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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 30th July 2015
Decided on: 6th August 2015

\+ **ITA 384/2012**

COMMISSIONER OF INCOME TAX-II ..... Appellant
Through: Mr Kamal Sawhney, Senior Standing counsel with Mr. Raghvendra Singh, Junior Standing counsel.

versus

M/S DELHI TRANSCO LTD. ..... Respondent
Through: Mr A.B. Dial, Senior Advocate with Ms. Ginny J. Rautray and Ms. Harsha, Advocates.

With

ITA 566/2013

CIT ..... Appellant
Through: Mr Kamal Sawhney, Senior Standing counsel with Mr. Raghvendra Singh, Junior Standing counsel.

versus

DELHI TRANSCO LTD ..... Respondent
Through: Mr Prashant Mehta with Ms. Abhinandana Kain and Mr. Himanshu Kapoor, Advocates.

With

ITA 570/2013

COMMISSIONER OF INCOME TAX TDS ..... Appellant

Through: Mr Kamal Sawhney, Senior Standing counsel with Mr. Raghvendra Singh, Junior Standing counsel.

versus

DELHI TRANSCO LTD. ..... Respondent

Through: Mr Prashant Mehta with Ms.Abhinandana Kain and Mr. Himanshu Kapoor, Advocates.

With

ITA 323/2015

COMMISSIONER OF INCOME TAX-TDS ..... Appellant

Through: Mr Kamal Sawhney, Senior Standing counsel with Mr. Raghvendra Singh, Junior Standing counsel.

versus

DELHI TRANSCO LTD. ..... Respondent

Through: Ms. Rashmi Chopra, Advocate with Mr. S. Babbar, GM (F) and Mr Rajesh Jain, AM(Legal).

With

ITA 324/2015

COMMISSIONER OF INCOME TAX-TDS ..... Appellant

Through: Mr Kamal Sawhney, Senior Standing counsel with Mr. Raghvendra Singh, Junior Standing counsel.

versus

DELHI TRANSCO LTD. ..... Respondent

Through: Ms. Rashmi Chopra, Advocate with

Mr. S. Babbar, GM (F) and Mr Rajesh Jain, AM (Legal).

With

ITA 325/2015

COMMISSIONER OF INCOME TAX-TDS ..... Appellant

Through: Mr Kamal Sawhney, Senior Standing counsel with Mr. Raghvendra Singh, Junior Standing counsel.

versus

DELHI TRANSCO LTD. ..... Respondent

Through: Ms. Rashmi Chopra, Advocate with Mr. S. Babbar, GM (F) and Mr Rajesh Jain, AM (Legal).

And

ITA 341/2015

COMMISSIONER OF INCOME TAX-TDS ..... Appellant

Through: Mr. Kamal Sawhney, Senior Standing counsel with Mr. Raghvendra Singh, Junior Standing counsel.

versus

DELHI TRANSCO LTD. ..... Respondent

Through: Ms. Rashmi Chopra, Advocate with Mr. S. Babbar, GM (F) and Mr Rajesh Jain, AM (Legal).

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

J U D G E M E N T

% **06.08.2015**

Dr. S. Muralidhar, J.

The issue

1. These are seven appeals relating to various Assessment Years filed by the Revenue where one substantial question of law arises, and which has been framed by the order dated 18th September 2012 in ITA No. 384 of 2012, relevant to the Assessment Year ('AY') 2005-06, as under:

> 'Did the Tribunal fall into error in holding that the "wheeling charges" paid by the Assessee, in the facts of this case, was deductable as it did not amount to "fees for technical services" within the meaning of Section 194J of the Act.'

The BPTA

2. The Respondent Delhi Transco Ltd. ('DTL') entered into Bulk Power Transmission Agreement ('BPTA') on 21st July 2004 with the Power Grid Corporation India Ltd. ('PGCIL'). In one of the preamble clauses of the BPTA, it was recorded that DTL "is desirous of receiving energy through power grid transmission system on mutually agreed terms and conditions". The BPTA defined several terms including the term 'wheeling' as under:

> "The operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under Section of Section 62 (sic) of the Electricity Act, 2003 and its subsequent amendments."

3. Under Clause 8 of the BPTA, it was agreed that the transmission charges would be paid to PGCIL by DTL for transmitting private sector power through PGCIL lines 'as per the guidelines' of the Central Electricity Regulatory Commission ('CERC'). Clause 10 stated that the 'transmission tariff' and terms and conditions for the power to be transferred by PGCIL would be in terms of the notification to be issued by CERC from time to time. On the commissioning of the new transmission system DTL was to pay "the provisional transmission tariff in line with the tariff norms issued by CERC". The tariff was subject to adjustment in terms of CERC notification. The wheeling for the transmission power was to be in terms of the CERC guidelines. The BPTA came into force with effect from 1st April 2002 and was to remain valid for a period of five years, that is, up to 31st March 2007.

Commencement of proceedings

4. A survey was carried out in the business premises of DTL under Section 133-A of the Income Tax Act, 1961 ('Act') on 22nd January 2009. It was noticed that DTL had deducted tax at source ('TDS') at 2% under Section 194C of the Act on the wheeling charges paid to PGCIL. The statement of one Mr. Surendra Babbar, Deputy General Manager (Finance) of DTL was recorded. Following the survey, DTL wrote a letter dated 29th January 2009 protesting that the survey was without jurisdiction as it could only have been carried out by ACIT Circle 10 (1), New Delhi. A show cause notice was issued to DTL on 20th February 2009. DTL filed a reply on 26th February 2009. After

considering the response to the show cause notice and after hearing the various representatives of the DTL, the AO passed an order dated 27th March 2009, under Sections 201 (1)/201 (1A) of the Act.

The order of the AO

5.The AO held that DTL was not only using the transmission system set up of PGCIL but also availing of other services from PGCIL "such as maintaining the delivery voltage, economic transmission, minimum loss of electricity in transmission of regular and uninterrupted supply etc., which are technical services". According to the AO, "the value of these services cannot be bifurcated from the total value paid by the assessee to PGCIL for transmission services in the name of wheeling charges. The transmission lines could not be of any use in isolation and without other associated services the transmission of electricity could not have been possible". Accordingly, the AO held that wheeling charges paid by DTL were fees for technical services liable for TDS under Section 194J of the Act. The AO referred to the replies provided by Mr. R. Rajagopalan, Chief Manager (Finance) of PGCIL on 24th March 2009 to a questionnaire sent to him.

6. The AO then proceeded to set out the calculation of short deduction of TDS and computed it at Rs.44752382. The AO treated DTL as a defaulter under Section 201(1) of the Act and the matter was referred to the Additional Commissioner of Income Tax ('ACI') for initiating penalty proceedings under Section 271-C of the Act. The AO held that in terms of the CBDT circular the demand under Section 201(1) would

not be enforced but that would not affect the liability of DTL regarding interest under Section 201(1A) of the Act and this worked out to Rs.78,40,426. The total demand was worked out as Rs 3,19,87,617.

The order of the CIT (A)

7. Aggrieved by the AO's order, DTL filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)] being Appeal No. 34/09-10 for the AY 2004-05. In the order dated 8th December 2010, dismissing the appeal, the CIT(A) agreed with the contention of DTL that Section 194C of the Act would apply since electricity was 'goods' as defined under Section 2 of the Sales of Goods Act and in terms of the contract, PGCIL was in fact transporting such goods to DTL. The CIT (A), however, held that "in the absence of sufficient legal precedent on the subject, I am unable to reject the view taken by Ld. Assessing Officer". The CIT (A), therefore, confirmed the said order of the AO. Some relief was granted as far as the calculation of interest payable.

The order of the ITAT

8. DTL then carried the matter further in appeal to the Income Tax Appellate Tribunal ('ITAT') by filing ITA No. 755(Del) 2011 (for AY 2004-05). The ITAT agreed with the DTL that what had been availed by it from PGCIL was not a technical service. It was held that DTL was not liable to be saddled with higher liability of TDS. The appeal was accordingly allowed.

9. The ITAT based its opinion on the decision of this Court in ***CIT v.***

Bharti Cellular Ltd. (2008) 220 CTR (Del) 258 and of the Madras High Court in ***Skycell Communications Ltd. v. DCIT (2001) 251 ITR 53 (Mad).*** The ITAT noted that both the decisions laid emphasis on the involvement of a 'human element' for rendering technical services and imparting of technical knowledge. The ITAT held that none of those conditions were satisfied in the present case. While there might be supervision of transmission work by the technical personnel of the payee "there is no human intervention in so far as the assessee is concerned regarding the transmission". It was further held that even if technical knowledge could be upgraded without "presence of human beings by way of handing over drawings and designs or a technical service can be rendered by robot (machines) without intervention of human element, the classification of the services rendered by the assessee as technical service is not free from doubt".

10. When the case was heard on 16th July 2015, Mr. A.B. Dial, learned Senior counsel for DTL, drew the attention of this Court to the decision dated 8th May 2015 of the Division Bench of the Bombay High Court in ***CIT v. Maharashtra State Electricity Distribution Co.Ltd. [2015] 375 ITR 23 (Bom)*** which held that wheeling charges would not amount to payment of fees for technical services. Mr. Kamal Sawhney, learned Senior Standing counsel for the Revenue then sought time to examine the said decision and make submissions.

Submissions on behalf of the Revenue

11. The submissions of Mr. Sawhney were heard by this Court on the

30th July, 2015. The principal submission of Mr. Sawhney was with reference to Section 194J of the Act and the Central Electricity Authority (Grid Standards) Regulations, 2010. The submissions of Mr. Sawhney was basically twofold. In the first place, he submitted that whether the fees paid in the context of rendering of services amounted to fees for technical service could be answered only by examining the very nature of service being performed, and in that context the working of the industry, in this case, the power generation and transmission industry. According to him, a detailed analysis would have to be undertaken by examining experts and since that was not performed by the ITAT or perhaps even the AO, the case would have to be remanded for a fresh determination.

12. The second broad submission of Mr. Sawhney was that the test adopted by the ITAT was plainly erroneous. The question was not only about whether there was any human intervention in rendering of the services, but whether without technical support or technical inputs it would at all be possible to avail of the services. He submitted with reference to the aforementioned regulations that there was a statutory requirement of the power generation company and the power transmission company to maintain their equipments in conformity with certain minimum standards. This required considerable technical knowledge and skill. He referred to the decision of this Court in ***DIT vs. Lufthansa Cargo India (2015) 375 ITR 85 (Del)*** and submitted that the observations therein helped the Revenue in so far as it was claimed that without technical inputs the question of availing the services of the kind

contemplated in the present case was not possible. He urged that the matter should be remanded to the AO for carrying out a detailed enquiry.

13. Mr. Sawhney spent considerable time distinguishing the judgment of the Bombay High Court in ***Maharashtra State Electricity Distribution Co. Ltd.***(*supra*). It was submitted that in facts of the case before it, the Bombay High Court did not have an occasion to actually examine whether 'wheeling' was in fact a technical service. Reliance was also placed by Mr. Sawhney on certain observations made by this Court in ***DIT(International Taxation)v. Panalfa Autoelecktrik Ltd. (2014) 272 CTR 117(Del)***.

Submissions on behalf of the Assessee

14. Replying to the above submissions, Mr. Dial, learned Senior counsel for DTL, at the outset pointed out that the judgment of the Bombay High Court in ***Maharashtra State Electricity Distribution Co. Ltd.***(*supra*) answered the issue entirely in favour of the Assessee. He referred to the definition of wheeling contained in the BPTA. He reiterated that the Assessee was only paying for the electricity transmitted to it through the equipment and lines maintained by PGCIL. Whatever services the technical personnel of PGCIL were performing was for the benefit of PGCIL itself. PGCIL was acting like a transporter of electricity through its equipments and the charges for that were being paid by the Assessee in terms of the tariff determined by the CERC. In the circumstances, it was essentially a payment for transportation of the

electricity and nothing more. He referred to the answers provided by Mr. Rajagopalan, Chief Manager (Finance) of PGCIL in response to the questionnaire sent to him by the AO.

15. Mr. Dial also referred to the decision dated 12th June 2015of the ITAT in Jaipur in ***Bharti Hexacom Ltd. v. Income Tax Officer (TDS) II*** (ITA No. 656/JP/2010), which was rendered after the decision of this Court ***in CIT v. Bharti Cellular [2009] 319 ITR 139*** was set aside by the Supreme Court in ***CIT v. Bharti Cellular Ltd. [2011] 330 ITR 239***, and the matter was remanded to the AO with directions to examine technical experts. Mr. Dial also referred to the dictionary meaning of the word 'services'. Ms. Rashmi Chopra, learned counsel supplemented the above submissions and referred to the decision in ***Union of India v. Martin Lottery Agencies (2009) 12 SCC 209***.

The relevant statutory provisions

16.The relevant portion of Section 194 J of the Act reads as under:

> "194J (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of –
>
> (a) fees for professional services, or
>
> (b) fees for technical services, or
>
> (ba) any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company, or
>
> (c) royalty, or

(d) any sum referred to in clause (va) of Section 28,

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent of such sum as income-tax on income comprised therein.....

Explanation- For the purposes of this section,

(a) "professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of Section 44AA or of this section;

(b) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;"

17. Explanation 2 of Clause (vii) of sub-section (1) of Section 9 reads as under:

"(vii) income by way of fees for technical services payable by-

(a) the Government; or

(b) a person who is a resident, except where the fees are payable in respect of services utilized in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

……

Explanation 2-For the purposes of this clause, "fees for technical services" means any consideration (including any

> lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services or technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

18. In addition Section 2 (76) of the Electricity Act, 2003 ('EA') defines 'wheeling' as under:

> " Section 2 (76): Wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62."

19. The question that requires to be addressed is whether there is any 'rendering of any managerial, technical or consultancy services (including the provision of services or technical or other personnel)' by PGCIL to DTL by virtue of the BPTA within the meaning of Section 194 J (1) read with Explanation 2 of Clause (vii) of sub-section (1) of Section 9 of the Act? In other words is the 'wheeling' of electricity, defined in the BPTA (and Section 2 (76) of the EA as an 'operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges', a rendering of service by PGCIL to DTL?

The decisions regarding 'technical services'

20. The ITAT has referred to the decision of the Supreme Court in ***Bharti Cellular*** (*supra*) where the question examined was whether "manual intervention is involved in the technical operations by which a cellular service provider, like M/s. Bharti Cellular Limited, is given the facility by BSNL/MTNL for interconnection." While setting aside the decision of this Court in ***CIT vs. Bharti Cellular Ltd [2009] 319 ITR 139 (Del)***, the Supreme Court observed that the problem which arose in such cases was that "there is no expert evidence from the side of the Department to show how human intervention takes place, particularly, during the process when calls take place....." It was observed further that "these types of matters cannot be decided without any technical assistance available on record". Accordingly the case was remanded to the AO to examine technical experts from the side of the department and to decide the matter within four months.

21. From the decision of the ITAT Jaipur in ***Bharti Hexacom Ltd.*** (*supra*), it is apparent that after the exercise of examination of experts was completed, and the AO gave his decision, the ITAT came to the conclusion that while for installation, setting-up, repairing, servicing, maintenance and capacity augmentation, human intervention might be required but "after completing this process mere interconnection between the operators is automatic and does not require any human intervention". Consequently, interconnect user charges received or paid were held not to be fees for technical services within the meaning of Section 194J read with Section 9 (1) (vii) read with Explanation 2 of the Act.

22. In ***Skycell Communications*** (supra), the Madras High Court went into the dictionary meaning of the word 'technical' and then concluded that the expression "fee for technical services could only be meant to cover such things technical as are capable of being provided by way of service for a fee". But it is not in every case that the provision of service might involve the element of human intervention.

23. In ***Panalfa Autoelecktrik*** (supra), this Court observed that technical services consist of services of technical nature "when special skills or knowledge relating to technical field are required for their provision, managerial services are rendered for performing management functions and consultancy services relate to provision of advice by someone having special qualification that allow him to do so". It was held that technical, managerial and consultancy services might overlap and it would not be proper to view them in watertight compartments. In that case it was held that the commission paid by the Assessee to its foreign agent for arranging export sales and recovery of payment could not be regarded as fee for technical services.

24. In ***Lufthansa Cargo India*** (supra) the Court was addressing the question whether the fee paid to the non-resident company outside India by the Assessee for carrying out maintenance, repairs to run the leased aircraft flying hours and for component overhaul and maintenance was "fee for technical services". Answering the question in affirmative, the Court opined that unlike normal machinery repair, the aircraft

maintenance and repairs, and their component overhaul maintenance would require specific level of technical expertise. The exclusive nature of these services could not but lead to the inference that they are technical services.

25. In ***Union of India v. Martin Lottery Agencies*** (*supra*), the Supreme Court considered the meaning of word 'service', and whether it would include promoting and organizing a lottery. It was held that dealing with lottery was *res extra commercium*, and therefore it could not amount to "rendition of any service". In para 20 (SCC), the dictionary meaning of the word 'service' was noted as follows:

> "Work done or duty performed for another or others; a serving; as, professional services, repair service, a life devoted to public service.
>
> An activity carried on to provide people with the use of something, as electric power, water, transportation, mail delivery, telephones, etc.
>
> Anything useful, as maintenance, supplies, installation, repairs, etc., provided by a dealer or manufacturer for people who have bought things from him."

26. The Bombay High court in the ***Maharashtra State Electricity*** (supra) considered, *inter alia*, whether wheeling charges could be characterized as fee for technical services. It was acknowledged that as a transmission licensee the state undertaking, MSEDCL, could engage in 'wheeling operations' as defined under Section 2(76) meaning thereby that the distribution system. The facilities of MSEDCL, in its capacity as transmission licensee, were permitted to be used by other

persons for conveyance of electricity upon payment of charges to be determined under Section 62 of the EA. The Bombay High Court concluded that 'wheeling charge' "would neither be rent nor fees for technical services". They represented "the charge for permitting use of the STU by persons other than the distribution licence. The transmission charges simply constitute fees for availing of the said transmission utility to be used by open access concept for distribution of electricity to licensees and consumers".

27. In light of the above decisions, it is clear that what constitutes technical services cannot be understood in a rigid formulaic manner. It will vary from industry to industry. There will have to be a specific line of enquiry for determining what in a particular industry would constitute rendering of a technical service. While in the case of ***Lufthansa Cargo India*** (supra) the question was not difficult to answer since clearly the service provided was of a technical nature, viz., the repair overhaul and maintenance of aircraft, in the case of ***Bharti Cellular*** (supra), the ultimate conclusion was that facilitating interconnection did not require any element of human intervention and was not in fact the provision of technical service. The latter case did require examination of technical experts. The decision of the Bombay High Court, discussed the very issue involved in the present case viz., whether wheeling charges could be characterised as payment for technical service and answered it in the negative.

Analysis of the evidence of experts

28. Turning to the case on hand, to understand the nature of the transaction forming the subject matter of the BPTA between DTL and PGCIL, it is necessary to examine the empirical evidence that has come on record and which has been referred to in the order of the AO. Mr. Surinder Babbar the Deputy GM of DTL appears to have given statement regarding mode and method of transportation. He stated that the question whether the maintenance of the sophisticated system would involve competent man power was itself a 'highly technical' one.

29. The other person to whom a questionnaire was sent and replies elicited was Mr. Rajagopalan, Chief Manager (Finance) of PGCIL. The AO appears to have extracted in his order only two of the questions regarding details of the transmission receipts and of the tax liability. What appears to have been omitted are the specific questions to Mr. Rajagopalan, asking him to explain the process of transmission. The relevant questions and the answers given by him are as under:

> "Q. Please explain the process of transmission?
>
> A. Central Power Generating Companies such as NTPC/NHPC/THDC etc. are generating power which are being carried through one Bulk Transmission and delivered to various State Transmission Board beneficiaries. Basically we are functioning as Bulk Carriers of Electronics.
>
> Q. Please give the details of employees whether they are skilled professional because transmission of electricity is a technical service and it requires constant involvement of technical system consisting of sophisticated instruments and technical knowledge to operate and maintain the

> system and requires technical competent manpower such as qualified engineer etc.?
>
> A. The power grid substation consists of substation and transmission towers and conductors. The main equipments are Auto Transformers, shunt reactors, isolated circuit breakers etc. All equipments are auto functioning. Power Grid has both skilled and unskilled man power. The power is carried through equipments and transmission lines only."

30. It is apparent from the above questions and answers that despite a leading suggestion put to Mr. Rajagopalan that the transmission of electricity was a technical service, his answer was to the effect that the technical service provided was not to the purchaser of electricity but in operating and maintaining the various equipments and transmission of lines.

31. This was an important input for understanding the nature of the service that is provided. The plea of DTL that the BPTA between it and PGCIL was essentially for transporting electricity from one point to another and that this is automatic through the network or equipments without any human intervention appears to be correct. The system operated by PGCIL and used for transmission of electricity is no doubt maintained by skilled technical personnel professional. This also ensures that PGCIL complies with the standards and norms put in place by the statutory regulations. However, the beneficiary of such services is PGCIL itself. PGCIL is operating and maintaining its own system using the service of engineers and qualified technicians. PGCIL is in that process not providing technical services to others, including DTL.

32. A comparison could be made with the system of distribution of some other commodity like water. It might require the operation and maintenance of water pumping station and the maintenance of a network of pipes. However, what is conveyed through the pipes and the equipment to the ultimate consumer is water. The equipment and pipes have to no doubt be maintained by technical staff but that does not mean that a person to whom the water is distributed through using the pipes and equipment is availing of any technical service as such.

33. Although the wheeling charges may be fixed by the CERC, that by itself is not a determinative factor. In the present case, DTL is seeking to characterize the wheeling charges as payment for use of PGCIL's equipment within the meaning of Section 194C of the Act. Interestingly, the CIT (A) in its order has accepted the plea that the job of DTL is to transport the electricity and it is therefore like carriage of goods. Despite accepting the above plea, the CIT (A) has simply concurred with the AO only because of "absence of sufficient legal precedent on the subject". Once it is accepted that all what PGCIL does is to transmit the electricity to DTL through the network without any human intervention, it cannot be characterized as a provision of technical services and sought to be brought within the fold of Section 194 J of the Act.

Conclusion

34. To reiterate, by virtue of the BPTA agreement between DTL and PGCIL there is transportation of the electricity from PGCIL to DTL, through the equipment and network required statutorily to be maintained by PGCIL through its technical personnel using technical expertise. This, however, does not result in PGCIL providing technical services to DTL. Therefore the wheeling charges paid by DTL to PGCIL for such transportation of electricity cannot be characterized as fee for technical service.

35. The ultimate conclusion of the ITAT is therefore not erroneous. Accordingly the question framed by the Court is answered in the negative i.e., against the Revenue and in favour of the Assessee. Since the same question is involved in all the AYs in question, all these appeals are dismissed affirming the impugned order of the ITAT, but in the circumstances with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

August 06, 2015/mg