

IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH

DATED THIS THE 9TH DAY OF AUGUST, 2016

PRESENT

THE HON'BLE MR. JUSTICE VINEET KOTHARI

AND

THE HON'BLE MR. JUSTICE B.VEERAPPA

INCOME TAX APPEAL No.200003/2014

BETWEEN:

Assistant Commissioner of
Income Tax
Circle – I, Gulbarga – 585 102.

... Appellant

(By Sri Ameet Kumar Deshpande, Advocate)

AND:

M/s Gulbarga Electricity
Supply Company Ltd.,
Main Road, Gulbarga – 585 102

... Respondent

(By Sri G.Venktesh for Sri A. Shankar, Advocate)

This ITA filed under Section 260 A of Income Tax Act, praying to allow this appeal and set aside the order dated 07.02.2014 passed in ITA No. 703/BANG/2013 passed by the Income Tax Appellate Tribunal Bangalore Bench 'A', confirming the order dated 28.02.2013 in ITA No. CIT (A) 191. HBL/2011-12 by the Commissioner of Income Tax (Appeals) Hubli for the Assessment year 2009-10.

This appeal coming on for hearing **B.VEERAPPA J.**, this day, the Court delivered the following:

JUDGMENT

The Revenue filed the present appeal against the order dated 07.02.2014 made in ITA No.703/Bang/2013 on the file of the Income Tax Appellate Tribunal, Bangalore Bench "A", dismissing the appeal filed by the Revenue, confirming the order passed by the Commissioner of Income Tax (Appeals), Hubli, in CIT(A) 191/HBL/2011-12, insofar as it relates to transmission of charges to State Load Dispatching Centre charges.

2. The brief facts of the case are that-

The respondent/assessee, a company registered under the Companies Act, 1956, is engaged in the business of buying and selling of electricity. The assessee purchases electricity from the generators of Karnataka Power Corporation Limited (KPCL), Central Generation Stations like NTPC, NLC, MAPS and non conventional electricity generators like Jindal Energy

Limited, Bhourukha, etc and sell the same to different categories of consumers in its jurisdiction. The power from the generation point to the customers is transmitted through the transmission net work of Karnataka Power Transmission Corporation Limited.

3. For the Assessment year 2009-10, the assessee filed its returns of income on 30.09.2009 declaring loss of ₹179,46,45,174/-. The return of income was processed under the provisions of Section 143(3) of the Income Tax Act, 1961 ('Act' for short) and the case was taken up for scrutiny. After considering the entire material on record, the ITO (TDS), Gulbarga, conducted a survey as contemplated under the provisions of Section 133A of the 'Act', found that there were instances where assessee had made payment of transmission charges to KPTCL and State Load Dispatching Centre ('SLDC' for short), an arm of KPTCL, without deducting tax at source thereon. The

authorities of the Revenue were of the view that payment for using the transmission lines for transmission of power generated by KPTCL was a payment for “technical services” rendered and therefore the assessee was obliged to deduct tax at source while making such payments in accordance with the provisions of Section 194J of the Income Tax Act. Similarly, in respect of SLDC charges paid to State Load Despatching Centre, which is an arm of KPTCL, the Revenue was of the opinion that tax ought to have been deducted under Section 194J of the Act.

4. The functions of SLDC are prescribed under Section 32 of the Electricity Act, 2003. According to the said provision, it was responsible for optimum scheduling and dispatch of electricity within a State in accordance with the contracts entered into with the licencees or the generating companies operating in that State for monitoring grid operations, keeping accounts of the

quantity of electricity transmitted through the State Grid, exercising supervision and control over the intra-state transmission systems, and for carrying out real time operations for grid control and dispatch of electricity within the State and to secure the economies of operations of the State Grid in accordance with the Grid Standards and State Grid Code.

5. In respect of payments made towards composite contracts for setting of electric sub-stations, Revenue was of the opinion that such payments made were liable for tax to be deducted at source in accordance with the provisions of Section 194C of the Income Tax Act, but that is not the issue raised in the present appeal, and no substantial question of law has been framed in this regard.

6. The Assessing Officer held that the assessee was an 'assessee in default' under Section 201(1) of the Act in respect of payments for transmission charges and SLDC

charges under Section 194J of the Act and also in respect of payments towards composite contracts for setting up electric sub-station under Section 194C of the Act.

7. The assessment was completed by an order under Section 143(3) of the Act on 30.11.2011 wherein the income of the assessee was determined at ₹69,76,80,360/- in view of the following disallowances under Section 40(a)(ia) of the Act:

- (i) on payments made to KPTCL, without deducting tax at source under section 194J of the Act on transmission charges and SLDC charges
₹113,05,08,348/-
- (ii) on payments towards composite contracts without deducting tax at source as required under Section 194C of the Act
₹136,18,17,186/-

8. Aggrieved by the said assessment order, the assessee preferred an appeal before the CIT (Appeals), Hubli. The CIT (Appeals), who after considering the entire material on record, relied upon the decision of the co-ordinate

Bench of the Tribunal in assessee's own case in ITA Nos.874 to 879/Bang/2011 dated 31.08.2012 for assessment year 2006-07 to 2011-12 and allowed the appeal by an order dated 28.02.2013.

9. Aggrieved by the said order of the CIT (Appeals) dated 28.02.2013, the Revenue filed second appeal before the Tribunal in ITA No.703/Bang/2013 urging various grounds. The Tribunal, after hearing both the parties and after considering the provisions of Section 40(a)(ia), 194 C and 194J and after following the decision of the co-ordinate bench of the Tribunal in identical circumstances in the case of *Bangalore Electricity Supply Company vs. ITO (TDS)* in ITA No.530 to 535/Bang/2011 and other cases, proceeded to dismiss the Revenue's appeal, upholding the order passed by the CIT (Appeals) insofar as it related to the transmission charges to SLDC charges.

10. Hence the present Income Tax Appeal is filed by the Revenue under Section 260 A of the Act.

11. This Court, while admitting the Appeal by an order dated 17.08.2015, framed the following substantial question of law:

“Whether the Tribunal below was justified in accepting the plea of the assessee that the assessee was not liable to deduct tax at source under Section 194J of the Income Tax Act, 1961 in respect of transmission charges payable to the Karnataka Power Transmission Corporation Limited and State Load Despatching Centre?”

12. We have heard the learned counsel for the parties to the lis.

13. Sri Ameet Kumar Deshpande, learned standing counsel for the appellant-Revenue contended that the payments made by the assessee to the KPTCL and

SLDC relating to transmission charges are in the nature of payments for technical services, hence, the tax was required to be deducted at source and the failure on the part of the assessee to deduct the tax at source under Section 194J of the Act disentitles the assessee from seeking any allowance on deduction of the amount from taxing, therefore, the said amount is taxable. He also contended that the Income Tax Appellate Tribunal ('ITAT' for short) has not made any mention regarding the ground raised by the appellant with regard to assessee having violated the provisions of Section 194C of the Act and disallowance on that account of and therefore, the order passed by the Tribunal is not a speaking order and same is liable to be set-aside. He further contended that the CIT (Appeals) was not justified in holding that when a separate invoice is raised, no deduction is permissible under Section 194C of the Act. Therefore, he prayed to allow the present appeal of the Department.

14. Per contra, Sri G. Venkatesh, learned counsel for the respondent/assessee sought to justify the impugned order passed by the ITAT confirming the order of the CIT (Appeals) and sought to rely on the decision of the coordinate bench of this Court dated 22.03.2016 in the case of *The Commissioner of Income Tax and another vs. Gulbarga Electricity Supply Company Limited* made in ITA No.438/2012 and connected matters and prayed for dismissal of the appeal of the Revenue.

15. We have given our anxious consideration to the arguments advanced by the learned counsel for the parties and perused the entire material on record, carefully.

16. The Revenue is aggrieved by the decision of the ITAT holding that the compliance of Section 194J mandating deduction of tax at source are not attracted to the facts and circumstances of the present case and the assessee

was not liable to deduct tax at source on payment of transmission charges to KPTCL and also SLDC charges paid by the assessee. The provisions of 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 31[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 notified³⁶ 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.”

17. It is relevant to state at this stage that the coordinate bench of this Court while considering the said provisions in identical circumstances in the case of The Commissioner of Income Tax, TDS, HMT Bhavan, Bellary Road, Bangalore and another vs. Hubli Electric Supply Company Limited in its judgment dated 15.12.2015 made in ITA No.437/2012 and connected matters, has held as under:-

“8. Irrefutable facts in these cases are KPTCL and assessee have entered into a power

transmission agreement dated 08.05.2012. Under the said agreement, KPTCL has agreed with the assessee to provide its transmission network for the purpose of carrying electricity to its users. For the said purpose, KPTCL has covenanted with assessee to fulfill the obligations contained in Article 2 of the agreement and to perform other obligations. Assessee has agreed to pay transmission charges on a monthly basis in terms of Article 8 of the agreement. Both parties have agreed to comply with the provisions of the State Grid Code and Regulations and Rules issued by KERC from time to time.

9. SLDC is required to maintain records of quantity of energy flowing through the State Grid and issue State Energy Account under KERC (Terms and Conditions of Tariff) Regulations 2006.

10. KPTCL is required to maintain the operation and maintenance of the transmission system.

11. Transmission charges are calculated as per transmission tariff determined by KERC and KPTCL is required to raise bills on every first working day of every month and the assessee has undertaken to pay transmission charges in terms of the said bills.

12. We have carefully perused the contents of the power transmission agreement. There is no mention of any offer with regard to any “technical services” by the KPTCL. Plain and simple intention of the parties to the agreement as discernable from the power transmission agreement is that the assessee was desirous of using the transmission network belonging to the KPTCL in accordance with the provisions of the Electricity Act subject to payment of charges applicable and determined by KERC. KPTCL was willing to provide its transmission network for the purpose of carrying electricity to its users subject to payment of transmission and other charges as determined by KERC. There is neither an offer nor an acceptance of any “technical service”

inter se between the parties. Admittedly, KPTCL is a State owned Company and the only power transmitting agency. It has installed and developed its own infrastructure. Assessee is also a State owned electricity distribution company. The only service which the assessee has availed from the KPTCL is “transmission of power” on payment of charges fixed by KERC. No material is placed by the Revenue before this Court to substantiate its contention that assessee had availed of any technical services. In our considered view, assessee has done nothing more than transmitting certain quantum of power from one place to the other for a price fixed by KERC. Assessee was oblivious to the technical expertise which the KPTCL may possess. There was neither transfer of any technology nor any service attributable to a technical service offered by the KPTCL and accepted by the assessee. Therefore, application of Section 194J of the Act to the facts of this case by the Revenue is misconceived.” (emphasis supplied)

18. This Court, while considering the provisions of Section 194J of the Act in the case of *The Commissioner of Income Tax and another vs. Gulbarga Electricity Supply Company Limited* made in ITA No.438/2012 and connected matters in its judgment dated 22.03.2016, following the aforesaid judgment on identical circumstances, has held as under:

“6. The learned counsel appearing for the assessee at the outset pointed out that the identical substantial questions of law raised in the case of **The Commissioner of Income Tax and another vs. Hubli Electric Supply Company Ltd.,** (ITA No.437/2012 and connected matters dated 15.12.2015), this Court has answered the same against the revenue. Placing reliance on this judgment, the assessee seeks to answer the substantial questions of law raised in these appeals against the revenue.

7. However, the learned counsel for the appellants-revenue though admits that the identical substantial questions of law raised

in similar circumstances in the case of **Hubli Electric Supply Company Ltd.**, (supra) is covered against the revenue, he makes an attempt to raise a new ground that the transaction of transmission of electrical energy from the generation point to the consumers through a transmission network of KPTCL, if not to be treated as technical services, attracting the provisions of Section 194-J of the Act, it would be brought under the provisions of Section 194-I of the Act as rent and contends that the appeals are required to be allowed.

8. We are afraid that this stand of the revenue is not appreciable. In the scheme of the Act, the proceedings before the assessing officer constitute the base, if the base is taken out/disturbed/replaced or substituted by any new material, the entire edifice of the proceedings will collapse. The points, which were not the basis of the proceedings or the subject matter of adjudication, cannot be raised for the first time in the appeal proceedings under

Section 260-A of the Act. The scheme of the Act contemplates mechanism to set right the error, if any committed by the Assessing Officer. We cannot give our acceptability to the arguments advanced by the revenue contrary to the well established machinery provided under the Act. It is an attempt to deviate from the scheme of the Act, having noticed that the substantial questions of law raised in these appeals are answered against the revenue in identical cases referred to above i.e., nature of services or transaction entered into between the assessee and KPTCL are not in the nature of technical services to attract the provisions of Section 194-J of the Act. It is not a chance litigation to switch over to a different provision alien to proceedings initiated. It is also discerned that this point was at no point of time raised, considered and examined by the authorities. Sections 194-J and 194-I are two independent provisions which operate in different fields. It is not possible to import the existence or the consideration of any point not raised and

adjudicated before the authorities or the Tribunal, much against the principles of natural justice and that too at this juncture in the appeal proceedings under the fiscal statute. The arguments advanced on behalf of the revenue deserve to be rejected and accordingly they are rejected. (emphasis supplied)

9. The judgment of **Hubli Electric Supply Company Ltd.**, is squarely applicable to the facts of the present case. We do not see any reasons to differ from the view taken by the co-ordinate Bench of this Court in **Hubli Electric Supply Company Ltd.** case (*supra*). We are in agreement with the view taken by this Court and answer the substantial questions of law raised against the revenue and in favour of the assessee.”

19. The Division Bench of the Delhi High Court, while considering the provisions of Section 194J for the assessment year 2005-06 in the case of **Commissioner**

of Income Tax vs Delhi Transco Ltd reported in
(2016)380 ITR 398 (Delhi) has held as under:

“Held, dismissing the appeals, that PGCIL was operating and maintaining its own system using the services of engineers and qualified technicians. PGCIL was in that process not providing technical services to others, including the assessee. 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 was conveyed through the pipes and the equipment to the ultimate consumer was water. The equipment and pipes have no doubt to be maintained by technical staff but that did not mean that a person to whom the water was distributed through using the pipes and equipment was availing of any technical service as such. Although the wheeling charges may be fixed by the Commission, that by itself was not a determinative factor. Once it was accepted

that all that PGCIL did was to transmit the electricity to the assessee through the network without any human intervention, it could not be characterized as a provision of technical services and sought to be brought within the fold of Section 194J".(emphasis supplied)

20. The said judgment was the subject matter of Appeal before the Hon'ble Supreme Court in Special Leave to Appeal (C) No.22801/2015 reported in **(2016)68 taxmann.com 231(SC)**. The Hon'ble Supreme Court, considering the provisions of Section 194J r/w 194C and 201 of the Income Tax Act, 1961, by order dated 08.01.2016 has dismissed the Special Leave to Appeal(C) and confirmed the Judgment of the Division Bench judgment of the Delhi High Court, by the short order.

Catchnote of Taxmann.online:

“Deduction of tax at source- Fees for professional or technical services (Wheeling

charges) – Assessment year 2005-06 – High Court by impugned order held that wheeling charges paid to Power Grid Corporation for transportation of electricity could not be characterized as fee for technical service and therefore, was not liable for TDS under Section 194J.”

Order of Hon’ble Supreme Court:

1. Delay Condoned.
2. We find no reason to entertain this Special Leave Petition, which is, accordingly, dismissed.

21. Learned Counsel for Revenue has failed to produce any contrary judgment for our consideration.

22. In view of the aforesaid reasons, we are in respectful agreement with the view taken by the two coordinate benches of this Court and the Division Bench of the Delhi High Court which was affirmed by the Hon’ble Supreme Court (supra) and accordingly, we answer the substantial question of law raised, in favour of the

assessee and against the revenue by saying that the provisions of Section 194J of the Act was not attracted in present case and the assessee was not liable to deduct the tax at source from the payments of transmission charge made by it to the KPTCL and SLDC and therefore, the additions made by the assessing authority in the returned income of the assessee on this account were rightly set aside by the Income Tax Appellate Tribunal. No other point was pressed before us.

23. Accordingly, appeal of Revenue is dismissed. No costs.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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