arrangement with any third party except with the prior written consent of the Arranger.

Please note that this communication should not be construed as giving rise to any binding obligation on the part of the Arranger unless the company communicates to the Arranger within 30 days of the date of this letter that the terms and conditions set out herein are acceptable to it.

Yours faithfully

(sd)

BK Iyer
Head-Corporate and Institutional
Banking, Singapore Branch

(sd)

Accepted as per letter dtd.6.2.2007
For Bajaj Eco-Tec Products
Ltd. Director

Further, Page No.1 of Annexure-I to the above letter dated 31.1.2007, which is relevant is reproduced below:-

*"Annexure-I
Bajaj-Eco Tec Products Ltd.
Terms & Conditions*

FACILITY:	External Commercial Borrowing
BORROWER:	Bajaj Eco-Tec Products Limited ('the Company')
PARENT:	Bajaj Hindustan Limited ('BHL')
ARRANGER-	ICICI Bank Ltd. (Offshore Branch)
FACILITY AGENT:	ICICI Bank Ltd. (Offshore Branch)
LENDER(S):	A group of financial institutions to be assembled by the Arranger
FACILITY	Not exceeding US 20.0 million and/or JPY equivalent of

AMOUNT:	USD 20.0 million
FACILITY TYPE:	Syndicated foreign currency term loan (the 'facility')
AGREEMENT DATE:	Date of signing of the Facility Agreement
PURPOSE:	Capital expenditure for set up of manufacturing facility for Medium Density Fibre and Panicle Board [the 'Project) at a cost of Rs.2,500 million with the following capital structure Equity: Rs.1,000.0 million Debt : Rs.1,500.0 million
INTEREST RATE:	The aggregate of: 1. The applicable margin; and 2. 6 month Libor Interest will be calculated on the total amount outstanding and will be payable at the end of each interest period."

The facts emerging from perusal of these documents are as follows;

7.5 The assessee wanted to expand its manufacturing activity at Noida, U.P. factory and therefore approached the ICICI Bank Limited in India for borrowing funds under the External Commercial Borrowing facility of the ICICI Bank Singapore Branch through its bankers which acted merely as an arranger and facility agent for the loans from various lenders located in Singapore for syndicated loan of US Dollars 20 Millions for which it received arranger fees of 1.40% upfront and facility agent fees of US Dollars 10,000 per annum whereas the interest payments were made to veracious lenders located in Singapore through ICICI Bank in India and Singapore branch from time to time. Moreover, various clauses of the terms and conditions clearly stipulate and indicate that a distinction has been drawn between ICICI Bank Ltd acting as arranger/ Facility agent and the lenders who were not identified in the terms and conditions. Moreover, it has been called a Facility Arrangement between assessee and ICICI Bank Ltd Singapore branch and it has been stipulated that these loans were subject to the jurisdiction of Courts of England. It also becomes very clear from the perusal of these terms and conditions and the letter dated 31/1/2007 of ICICI Bank Ltd, Singapore branch that ICICI Bank Ltd Singapore Branch acted merely as arranger and it was not the lender on funds but merely an arranger, facilitator and conduit through which the funds passed through ultimately to the assessee in Mumbai and Noida.

7.6 Therefore, what becomes crystal clear is that ICICI Bank Ltd acted as an arranger cum Facility agent cum conduit for the raising of funds by various lenders either located in Singapore and/or in United Kingdom and was definitely not a lender from whom the assessee borrowed funds and the actual lenders were various parties located in Singapore and/or U.K. to whom interest was paid by the

assessee through the medium of ICICI Bank Ltd in India and Singapore. ICICI Bank Ltd Singapore Branch was and facility fees. Thus, assessee paid interest to various lenders located either in Singapore and/or UK or somewhere else in the world through the medium of ICICI Bank Ltd in India and Singapore branch and this interest was routed through the medium of ICICI Bank Ltd and but was definitely paid to the ICICI Bank Ltd. since ICICI Bank Ltd never lent any money in Dollars to the assessee, but merely arranged for the funds from and through its Singapore branch through either itself or any other banker in India and assessee received the funds. Thus it is crystal clear that the interest payments totaling Rs.11,69,45,505/- was made to various lenders in Singapore and/or UK and/or anywhere in the world in respect of funds lent in India through the medium of ICICI Bank Singapore, may be another branch of ICICI Bank in India and/or any other bank in India through which funds were received by the assessee in India. Prima facie these funds have been lent in India through the ICICI Bank Limited Singapore and its affiliates in India which has/ have acted as agent for various lenders in India. In view of the provisions of section 9(1)(vi) and (vii) of IT Act 1961, interest paid on funds lent in India by foreign non-resident parties are deemed to accrue and arise in India and hence tax at source is deductible in India because the payments in this case are made in India through the medium of a Bank located in India and ICICI Bank Ltd Singapore because the interest paid to a non resident in respect of funds lent in India are deemed to accrue and arise in India and hence provisions of section 195 of IT Act 1961 are squarely applicable in this case because the payment of interest is made to a non-resident and ICICI Bank Ltd which has merely acted as arranger, facilitator and conduit for remittance of funds and nothing else. Thus payment of interest was not made to ICICI Bank Ltd. either in India and/or Singapore but the payment of interest was made to various lenders located in Singapore and/or UK and/or anywhere else in the world through the medium and conduit of ICICI Bank Ltd. India and Singapore, that is all. This is the essential difference between payments made to XYZ and payments made through XYZ and if this submission is put forward by the assessee were applied in respect of all the payments made through banking channels in India, whether payments are made to residents and/or non-residents, all banks will become liable for the defaults committed by various assessees all over India and the entire burden of deducting tax at source will fall on the banks only because the payments are made through banks and to the banks because banks in India will be acting as agents of the assessees who will make payments through banking channels. But that is not the case, banks act *only* as agents for making payments through which payments of various types can be made and it is the assessee having the bank account which makes payments to various parties liable for deducting tax at source and not the banks/And if the argument of section 194A(3) being applicable were invoked every time a payment of interest to a third party resident is made through cheque, the banks will not be able to function. Moreover, in the instant case, payment of interest is made to a non-resident as shown earlier and hence provision

of section 195 of IT Act 1961 apply and not the provisions of section 194A of IT Act 1961, and hence it is held that interest payments made to the non- resident lender/s accrued and arose in India and since interest payments were made to non-residents, provisions of section 195 of IT Act 1961 were applicable and since the assessee did not deduct tax at source under section 195 of IT Act 1961, provisions of section 201(1)/201(1A) of IT Act 1961 were correctly applied and were valid and order dated 30/3/2012 passed by the ITO(TDS) International Taxation, Noida was a legally valid, correctly applicable order passed with proper jurisdiction over the case. Ground numbers 3, 4 and 5 made by the assessee are rejected in facts of the case and in law.

7. Aggrieved by the Id. Commissioner of Income Tax (Appeals)'s order, the assessee is in appeal before us.

8. The Id. Counsel of the assessee at the time of hearing submitted that he did not want to press ground nos. 1, 2 and 3 challenging the jurisdiction u/s. 201(1)/201(1A) of the Income Tax Act, 1961. Hence, ground nos. 1, 2 & 3 raised by the assessee challenging the jurisdiction of Assessing Officer has been dismissed as not pressed for all the assessment years.

9. The next issue that came up for our consideration from ground nos. 4 to 9 is the applicability of provision of section 195 in respect of payments made to Singapore Branch of ICICI Bank Ltd. The Id. Authorized Representative for the assessee submitted that the Id. Commissioner of Income Tax (Appeals) was erred in not appreciating that there is no failure on the part of the assessee to deduct tax in respect of payment made to ICICI Bank Ltd. and accordingly the assessee is not the assessee in default u/s. 201(1)/201(1A) of the Act. The Id. Authorized Representative further submitted that the assessee has borrowed external commercial borrowings from ICICI Bank Ltd., Singapore branch which is evident from the loan agreement entered between the assessee and the

bank, as per which it clearly states that the ICICI Bank Ltd. is the main lender of the loan. The Assessing Officer merely on the basis of certain clauses in agreement came to a wrong conclusion that the ICICI Bank Ltd. is acting as an arranger cum agent to facilitate external commercial borrowing to the assessee. The Id. Authorized Representative further submitted that the assessee has filed necessary evidence including certificate from Jt. CIT(OSD), Central Circle-31, Mumbai to the fact that the global income of the ICICI Bank Ltd., including offshore branches is taxable in India in terms of section 6(3) of the act and, hence, any payment made to Singapore branch of ICICI Bank Ltd. does not come within the provision of section 195 and the assessee does not require to deduct tax at source. The Id. Authorized Representative further submitted that as per the provision of section 194A(3)(iii) of the Act, there is no requirement to deduct tax at source on interest payment made to ICICI Bank Ltd., being a banking company under the Banking Regulation Act, 1949. The Id. Commissioner of Income Tax (Appeals) grossly erred in not appreciating the fact in right prospective. Therefore, requested to delete the addition made by the Assessing Officer towards short deduction of tax and interest u/s. 201(1)/201(1A) of the Act.

10. The Id. Departmental Representative, on the other hand, strongly supported the order of the Id. Commissioner of Income Tax (Appeals) and submitted that the lower authorities have brought out clear facts to the effect that the assessee has borrowed external commercial borrowings from ICICI Bank Ltd., Singapore branch, which in turn arranged loan from known lenders which is evident from the loan agreement between the

assessee and the ICICI Bank Ltd., as per which the ICICI Bank Ltd. acted as an arranger and agent. The Id. Departmental Representative further submitted that the letter addressed by the ICICI Bank Ltd. to the assessee categorically states that ICICI Bank Ltd., Singapore branch is an arranger cum facility agent and the lender are a group of financial institution to be assembled by the arranger. Therefore, there is no merit in the arguments that ICICI Bank Ltd. is the main lender and payment made to Singapore branch is not coming within the provisions of section 195 of the Act.

11. We have heard both the sides and perused the materials available on record and gone through the orders of the authorities below. The factual matrix of the impugned dispute is that the assessee has borrowed 20 million USD external commercial borrowings by an agreement with ICICI Bank Ltd., Singapore branch. As per the said agreement dated 15.03.2007, the ICICI Bank Ltd. acted as an arranger and agent to facilitate 20 million USD external commercial borrowings to the assessee. The assessee has paid interest on external commercial borrowings to ICICI Bank Ltd, Singapore branch aggregating to Rs.11,69,45,505/- for the assessment years 2009-10 to 2011-12. The Assessing Officer held that the assessee as an assessee in default u/s. 201(1)/201(1A) of the Act, on the ground that the assessee has paid interest to a non resident entity located outside India which comes within the provision of section 195 of the Act. The Assessing Officer further observed that since the assessee has failed to deduct tax at source u/s. 195, he held the assessee as an assessee in default and computed short deduction of tax and interest u/s. 201(1)/201(1A) of the Act.

12. The Assessing Officer has drawn an adverse inference against the assessee on the basis of Form 15CA and 15CB that the assessee has made payment to a non resident entity ICICI Bank Ltd., Singapore branch. The Assessing Officer further observed that as per the clauses of agreement dated 15.03.2017, the assessee is a borrower and ICICI Bank Ltd, Singapore branch is an arranger cum facility agent which arranged external commercial borrowings from a group of financial institutions to be assembled by the arranger. The Assessing Officer has referred a letter dated 31.01.2007 of ICICI Bank Ltd., Singapore branch addressed to the assessee. As per which, the assessee is a borrower, ICICI Bank Ltd is an arranger cum facility agent and the lender of the loan are a group of financial institutions assembled to by the arranger. According to the Assessing Officer, although the assessee claims to have made payment to a resident entity, he failed to file any evidences to justify its arguments other than the agreement dated 15.03.2007. The Assessing Officer further observed that as per the said agreement, the various clauses in agreement as well as the letter addressed by the ICICI Bank Ltd., categorically states that ICICI Bank Ltd., Singapore branch is only the agent for arranging external commercial borrowings.

13. It is the contention of the assessee that the ICICI Bank Ltd., Singapore branch is a main lender and also acted as an arranger cum facility agent to facilitate external commercial borrowings at USD 20 million which is evident from the agreement dated 15.03.2007 as per which Schedule 1, clearly specifies the name of the original lender as ICICI Bank Ltd., Singapore branch. The assessee further referring to the letter addressed

by the office of the Jt. CIT (OSD)-3(1), Mumbai dated 27.04.2011 as per which the ICICI Bank Ltd including its offshore branches at Singapore and Hongkong are the part of the ICICI Bank Ltd., India having its registered office at Vadodra. The letter further states that ICICI Bank Ltd is an Indian resident company in terms of section 6(3) of the Act, and the global income of the ICICI Bank Ltd., including that of the offshore branches is chargeable to tax in India and is assessed to tax under the PAN: AAACI1145H in Mumbai, India. The assessee contended that as per the provisions of section 194A(3)(iii) of the Act, any payment made to a banking company are outside the purview of provisions of TDS, therefore, the Assessing Officer was erred in invoking the provision of section 195 to compute short deduction of tax and interest u/s. 201(1)/201(1A) of the Act.

14. There is no dispute with regard to the residential status of ICICI Bank Ltd., including its offshore branches at Singapore, Hongkong. The office of Jt. CIT(OSD)-3(1), Mumbai has clarified vide its letter dated 24.01.2011 that ICICI Bank Ltd is an Indian resident company in terms of section 6(3)(iii) of the Act, and the global income of the ICICI Bank Ltd including the offshore branch is chargeable to tax in India and is assessed to tax in India. It is also undisputed fact that any payment made to a resident banking company does not come within the purview of TDS as per the provision of section 194A(3)(iii) of the Act. The only dispute is with regard to the residential status of lender of external commercial borrowings to the assessee and interest payment on such external commercial borrowings. The assessee claims that it has borrowed external

commercial borrowings from Singapore branch and which is a main lender of the loan. Therefore, any interest payment to ICICI Bank Ltd., Singapore branch is not coming within the provisions of section 195 of the Act. No doubt, any payment made to a resident banking company is outside the purview of provision of section 195 of the Act. Similarly, any payment made to a non-resident including a banking company is coming within the provision of section 195 of the Act. The primary dispute is with regard to the residential status of payee in Singapore and the lender of external commercial borrowings. As per the letter of Jt. CIT(OSD)-3(1), Mumbai, the residential status of the ICICI Bank Ltd., has been clarified. To that extent there is no dispute. The remaining dispute is with regard to the lender of external commercial borrowings. Although the assessee claims that the ICICI Bank Ltd. is the main lender for USD 20 million external commercial borrowings, the facts available on record states otherwise. The agreement between the assessee and the bank dated 15.03.2007 states that ICICI Bank Ltd is acting as an arranger cum facility agent. The said agreement further states in Schedule 1 at pg. 59 states that ICICI Bank Ltd, Singapore branch is original lender. But the letter written by the ICICI Bank Ltd., Singapore branch dated 31.01.2007 states that ICICI Bank Ltd., Singapore branch is an arranger and facility agent and the lender of the loan is a group of financial institutions to be assembled by the arranger. The facts are contradictory to each other as per the assessee's own record. Therefore, we are of the considered opinion that the issue needs to be reexamined by the Assessing Officer in light of the claim of the assessee that ICICI Bank Ltd., Singapore branch is the main lender. The assessee is directed to substantiate its case with further evidences. In case, the Assessing Officer

found that ICICI Bank Ltd., Singapore branch is lender of external commercial borrowing, than there is no default in deduction of tax at source u/s. 201(1)/201(1A) of the Act. Hence, we set aside the issue to the file of the Assessing Officer with a direction to consider the issue afresh in light of the evidences filed by the assessee and pass a proper order as per law.

15. In the result, all the appeals filed by the assessee in ITA Nos. 4609, 4610 & 4611/Mum/2016 are allowed for statistical purpose.

Order pronounced in the open court on 08.06.2018

Sd/-

Sd/-

(Mahavir Singh)

(G. Manjunatha)

न्यायिक सदस्य / Judicial Member

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 08.06.2018

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai