

Court No. - 3

1. Case :- INCOME TAX APPEAL No. - 86 of 2015

Appellant :- Pr. Commissioner of Income Tax-II, Lucknow
Respondent :- M/s Madhyanchal Vidyut Vitran Nigam Ltd.
Lucknow

Counsel for Appellant :- Manish Misra
Counsel for Respondent :- Ashish Bansal, O.P. Shukla, Shashank
Dhaon

2. Case :- INCOME TAX APPEAL No. - 147 of 2015

Appellant :- Pr. Commissioner Of Income Tax-II, Lucknow
Respondent :- M/S U.P. Power Corporation Ltd. 14 Ashok Marg
Lucknow

Counsel for Appellant :- Manish Misra
Counsel for Respondent :- Ashish Bansal, S.K. Garg, Shashank
Dhaon

3. Case :- INCOME TAX APPEAL No. - 149 of 2015

Appellant :- Pr. Commissioner Of Income Tax-II, Lucknow
Respondent :- M/S U.P. Power Corporation Ltd. Ashok Marg
Lucknow

Counsel for Appellant :- Manish Misra
Counsel for Respondent :- Ashish Bansal, S.K. Garg, Shashank
Dhaon

Hon'ble Sudhir Agarwal,J.
Hon'ble Ravindra Nath Mishra-II,J.

1. These three appeals under Section 260-A of Income Tax Act, 1961 (hereinafter referred to as the “Act, 1961”) have arisen from judgments and orders of Income Tax Appellate Tribunal (hereinafter referred to as the “Tribunal”) in respect to different Assessment Years (hereinafter referred to as “A.Y.”) though raise common substantial questions of law. Details of appeal numbers, date of order of Tribunal and A.Y. are as under:-

Sr. No.	Income Tax Appeal Numbers	Date of Order	Assessment Year	ITA Numbers
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				(Before Tribunal)
1.	86 of 2015	27.02.2015	2008-09	1/LKW/2013
2.	147 of 2015	16.06.2015	2009-10	136/LKW/2013
3.	3. 149 of 2015	16.06.2015	2008-09	135/LKW/2013

2. The substantial questions of law as formulated by appellants are differently worded but as agreed by learned counsel for parties, there are three substantial questions of law;

(i) Whether payment of fee for transmission of electricity constitute payment for “Technical Service” and tax was deductible under Section 194J of Act, 1961.

(ii) Whether service rendered but related to transmission of electricity is covered under Section 194J of Act, 1961.

(iii) Whether Assessee-Company was liable to deduct tax at source and having not done so, whether payment made was liable to be disallowed under Section 40(a)(ia) of Act, 1961.

3. For the purpose of reference of facts with the consent of learned counsel for parties, we have taken up record of Income Tax Appeal No. 86 of 2015.

4. Brief factual matrix, necessary to understand dispute, may be stated as under.

5. Assessee-M/s Madhyanchal Vidyut Vitran Nigam Limited is a licensee for distribution and sale of electricity under provisions of Electricity Act, 2003, by Uttar Pradesh Electricity Regulatory Commission (hereinafter referred to as “UPERC”). Assessee purchases power from Uttar Pradesh Power Corporation Limited (hereinafter referred to as “UPPCL”). For A.Y. 2008-09, Assessee filed e-Return on 08.10.2008 at nil income, showing loss of Rs. 6,96,56,41,325/-. Case was selected for scrutiny and notice under Section 143(3) of Act, 1961

was issued on 07.09.2009. Later Assessee filed revised Return on 05.04.2010 at nil income and loss at Rs. 5,64,30,80,402/-. Thereafter, notices under Section 142(1) and 143(2) were issued on 03.09.2010. Assessing Authority (hereinafter referred to as "A.A.") noted that Assessee during A.Y. 2008-09, purchased power of Rs. 22,18,88,65,800/- from UPPCL. A.A. required Assessee to show cause as to why nature of purchase of power be not treated as job work or contract or technical service rendered by UPPCL and payment made to it, liable for deduction of tax at source. Since no tax was deducted, why said payment be not disallowed under Section 40(a)(ia) of Act, 1961.

6. Assessee explained that payments have been made in terms of tariff issued by UPERC which is bifurcated in two parts; (i) Power Supply Tariff; and (ii) Power Transmission Tariff. Payment of these two parts made by Assessee during A.Y. 2008-09 was as under:-

(i) Power Supply Tariff at Rs. 20,53,55,77,760/-.

(ii) Power Transmission Tariff at Rs. 1,65,32,88,040/-.

7. A.A. found that transmission charges were paid to Uttar Pradesh Power Transmission Company Limited (hereinafter referred to as "UPPTCL") and power supply charges were payable to UPPCL.

8. UPPTCL is a transmission licensee by UPERC and Assessee is a distribution licensee. Both are companies registered under the provisions of Companies Act, 1956 (hereinafter referred to as "Act, 1956") and are government companies. Service provided by UPPTCL involved use of sophisticated technology and also involve human interface in use of that technology and can be termed as "Technical Service". As per Electricity Regulatory Act, 2003 (hereinafter referred to as "Act, 2003"), transmission licensee is a "Service Provider" and transmission service provider i.e. UPPTCL formulated an agreement from Assessee-Company for resuming technical charges for "Technical Service" rendered. A.A. observed that it observed that payment made to UPPTCL is not a payment of purchase/supply of power but payment of

technical charge for rendering “Technical Service” on monthly basis. It consequently held that Assessee was liable to deduct tax at source on charges paid for transmission to UPPTCL and since it has failed to do so, amount of Rs. 1,65,32,88,040/- is disallowed under Section 40(a)(ia) of Act, 1961. Assessment order was passed making addition of aforesaid amount.

9. Assessee preferred appeal before Commissioner of Income Tax (Appeals) II, Lucknow (hereinafter referred to as “CIT(A)”) which was allowed and addition made by A.A. with regard to payment made to UPPTCL was deleted. CIT(A) relied on judgments of Income Tax Appellate Tribunal, Mumbai Bench in **Maharashtra State Electricity Vs. ITO decided on 27.06.2012**; Jaipur Bench in **Jaipur Vidyut Vitran Nigam Limited Vs. DCIT, (2009) 26 DTR 79** and Bangalore Bench in **Bangalore Electric Supply Vs. ITO, decided on 16.03.2012**.

10. Matter was taken up by Revenue to Tribunal. It found that similar issue has been considered across the country by various Benches and all have taken the view that “Transmission charges” does not attract Section 194J and therefore, such payment cannot be disallowed under Section 40(a)(ia) of Act, 1961. In this regard, it relied on judgments in **Jaipur Vidyut Vitran Nigam Ltd. Vs. DCIT, 123 TTJ 888 (ITAT, Jaipur)**; **Maharashtra State Electricity Distribution Co. Ltd. Vs. ACIT, 133 ITD 519 (ITAT, Mumbai)**; **Chattisgarh State Electricity Board Vs. Income Tax Officer, 143 TTJ 151**; **Gridco Ltd. Vs. ACIT, (2012) 49 SOT 363 (ITAT, Cuttuck)**.

11. A finding of fact has been recorded by Tribunal that Assessee is making payment of transmission charges to transmission company in consideration of availing benefits on standard technical facility i.e. transmission system network of transmission company for the purpose of transmission of electricity from generation point to distribution point and as such by merely making available the benefits of its sophisticated transmission system network to applicant Company, transmission company is not rendering any “technical service” within the meaning of

Explanation 2 of Section 9(1)(vii) of Act, 1961. Tribunal has also observed that technical staff of UPPTCL, by operating and maintaining its grid stations and transmission lines, are simply discharging their own statutory functions and all are on pay rolles of transmission Company, therefore, they do not render any “Technical Service” to Assessee.

12. Sri Manish Misra, learned counsel for appellant contended that transmission of electricity is not possible without technical aid and assistance and therefore, it is a “Technical Service”.

13. Section 194J of Act, 1961 was inserted by Finance Act, 1995 w.e.f. 01.07.1995. It has undergone two substantial amendments, (i) by insertion of Clause (BA) by Finance Act, 2012 w.e.f. 01.07.2012 and; (ii) insertion of Clause (C) by Taxation Laws Amendment Act, 2006 w.e.f. 13.07.2006. There is some other minor amendments which are not substantial. Section 194J 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 :

Provided that no deduction shall be made under this section—

- (A) *from any sums as aforesaid credited or paid before the 1st day of July, 1995; or*
- (B) *where the amount of such sum or, as the case may be, the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed—*
 - (i) *thirty thousand rupees, in the case of fees for professional services referred to in clause (a), or*
 - (ii) *thirty thousand rupees, in the case of fees for technical services referred to in clause (b), or*
 - (iii) *thirty thousand rupees, in the case of royalty referred to in clause (c), or*
 - (iv) *thirty thousand rupees, in the case of sum referred to in clause (d) :*

Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such sum by way of fees for professional services or technical services is credited or paid, shall be liable to deduct income-tax under this section :

Provided also that no individual or a Hindu undivided family referred to in the second proviso shall be liable to deduct income-tax on the sum by way of fees for professional services in case such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.

(2) ***

(3) ***

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;*
- (ba) “royalty” shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;*
- (c) where any sum referred to in sub-section (1) is credited to any account, whether called “suspense account” or by any other name, in the books of account of the person liable to pay such sum, such crediting shall be deemed to be credit of such sum to the account of the payee and the provisions of this section shall apply accordingly.”*

14. Explanation (b) of Section 194J explains what is “fees for technical services”. For the said purpose, it says that “fees for technical services” shall have the same meaning as contained in Section 9(1)(vii) Explanation (2) of Act, 1961. This Explanation (2) of Section 9(1)(vii) reads as under:-

“Explanation (2) – For the purpose 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 of 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’.”

15. A reading of aforesaid provision shows that fee is nothing but consideration for payment of amount rendered to anyone including any lump sum amount for specific services i.e. “Managerial, Technical or Consultancy”. “Technical Services”, therefore, as per Explanation (2) is not confined to any performance or function involving technology only

but it has been given a very wide meaning by including within its ambit even “Managerial or Consultancy Services”. Legislature has not given meaning to the word “Technical Services” as it is known in common parlance but an extended, varied and extensive scope has been given to the word “Technical Services”. What is not included therein has also been provided in Explanation (2) which says that it will not include consideration paid for any construction, assembly, mining or like project undertaken by recipient. Explanation (2) also says that consideration which would be income of recipient, chargeable under the head “Salaries” would also be excluded from “fees for technical services” and this is in the context of the consideration paid for “Technical Services”. Legislature has also clarified that something which would be chargeable under the head “Salaries” would not be included. Therefore, we cannot consider the word “Technical Services” in the manner as has been read by A.A. by simply confining it to a function by a person involving technology only. This aspect has been considered by Supreme Court also as to what is the meaning of “Technical Services” in Explanation (2) of Section 9(1)(vii) of Act, 1961 in **Commissioner of Income Tax Vs. Bharti Cellular Limited, (2011) 330 ITR 230 (SC)**, where Court has said as under;

“Right from 1979 various judgments of the High Courts and Tribunals have taken the view that the words "technical services" have got to be read in the narrower sense by applying the rule of Noscitur a sociis, particularly, because the words "technical services" in Section 9(1)(vii) read with Explanation 2 comes in between the words "managerial and consultancy services".

16. In **CIT-IV, Mumbai Vs. Kotak Security Limited, 2016 (383) ITR 180 (SC)** referring to aforesaid decision, Court said;

“Managerial and consultancy services” and, therefore, necessarily “technical services”, would obviously involve services rendered by human efforts. This has been the consistent view taken by the courts

including this Court in Bharti Cellular Ltd. (supra). However, it cannot be lost sight of that modern day scientific and technological developments may tend to blur the specific human element in an otherwise fully automated process by which such services may be provided. The search for a more effective basis, therefore, must be made.”

17. In the aforesaid decision, A.A. held that service made available by Stock Exchange may come within the term “Technical Service”. Rejecting this approach, Court said that “Technical Services” like “Managerial and Consultancy service” would denote seeking of services to cater to special needs of consumer/user as may be felt necessary and making of same available by service provider. It is the above feature that would distinguish/identify a service provided from a facility offered. While former is special and exclusive to seeker of service, latter, even if termed as a service, is available to all and would therefore stand out in distinction to former. Service provided by Stock Exchange for which transaction charges are paid fails to satisfy aforesaid test of specialized, exclusive and individual requirement of user or consumer who may approach service provider for such assistance/service. It is only service of above kind that, according to us, should come within ambit of expression “Technical Services” appearing in Explanation 2 of Section 9(1)(vii) of Act. In absence of above distinguishing feature, service, though rendered, would be mere in the nature of a facility offered or available which would not be covered by aforesaid provision of Act. The view of A.A. which was upheld by Bombay High Court was negated.

18. Applying aforesaid dictum in the present case also, it is not in dispute that Assessee is engaged in the business of distribution and sale of electricity to consumers within its licensed area of operation. Electricity is generated in State of U.P. by different companies but for the purpose of sale; pooled through UPPCL. Since electricity is a commodity which cannot be carried from one place to another like

other commodities but it has to flow through metal conductors which is called “transmission lines” and therefore, transmission lines constitute a facility for travelling of electricity from the point of generation to the point of distribution.

19. This flow of electricity in conductor cannot be said to be any specialized, exclusive individual service rendered by UPPTCL to Assessee for the reason that now grid is common and transmission lines are used in general by respective distributor licensees. Only for the purpose of facility to use and maintenance of transmission lines, charges are paid and there is no “Technical Service”, as such, rendered by UPPTCL to Assessee.

20. Learned counsel appearing for Revenue also could not dispute that various judgments of Tribunals at different places across the country have unanimously held that transmission of electricity and payment thereof does not amount to payment of fee for “Technical Services” as defined under Explanation (2) of Section 9(1)vii of Act, 1961. There is no otherwise view taken by any Court and it is also not stated before us by learned counsel for Revenue that aforesaid judgments have not attained finality or not in operation or holding field till date.

21. Sri Manish Misra, learned counsel for appellant relied on an opinion rendered by Chairman i.e. Authority for Advance Ruling (Income Tax) expressing his view that payment for transmission of electricity to transmission service provider is a payment towards “Technical Services” and therefore, would attract Section 194J for the purpose of deduction of tax at source.

22. We have gone through the aforesaid opinion and find that neither expression “Technical Services” as construed by Supreme Court in **Commissioner of Income Tax Vs. Bharti Cellular Limited (supra)** and **CIT-IV, Mumbai Vs. Kotak Security Limited (supra)** has been considered nor the said authority has looked into the fact that mere

involvement of technology will not bring something within the ambit of “Technical Services” as defined in Explanation (2) of Section 9(1)(vii) for the reason that here, under Act, 1961, term “Technical Services” has been defined in a different manner i.e. alongwith terms “Managerial and Consultancy Services”. “Managerial or consultancy Services” by itself may not include any technology still would be covered by definition of “fee for technical services” in the Act. Therefore, term “Technical Services” is not dependent solely on the fact that use of technology is involve or not. Moreover, term “technical” has to be read applying principle of *noscitur a sociis* in the term “Managerial and Consultancy”. That takes away normal and common meaning of “Technical Services” as is known in common parlance and make it totally different. Detailed aspect in this regard we have already discussed and therefore, we are not able to be persuaded to agree with opinion rendered by Authority for Advance Ruling (Income Tax) vide opinion dated 27.08.2012.

23. Be that as it may, we have no hesitation in holding that in transmission of electricity, there is no human touch or effort and if the term ‘technical’ is read applying the principle of *noscitur a sociis* with the term “Managerial or Consultancy”, there can be no manner of doubt that view taken by Tribunal cannot be faulted. Consequently, questions formulated above are answered against Revenue and in favour of Assessee.

24. Appeals lack merit. Dismissed with costs throughout.

Order Date :- 12.1.2017
Shubham