IN THE INCOME TAX APPELLATE TRIBUNAL, CUTTACK BENCH, CUTTACK

Before : Shri K.K.Gupta, AM, and Shri K.S.S.Prasad Rao, JM

ITA No.404/CTK/2011
(Assessment Year 2008-09)

M/s.GRIDCO Limited, Janpath, Bhoi Nagar, Bhubaneswar 751 022 PAN: AABCG 5398 P	Versus	Asst.Commissioner of Income-tax ,Circle 2(19), Bhubaneswar.
(Appellant)		(Respondent)

For the appellant: Shri V.Jain/D.Mohanty, ARs
For the respondent Smt. Paramita Tripathy, DR

Date of hearing : 21.10.2011
Date of pronouncement : 17.11.2011

ORDER

Shri K.S.S.Prasad Rao, JM : The assessee has filed this appeal having been aggrieved against the order dt.03.08.2011 of the Commissioner of Income-tax (Appeals) for the Assessment Year 2008-09.

2. The assessee raised the following issues in its grounds of appeal.

"1) That the order of the CIT(A)-II, Bhubaneswar dismissing the appeal filed on 28.01.2011 is arbitrary, uncalled for, without appreciating the facts of the case, by wrongful application of law and hence bad in law.

2) (a) That the Ld. A.O. erred in disallowing and the CIT(A) wrongly confirmed the application of section 40(a)(ia) to the case of the appellant in regard to a sum of ₹367.06 crores being the transmission charges paid to OPTCL by WESCO, NESCO, SOUTHCO and CESU under the regulatory mechanism devised by Orissa Electricity Regulatory Commission (OERC).

(b) That the Ld. A.O. and the CIT(A) wrongly assumed that the appellant paid rent for the use of the transmission line of OPTCL when no such services were taken nor any agreement was entered into with OPTCL for providing transmission line to the Appellant Company

(c) That OPTCL having directly dealt with the four distribution companies i.e. WESCO, NESCO, SOUTHCO and CESU and having raised bill on them for the transmission of Electricity, the A.O. and the CIT(A) wrongly held that such a payment was made by the appellant company.

3) That in any case the appellant company having never debited the impugned payment made to OPTCL by the four distribution companies in its books of accounts as its expenditure, the A.O. and the CIT(A) wrongly applied provisions of section 40(a)(ia) to the impugned amount.

4) That the order of the Ld. A.O. and the CIT(A) adding and confirming a sum of ₹367.06 crores for non-deduction of TDS under section 194-I by invoking the provision of section 40(a)(ia) having been done on the misinterpretation of the impugned provision of law, the same may kindly be striked down.

5) That the order of the Ld. A.O. and the CIT(A) on this account be reversed and your appellant be given the relief(s) as per the aforesaid grounds.

6) That the Ld. A.O. and the CIT(A) wrongly disallowed a sum of ₹ 145,38,04,459/- being the payment made to the PGCIL for the purchase of electricity by invoking provision of section 40(a)(ia) of the I.T. Act, 1961 alleging violation of the provision of section 194-I by not deducting tax at source on the aforesaid amount.

7) That in view of the decision of ITAT, Cuttack Bench, in ITA Nos.191, 192, 193, 194, 283, 282 & 284/CTK/2010 which was well within the knowledge of the CIT(A), he erred in having confirmed the aforesaid disallowance.

8) That in any case, the aforesaid payment made to PGCIL being not in the nature of rent but being the part of the purchase price of the Electricity, the provisions of section 194-I was never attracted to such a payment.

9) That the order of the Ld. A.O. and the CIT(A) hence be annulled on this account and necessary relief may kindly be granted.

10) That in any case, OPTCL being a loss making enterprise and the tax liability in their hand in relation to the receipt being known to be non-existence, the A.O. and the CIT(A) wrongly treated the assessee in default in relation to the aforesaid sum although OPTCL had filed its return much before the completion of assessment showing a book loss of ₹3.86crores."

3. Both the parties were heard regarding the issues raised by the assessee and their legal implications.

4. On careful consideration of the material made available to the Tribunal in the light of the rival submissions of both the parties, the undisputed facts relating to the issues are that the assessee is a Public Limited Company. It filed its return for the Assessment Year 2008-09 on 25.10.2008 showing the total income at NIL. It has shown deemed total income at NIL under MAT u/s.115JB. The case was selected for scrutiny and in the scrutiny assessment, the Assessing Officer found that the assessee is a Company engaged in the business of trading of power. Power is purchased from the generators (power generating companies) and sold to the DISCOMs and others utilizing the transmission, network of OPTCL, PGCIL and other. The above Companies, the generators, DISCOMs and GRIDCO are regulated by Orissa Electicity Regulatory Commission(OERC) whose functions, *inter alia*, are to issue licenses, determine the conditions therein, regulate the purchase, distribution and supply of electricity and the tariffs payable. The assessee company after purchasing power from the generators sells it to the Distribution Companies. The assessee company had entered into a Bulk Supply Agreement with the Distribution companies in the year 1999 and on the terms of these agreements, it used to sell electricity to the Distribution companies. In the year.2000, an escrow Agreement was entered into between GRIDCO and Distribution companies, thereby creating a first charge of GRIDCO, on the receipts of the Distribution Companies from the consumers. In the year 2005, Orissa Power Transmission Corporation Ltd (OPTCL) was hived out of GRIDCO. OPTCL was to create and maintain the transmission network in the state. For the previous year 2007-08, relevant to the assessment year 2008-09 , the electricity sold by GRIOCO to the Distribution companies was based on the Bulk Supply Agreement and the payment made by the Distribution Companies to GR1DCO was as per the Escrow Agreement. The transmission

charges were not paid by the distribution companies to OPTCL directly. The Distribution companies paid electricity charges to GRIDCO through the Escrow agreement and GRIDCO after collection from the Escrow agreement, paid to OPTCL. The transmission//wheeling charges were paid by GRIDCO to the OPTCL. Further the assessee company, GRIDCO has also paid transmission/wheeling charges to Power Grid Corporation of India Ltd.(PGCIL) and other Transmission companies depending on the party, whose transmission network was used while bringing the electricity purchased from other generators (in other states) or selling the extra energy generated in Orissa , which are sold to the other states. The Assessing Officer further noticed that there has been a payment to OPTCL, PGCIL and others against wheeling charges/Transmission charges by GRIDCO. Wheeling charges are levied by the transmission utilities for use of their network. The Assessing Officer was of the view that TDS is applicable on these charges under section 194-I of the Income-tax Act,1961. The assessee-company has not deducted TDS on these expenditures. With respect to the transmission charges paid to OPTCL and others the assessee company has failed to deduct TDS. The assessee company has not showed the transmission charges paid to OPTCL in its books of accounts. The assessee company has neither credited the amounts received from the Distribution companies in its profit and loss account nor it has debited the amounts paid to OPTCL. Accordingly, the Assessing Officer issued show cause in response to which, the assessee submitted as under:

> “GRIDCO is supplying power to the DISCOMs through Orissa Power Transmission Corporation Limited (OPTCL) network and the power purchase bill raised by GRIDCO is based on the measurement of power through the meters at the intersection points. Similarly, OPTCL is raising the transmission charges bill to the DISCOMs based on the measurement of power through the meters at intersection points. The payment of both the bills

> i.e Bulk Supply Tariff (BST bill raised by GRIDCO and Transmission Charges bill raised by OPTCL to DISCOMs is made in favour of GRIDCO as per the clarificatory order given by Orissa Electricity Regulatory Commission (OERC). GRIDCO in turn transfers the amount received towards transmission charges to OPTCL on priority after which the balance amount is adjusted against the amount due towards the BST bill of GRIDCO. The transmission charges of OPTCL received from DISCOMs is neither an income when it is received nor expenditure when it is paid to OPTCL. Hence the transaction is not routed through the-profit and loss account of GRIDCO. As the company has not claimed transmission charges as a deductible expenditure, the provisions section 40(a) (ia) does not apply.
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> However, with effect from 01.04.2010 the system of routing energy bill through GRIDCO has been dispensed with. Presently, the DISCOMs are directly remitting the transmission charges of OPTCL, through a separate ESCROW arrangement with OPTCL."

The Assessing Officer further observed that in the AYs 2007-08,2008-09, the default in TDS deduction on wheeling charges were held to be in the hands of the DISCOMS and interest was charged u/s.201(1A) by the Income-tax Officer(TDS).The DISCOMS carried the matter up to Tribunal and ITAT, Cuttack Bench in its consolidated order in ITA Nos.191,192,193,194,283,282 and 284/CTK/2010 allowed the appeal of DISCOMS. Referring to paragraph 7 of the above order of the ITAT, the Assessing Officer observed that the DISCOMs have not used any equipments of OPTCL; GRIDCO has used the equipments to deliver the electricity purchased from the generators to the DISCOMs. The DISCOMs have paid charges only to GRIDCO, as per their agreement with GRIDCO. GRIDCO has paid to OPTCL as per the rate. Bills were raised by OPTCL in the name of the DISCOMs just to create a first charge on the receivables of GRIDCO from the DISCOMs. In view of the above, the Assessing Officer concluded that the transmission charges/wheeling charges were paid by GRIDCO to OPTCL towards use of equipments for transfer of power from the generators to the DISTCOMs,

which attracted liability under Section 194-I of the Income-tax Act,1961. Since the assessee failed to deduct and deposit TDS, the Assessing Officer disallowed ₹ 512,44,43,724 u/s.40(a)(ia) of the Income-tax Act,1961 being the total payments of transmission/wheeling charges indirectly paid by the DISCOMs to OPTCL and PGCIL of and added the same to the total income of the assessee.

5. Aggrieved, the assessee preferred appeal before the Commissioner of Income-tax (Appeals) but being unsuccessful has come up in the present appeal.

6. On careful consideration of the material made available to the Tribunal in the light of the rival submissions of the parties, it is found that the issue to be decided is whether the act of the assessee in asking the OPTCL to transmit the power purchased from various producers will fall within the scope ofSection194-I. For this purpose first of all we have to analyze the scope of the functioning of the various companies related to the production, distribution of powers to the ultimate consumers. For this purpose, it is to be taken into consideration the development of the power transmission in the State of Orissa. The Electricity Act of 2003 explains the electricity reform taken by the Central Government in the State Governments. The electricity supply industries in India is being governed by the Indian Electricity Act,1910 this is being the basic frame work of supply of electricity in India. At that stage the electricity industry was in its infancy and this Act envisages the growth of industry through providing licenses. This continued till the independence of India. With a new Act i.e., The Electricity (supply) Act, 1948 was enacted for growth of the State Electricity Board. This enactment was made to ensure for expansion of electricity across India not limited to its cities only. Since performance of the State Electricity Boards deteriorated

over a period on account of various reasons there raise a need in 1990 for Electricity Regulatory Reform.

7. Orissa is the first state to notify the State Electricity Reform by enacting the Orissa Electricity Reform Act, 1995 to combat the problem arising to the State Electricity Board where the power production, trading and transmissions and distribution were bifurcated into three different entities. The production of power was given to Orissa Hydro Power Corporation Ltd. Trading and transmission was given to the assessee Company. The act of distribution was assigned to four different entities (1) Central Electricity Supply Co. of Orissa, (2) Western Electricity Supply Co., (3) Eastern Electricity Supply Co., and (4) Southern Electricity Supply Co. All these entities are called “DISCOMs”.

8. Consequent to these reforms, the assessee company was incorporated on 20.4.1995 with the object of carrying on the business of purchasing, selling, transmission and wheeling of power in the State of Orissa. The duty of the assessee was to purchase powers from power producers and to sell and transmit the same to the distributing Companies. Accordingly, the assessee is having the twin object of trading as well as the transmission and wheeling of powers. In order to achieve this duty, the assessee obtained bulk supply agreement with the distribution companies thereby purchasing power from the producers, transmitting powers to DISCOMs stated supra.

9. While so, the Central Act namely, the Electricity Act, 2003 was enacted in order to further carry out the reforms in the power sector. One of the important features of this act was that there has to be a separate entity for which all the activities i.e., for generation, trading, transmission and distribution. This enactment envisages an independent transmission entity having responsibility of power transmission or wheeling of powers and for

that purpose to own and develop transmission work in a planned manner. In the line of that requirement of Electricity Act, 2003, Orissa Government issued a Notification dt.9.6.2005 namely, the Orissa Electricity Reforms (transmission and related activities) Scheme of 2005 in order to divide the function of GRIDCO i.e., the assessee into two companies whereby the assessee is to restrict itself to trading. The transmission and wheeling of powers was to be done by a new and independent Company. Accordingly, a new Company was created with the name and style “Orissa Power Transmission Corporation Ltd (OPTCL) and the entire transmission undertaken by the assessee Company was transferred to new Company and the assessee was left with the trading undertaking only without any assets. To support this contention a notification dt.9.6.2005 made in the Gazette which is placed at pages 52 to 63 ot the PB filed by the assessee. In this notification various definitions are given. Consequently a bulk supply agreement was entered into by the assessee and three distributing companies on 24.5.1999 and another agreement was entered into with CESCO dt.19.9.1999 modified under the obligation of transmission and wheeling of power stood transferred to OPTCL. This is fortified by clauses 11 sub-clause (1) and (ii) which is placed at page 58 of the PB filed by the assessee. This specifically provides that bulk supply agreement stands modified and all the obligation of transmission towards DISCOMS stated therein shall be that of the transferee i.e., OPTCL. As per the notification placed at page 54 of the PB filed by the assessee, the transferee i.e, ,OPTCL shall be responsible for all contracts, rates , deeds , schemes , arrangements, agreements and other items of whatever nature relating to the transmission undertaking, transferred to the transferee i.e., OPTCL to which the transferor i.e., the assessee was a party subsisting or having effect of transfer in the

same manner as the transferor was liable immediately before the transfer. Consequent to gazette notification dt.9.2.2005 and coming into existence of OPTCL, an independent company engaged in transmission and wheeling of power, the bulk supply agreement stood automatically modified and the assessee has no role to transmission of power to the distributing companies. This is borne out by the invoices being raised thereafter by the OPTCL directly on the DISCOMS and the copies of such invoices are also placed at pages 96 to 203 of the PB filed by the assessee.

10. A Notification dt.6.6.2006 issued by the Orissa Electricity Regulatory Commission clarified that OPTCL and GRIDCO i.e., the assessee are separate companies with different licenses and revenue requirements have been approved separately, so also the transmission charges and the bulk tariff. It was further clarified by this notification that two separate bills have to be issued by the two separate licensees for the services rendered by each of them. Under these facts and circumstances, the privity of contract for payment for transmission charges are between the OPTCL and DISCOMs. Therefore, the Assessing Officer cannot hold that the assessee is liable to deduct tax at source in respect of transmission charges merely because the basis of the escrow arrangement for payment whereby the sale proceeds of DISCOMs are coming into the bank account of the assessee.

11. The Assessing Officer has not been able to appreciate the purpose and the procedure for which escrow agreement was created. The escrow arrangement does not in any way change the privities of the contract between the OPTCL and DISCOMs in respect of transmission and wheeling charges. The escrow arrangement is made only to secure payment. The privities of contract are between the OPTCL and DISCOMs in respect of transmission and wheeling charges. Since the entire sale proceeds of the

transporting companies were escrowed in to bank account of the assessee company and this arrangement was continued since 1999 and there was procedural hassle in the banking it is thought fit that let entire sale proceeds of DISCOMs continue for the time being to go to the bank account of the assessee and there from it will be transferred to the bank account of OPTCL on behalf of DISCOMs. This arrangement of securing payment from escrow account in no way creates the liability of the assessee company towards OPTCL nor does it create the privities of contract between the assessee and the OPTCL. The OPTCL having coming into existence as an independent company doing transmission work, getting tariff determined by its own, charging the transmission charges directly to DISCOMs. DISCOMs also participating in determination of tariff thereby there is no reason to assume that the assessee company is making payment to the OPTCL on its on account. To support this aspect, the assessee has placed at pages 139 to 189 of the PB where objections have been filed by these distributing companies before the Orissa Electricity Regulatory Commission on the issue of determination of transmission and wheeling charges and Orissa Electricity Regulatory Commission has determined the transmission charges to bepaid by DISCOMs to OPTCL. In this view of the matter, it is clear that the distributing companies have participated in tariff determination and on that basis OPTCL was to issue bills on DISCOMs . The bills for sale of power are being raised by the assessee on the DISCOMs whereas the bills for transmission and wheeling charges are being raised by the OPTCL on DISCOMs. The order of the Orissa Electricity Regulatory Commission clarified that distributing companies could argue that the power is being purchased is inclusive of transmission charges.

12. In view of the above stated undisputed facts, the reliance placed bythe Assessing Officer on the bulk supply agreement 1999 is nothing but misplaced as he has failed to take cognizance of the developments thereafter particularly the amendments made in the year 2005 by way of gazette notification dt.9.6.2005 wherein a new company was created and the bulk supply agreement stands divided into two parts of purchase and sales is to the assessee and the transmission and wheeling charges is on the account of OPTCL. Consequently the four DISCOMs are supposed to make separate payment for purchase of power to the assessee and for the transmission and wheeling charges to the OPTCL. In this view of the matter, the learned CIT(A) was not justified in upholding the order of the Assessing Officer that the assessee has failed to deduct tax at source on transmission and wheeling charges u/s.194-I and consequent addition u/s.40(a)(ia) in making consequential addition of this amount. To fortify this proposition, the balance sheet and profit & loss account of the assessee are coming into play and the assessee has neither shown any income on this account nor any expenditure. The assessee is just holding the payment which comes into its bank account from the distributing companies because of the escrow arrangement and the same goes to the OPTCL and as such there is no income in the hands of the assessee. This is nothing but a transfer of payment by overriding effect. The assessee at best can be said to be acting as banker just to secure the payment and money is not diverted elsewhere by DISCOMs.

13. The Assessing Officer’s finding that the payment of transmission charges is rent within the meaning of provisions of Section 194-I of the Income-tax Act,1961 is not correct. This is clear from the provisions of Section 194-I of the Income-tax Act,1961 that were introduced by Finance Act,1994. Initially it was limited to the payment of rent whatever name called

in any lease or sub-lease or tenancy or any other agreement or arrangement for use of any land or building. The scope of this provision was explained by the Taxation Laws (Amendment) Act, 2006 to include payment for the use of machinery or plant or equipment or furnitures or fittings. The analysis of provisions of Section 194-I clearly shows that “rent” by whatever name called used the words “any other agreement or arrangement”” will have its meaning from the word “rent”. The legislation has used the word “rent” and thereafter inserted the words “whatever name called”. The effect of this will be that if the different nomenclature has been used for the word “rent” in any agreement or arrangement which in effect is payment like rent, rent that will be considered as payment covered by Section 194-I. Hence, the words “other agreement or arrangement” shall also have the same meaning which is akin to or in the nature of “rent”. In support of this proposition, the assessee has relied on the following judicial pronouncements.

(1) United Airlines v. Commissioner of Income-tax [2006] 287 ITR 281 (Del)
(2) CIT v. Asiana Airlines, 175 Taxman 77 (Del).
(3) CIT v. Japan Airlines , 325 ITR 298 (Del).
(4) VODAFONE ESSAR LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX 135 TTJ 385 (Mumbai)

14. The Legislation has initially used the words “any lease, sub-lease and tenancy” as these words have to be given a meaning in case the interpretation is to balance that the meaning or interpretation of “any other agreement or arrangement” are independent of these three words namely “any lease , sub-lease and tenancy”, then there would not have any need to insert these words “any lease , sub-lease and tenancy” in the Section. It would have been sufficient then to say “rent” means any payment by whatever name called ……”. The words agreement and arrangement being so comprehensive would have

automatically included lease agreement, a sub-lease agreement or a tenancy agreement. Similarly there would not have been any need to use the word “rent”. It would have been suffice to say “any payment by whatever name called but any agreement or arrangement for use of any …….”. Despite the above referred judgments and without application of principles of esjudim jeneresis, the nature of payment has to be akin to a rent to fall within the purview of Section 194-I. The CDBDT Circular 736 dt.13.2.96 clarifies that where an issue is raised about the deduction of tax at source in respect of the payment made by film distributor to a film exhibitor owning a cinema theatre. In the said Circular it is stated in Para 3 that (iii), the distributor does not take cinema building on lease or sub-lease or tenancy or under any agreement of similar nature. The word used is “under any agreement or similar nature” clearly demonstrates the intention of the Legislation that it is something akin to lease or sub-lease or tenancy. Further in para (i) it has also been stated that (i) The exhibitor does not let out the cinema hall to the distributor. This clearly shows the intention of the legislation.

15. CBDT Circular No.5 dt.30.7.2002 is on the issue of payment to hotel for room hired, wherein the CBDT has considered and made it clear that first, it needs to be emphasized that the provisions of section 194-I do not normally cover any payment for rent made by an individual or Hindu undivided family except in cases where the total sales, gross receipts or turnover from business and profession carried on by the individual or Hindu undivided family exceed the monetary limits specified under clause (a) or clause (b) of section 44AB. Similar would be the case, where a room or set of rooms are not earmarked, but the hotel has a legal obligation to provide such types of rooms during the currency of the agreement. On going through the above Circular, it is clear that the payment made under a rate contract is not an

agreement or arrangement to fall within the provisions of Section 194-I. This circular also confirms the fact that any agreement or arrangement referred to in Section 194-I is akin to rent. Had it not been so, there would not have any need to exclude the rate contract agreement on the basis of logic given in the said Circular. Accordingly, the provisions of Section 194-I cannot be interpreted de horse the intention of the legislation as manifested by using the words “lease, sub-lease or tenancy’’.

16. That apart the payment of transmission and wheeling charges in any case is not payment for the use of plant and machinery. The payment alleged to have been made by the assessee to OPTCL is for the use by the assessee of any machinery or equipment of OPTCL. The responsibility of the transmission and wheeling of power is that of OPTCL. The transmission and wheeling of powers have to be carried out by the OPTCL and plant, machinery and equipments will be used by OPTCL and not by the assessee. As per the provisions of Section 43(3) of the Income-tax Act,1961, ‘’plant” includes books, scientific apparatus and surgical equipment used for the purposes of the business. There can be clients who visits the office of Chartered Accountant and Advocate and seeks advice of a legal issue, the concerned Advocate or CA for giving his advice refers to the books in his library and got paid for the advice by the client. In such circumstances, it cannot be said that the payment as made by the Client for the use of the books which falls within the definition of “rent” u/s.43(3) of the Act and if so such payment will be covered by Section 194-I the payment for use of the books. Similar would be the case where a Doctor carried diagnostics test or operation by using surgical apparatus stood covered within the definition of ““plant’’ u/s.43(3) of the Act. In the present case on hand, the assessee company has not used the equipments transmission lines itself. All these transmission lines which are

being maintained operated and serviced by the OPTCL , OPTCL has the responsibility of transmitting or wheeling the powers. By no stretch of imagination it can be said that such payment made by the assessee is for the use of plant or machinery. Accordingly such payment will not fall within the provisions of Section 194-I as in this case the equipment was used by OPTCL to transmit the powers for which he gets it paid for. It is not the case where the assessee or the distributing companies have used the equipments. The following judicial pronouncements will fortify this position.

1. VODAFONE ESSAR LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX, 135 TTJ 385 (Mumbai)
2. Jaipur Viduty Ltd., v. DCIT (123 TTJ (JP) 888
3. CIT v. NIIT Ltd (318 ITR 289)
4. Dell International P. Ltd. (305 ITR 37 (AAR)
5. CIT v. Bharati Cellular Ltd., (319 ITR 139)

17. The payment of transmission charges will not also come within the purview of Section 194 as for technical services, since operation and maintenance of transmission lines and use of these lines for transmitting powers does not resulted into any technical services being rendered to the assessee. The provisions of Section 194J will be applicable when the technology or technical knowledge is made available to others and not where use of technical system services are provided to others. Rendering of services by allowing use of technology system is different than charging fees for rendering technical services. In case where any facility is provided by use of machinery or where equipments are installed with a view to earn income by allowing customers to avail benefit by using of such equipment the same does not mean technical services to the customers for a fee. This proposition is fortified by the following judicial pronouncements:

(i) CIT v. Bharati Cellular Ltd., (319 ITR 139)
(ii) **Skycell Communications Ltd. v. Deputy CIT [2001] 251 ITR 53 (Mad)**
(iii) Asia Satelite Telecommunicatin v. Dierctor of IT (320 ITR 340)

(iv) VODAFONE ESSAR LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX, 135 TTJ 385 (Mumbai)

18. The provisions contained in Section 194C are also not applicable to the facts of the case as detailed hereunder. The provisions of Section 194C laid down that liability to deduct tax at source is in respect of work carried out in pursuance of contract between the contractor and the specified person. This Section 194C is inserted in the statute w.e.f.1.4.1972.The word ‘’work’’ was not been defined in the statute. But vide Circular No.86 dt.29.5.1972 it was clarified that the provisions of Section 194C would apply in relation to work contracts, labour contracts and section 194C would not apply to contract for sale of goods. It was also stated therein that the contract for rendering professional services by lawyers efficiency services, engineers, architect, consultants etc., shall not be regarded as contracts for carrying out any work u/s.194C of the I.T.Act. Thereafter another Circular No.93 dt.26.9.1972 clarified that service contracts which do not involve carrying out of any work would be outside the purview of Section 194C of the Act. Accordingly since inception there was no dispute that all service contracts are outside the purview of Section 194C of the I.T.Act. Later on Circular no.681 dt.8.3.1994 was issued by the CBDT specifying that all types of contracts including transport contracts, service contracts, advertising contracts, broadcasting contracts, recasting contracts, labour contract, material contracts and work contracts will be covered within the provisions of Section 194C.

19. The said Circular was the subject matter of challenge by way of a writ petition before the Court. Hon’ble Mumbai High Court in the case of Chamber of I.T. consultants and others v. CBDT (209 ITR 660) held that the circular No.681 is illegal to the extent that the tax has to be deducted from the amount payable to lawyers, CAs etc., towards their professional fees. Similarly in the case of Bombay Goods Transport & others v. CBDT (210 ITR

136), the circular was declared to be illegal as it applies to the transport contracts. In the case of advertising agency of India & another v. CBDT (210 ITR 125)(Mumbai), it was held that the said circular is illegal as it applies to the advertising agency. Consequent to the above judgments, the provisions of the IT Act was amended by Finance Act, 1995 w.e.f. 1.7.1995 so as to include fees for professional and technical services within the purview of deduction of tax by inserting a new Section 194J. Further the scope of Section194C was extended by inserting Explanation III by including the specific items within its provision. Accordingly by inserting Explanation III to Section 194C w.e.f. 1.7.1995, the provisions relating to deduction of tax at source has been enlarged by bringing some of the service contracts within the provisions of Section 194C. In a way by inserting Explanation III the word “work” in Section 194C has been extended so as to include four types of service contracts within the purview of section 194C. Therefore, Section194C now covers only four types of services beyond what was original enacted i.e., advertising, broadcasting and telecasting including production of programmes for such broadcasting or telecasting, carriage of goods and passengers by any mode of transport other than by railways, and catering. Undisputedly the transmission and wheeling charges are not covered in this amendment. Accordingly it could not be said that transmission charges or wheeling charges require deduction of tax at source u/s.194C of the Act.

20. The scope of Section 194C has been analyzed by the Hon’ble Supreme Court in the case of Birla Cement v. CBDT (248 ITR 216 (SC) holding that the key words of Section 194C are "carrying out any work". A word or collection of words should fit into the structure of the sentence in which the word is used or collection of words found in the context of Section 194C carrying out any work indicates doing something to conduct the work to completion or

something which produces such result. Applying the above ratio of the judgments to the present facts, the transmission and wheeling charges unless there is specific amendment making the same covered within the scope as has been done by insertion of Explanation III in Section 194C, the payment of transmission and wheeling charges would be outside the purview of Section 194C as well. This proposition is further fortified by the judgment of Hon'ble Mumbai High Court rendered in the case East India Hotel & another v. CBDT & another delivered on 6.3.2009 in W.P.No.2104 of 1994.

20. The Department is of the view that the assessee is a limited Company of Government of Orissa engaged in bulk supply of electricity to distributing companies. The primary function of the assessee involves purchase of electricity from generating concerns and selling the same to the distribution companies which in turn make the electricity available to the consumers. The assessee purchases power from generators at the point of their delivery on high voltage of 440KVA and supply such powers to DISCOMs at 11KVA by downgrading the transmission lines. As the assessee purchases powers from generators outside the State and inside the State of Orissa for all the stepping down of power from 440 KVA to 11 KVA and for transmission of powers from the end of the generator to the end of DISCOMs the assessee uses the transmission lines and facilities of the Companies like power Corporations of India and Orissa Power Transmission Company Ltd. The assessee pays purchase price of power to the generators and it receives sale price from DISCOMs from selling of power. In view of the Department, the assessee pays transmission and wheeling charges to transmission companies for the use of the transmission facilities. The electricity being in the regulatory sector, the price of electricity are not determined by market force but determined by the regulatory authorities. The Central Electricity

Regulation Commission determines inter State purchase and/or sale of electricity and different State Regulatory Commission determines such prices within their respective States. The Orissa State Electricity Regulatory Commission determines the purchase and sale prices of electricity inside the State of Orissa. For the Assessment Year 2008-09, the assessee had paid in total an amount of ₹512.44 Crores to different transmission companies as transmission charges and wheeling charges. The Assessing Officer during the scrutiny proceedings has taken the view that the above payments made by the assessee are towards use of equipments for transmission of powers to DISCOMs thereby attract the provisions of TDS liability u/s.194-I. Since the assessee Company has failed to deduct tax and deposit such TDS, the Assessing Officer after giving reasonable opportunity to the assessee decided that the amount of ₹512.44 Crores to be added to the total income of the assessee. To support the claim of the Assessing Officer the Department heavily relied on the applicability of the TDS provisions u/s.194-I to the above payments. More stress is laid on the meaning of “rent” contained in Section 194-I of the I.T.Act. It was further submitted by the learned DR that the word “rent” has been defined in the Section and it will have the meaning assigned to it in the definition. The definition of “rent” in other enactments like the Transfer of Property Act or the Indian Succession Act or the meaning of the word in common use or common parlance is of no relevance and should not influence the judgment as what can fall within the ambit or the word “rent” One has to look within the definition to find the answer. Lease, sub-lease and tenancy are the common arrangements for renting land and premises and certainly there is transfer of significant rights to the lessee and the tenant. However, the definition has not stopped with these agreements but has made the field open for “any other agreement or arrangement”. It is argued by the

learned DR that the contention of the assessee that “any other agreement or arrangement” should have the similar nature or character as lease, sub-lease or tenancy following maxim *ejusdem generis* is not correct. The mute question is that it is necessary or required to interpret “any other agreement or arrangement” in the manner of lease, sub-lease, ignoring its plain and natural import. The necessity to depend upon the maxim ejusdem *generis* will arise in relevant situations. Hon’ble Calcutta High Court rendered in the case of CIT v. Anglo India Jute Mills Co., 202 ITR 104 (Cal), where the applicable schedule was as under

> “Electrical machinery - switch gear and instruments, transformers and other stationery plants and wiring and fittings of electric light and fan installations.”

Hon’ble Calcutta High Court concluded that the words “other stationery plant” have to take its meaning from the prior words “other stationery plant”. Here “other stationery plant” refers to stationery plant ,generators has to be understood in terms of specified electrical machinery. The learned DR has also relied on other judgement of Hon’ble Calcutta High Court rendered in the case of CIT v. The Statesman Ltd, 198 ITR 582 (Cal), wherein the expression “Sales promotion” was preceded by the words “advertisement and publicity” in section 37(3)(b) and Hon’ble Calcutta High Court has applied the maxim *ejusdem generis* to understand the meaning of sales promotion. Even though sales promotion is a general word and It does not have open ended implication. The preceding word helps to specify its meaning, but “any other agreement or arrangement” does not call for any restriction on its import in the context of the definition. Therefore, the meaning of “any other agreement or arrangement” is quite clear and unambiguous and it is not necessary to restrict its scope by invoking the maxim *ejusdem generis*. Hon’ble Andhra Pradesh High Court as well as Delhi High Court has not found it necessary to

rely upon the above maxim *ejusdem generis* while interpreting the words "any other agreement or arrangement" occurring in section 194-I. In the case of Krishna Oberoi v Union of India, 257 ITR 105 (AP), Hon'ble A.P. High Court was concerned with the applicability of section 194-I to the charges paid for use and occupation of hotel rooms. The court observed that the expressions "any payment", by whatever name called, and any other agreement or arrangement" occurring in the definition of the term "rent" in the Explanation to section 194-I have the widest import. According to Black's Law Dictionary, the word "any" is often synonymous with either "every" or "all' its generality may be restricted by the context in which that word occurs in a statute. Hon'ble Supreme Court in Lucknow Development Authority V.M.K. Gupta (1994) 80 Comp. Cases 714 (SC); AIR 1994 SC 787, dealing with the use of the word "service" in the context it has been used in the definition of the term in clause (o) of section 2 of the Consumer protection Act has opined that the word "any" indicates that it has been used in a wider sense extending from "one to all". In G. Narsingh Das Agarwal V. Union of India (1967) 1 MLJ 197, the court opined that the words "any" means "all" except where such a wide construction is limited by the subject matter and context of the statute. Hon'ble Patna High Court in Ashiq Hasan Khan V. Sub-Divisional Officer, AIR 1965 Patna 446 and Chandi Prasad V. Rameshwar Prasad Agarwal, AIR 1967 Patna 41, has held that the word "any" excludes "limitation or qualification". In State of Kerala V. Shaju (1985) Ker LT 33, Hon'ble Kerala High Court held that the word "any" is expressive. It indicates in the context "one or another" or "one or more", "all or every", "in the given category"; it has no reference to any particular or definite individual, but to a positive but undetermined number in that category without restriction or limitation of choice. Thus, having regard to the context in which the expressions "any payment" and

"any other agreement or arrangement" occur in the definition of the term "rent", it only means each and every payment made to the petitioner hotel under each and every agreement or arrangement with the customers for the use and occupation of the hotel rooms. The above observation of the Constitution Bench of Hon'ble Supreme Court supports the stand of the Department because the word "rent" in its wider sense may mean payment made by a licensee also for the use of land or buildings and not necessarily a payment made by a tenant or a lessee. If such a wider meaning can be given to the word "rent", even in the absence of a definition of the word "rent" in a statute, we do not find any weighty or sound reasons to limit the meaning of the word "rent" occurring in the Explanation to section 194-I only to payment made by a tenant or a lessee for the use of land or buildings demised to him. We say this because, the term "rent" is defined in the Explanation in a wider sense. The learned DR contended that it is a well recognized principle governing interpretation of the statute that only if there is ambiguity in the terms of the provision, recourse must naturally be had to well established principles of construction, but it is not at all permissible for the court first to create an artificial ambiguity and then try to resolve the ambiguity by resort to some general principle." The decision of Hon'ble A.P High Court (supra) on the widest import of "any other agreement or arrangement" is quite clear and unambiguous. The contention of the assessee is that the maxim *ejusdem generis* was not before the High Court and that there was physical use of rooms in that case does not in any manner make the ratio of the decision inapplicable to the present case. Hon'ble A.P High Court has clearly pointed out why it is not necessary to take recourse to principles of interpretation in this case. The facts in the case of United Airlines v. CIT, 287 ITR 281 (Del) are quite close to the present case. In this case, Hon'ble Delhi High Court was

dealing with the applicability of section 194-I to the landing and parking charges paid by an Airline. Hon'ble Court observed as under: -

> *"A perusal of the above provision shows that the word "rent" as defined above has a wider meaning than "rent" in common parlance. It includes any agreement or arrangement for uses of land."*
>
> *"The word "rent" in the aforesaid definition has a wider meaning, as already stated above, than in common parlance and it amounts to a legal fiction. Legal fictions are well-known in law. For instance, section 43(3) of the Income-tax Act defines "plant" to include a book. Normally, in common parlance "plant" means a factory but section 43(3) includes books within the meaning of the word "plant" for the purpose of depreciation."*
>
> *"In our opinion, the definition of the word "rent" in Explanation (i) to section 194-I is very clear and the plain meaning of that provision shows that even the landing of aircraft or parking aircraft amounts to user of the land of the airport. Hence, the landing fee and parking fee will amount to "rent" within the meaning of the aforesaid provision, even if it could not have such a meaning in common parlance."*

21. The learned DR contended that this decision makes it abundant clear that the definition of "rent" is a deemed one creating a legal fiction about the meaning of rent for the purpose of section 194-I. It vouches any payment for use of specified assets under any arrangement. The contention of the assessee against the applicability of the ratio of the above judgment in terms of non-consideration of the principle of *ejusdem generis* and physical contact with the ground is without merit. They have not gone to the principle of *ejusdem generis* as it was not required. Secondly, the use of assets in section 194-I, nowhere limits to the physical use of assets which is possible in land and not possible in case of high voltage transmission lines. The decision of Hon'ble Delhi High Court in the case of United Airlines v. CIT, 287 ITR 281 (Del) has been reconfirmed in the cases of CIT, Delhi- XVII v. Asiana Airlines, 175 Taxman 177 (Delhi) and CIT v. Japan Airlines Co. Ltd. [180 Taxman 188

(Delhi)]. The assessee has also raised contentions for the restrictive meaning of “for the use of” where such a right comes from possession and control of the asset in conjunction with lease, sub-lease and tenancy arrangements. But the definition is open ended and includes any possible arrangement for the use of specified assets. There is no need to restrict the meaning of “use” in terms of physical use. The fact that the charges paid by Airlines for use of runway and parking bay attracts provision of section 194-I implies that any common use of the specified assets would be covered under the section. Certainly, the payment which in recent times carry the nomenclature “user fee” will be included in the ambit of 194-I as long as they involve the use of the specified assets. Relying on this analogy, the learned DR submitted that the present case in hand transmission charges were paid for use of transmission net work owned by OPTCL and hence, these payments are liable to deduction of tax at source u/s.194-I in the light of the decisions stated supra.

22. Section 194-I of the Act deals with the provision of TDS from rent. The assessee is using the machinery, plant and equipment of OPTCL and PGCIL for the purpose of supply of electricity. In the explanation rent is defined to mean any payment, by whatever name called under any arrangement for the use of machinery, plant or equipment. It is undisputed that in order to supply electricity to the distribution companies, the assessee has to use the machinery, plant and equipment belonging to OPTCL and PGCIL. As regards the assessee’s contention that cost of power and cost of transmission at every stages are determined by OERC, the fact that OERC determines the cost of power and cost of transmission does not in any way come to friction with the taxability of such payments or receivables. It is immaterial whether the receipts and payments are routed through the P & L Account or not when

it is already established that the payment is in the nature of “rent”. Thus the transmission charges paid to OPTCL and TGCIL or NTPC cannot be treated as reimbursement of expenses by the assessee company and other users of transmission network.

23. Countering the contention of the assessee that transmission charges paid to OPTCL has not been claimed as expenses nor as income earned by it when payments made by the assessee to OPTCL is only reimbursement of the expenses, the learned DR submitted that it is immaterial whether the receipts and payments were routed through the P & L account or not when the payments are in the nature of “rent”. The learned DR has fairly admitted that the assessee has not shown amount received from DISCOMs as receipts and the amount paid to OPTCL as payments. However, in the case of TGCIL a payment of ₹145.30Crores and in the case of NTPC Vidyut Vyapar Nigam Ltd., a payment of ₹3.93 Crores has been shown as transmission and wheeling charges by the assessee. Therefore, to that extent the assessee cannot say that it has not claimed transmission charges as expenses.

24. Considering the applicability of provisions of Section 194-I in view of the fact that the plant and equipments have been used by OPTCL for transmission and not by the assessee and also in the examples given by the learned AR of the assessee regarding books in the library being used by an Advocate or a Chartered Accountant while providing consultancy service or use of surgical equipments by a Doctor while providing treatment to a patient, the learned DR contended that in such a case Section 194-I may not be applicable, however the said services will be covered by Section 194-J.

25. On careful consideration of the rival submissions and contents of the Paper Book and the case laws relied on by both the parties, it is noticed that the assessee in its ground Nos.2 and 3 has raised the issue of payment of

₹367.06 Crores made to DISCOMs was not in its own account but on account of the DISCOMs. In ground Nos.4,6 and 8, it has raised the issue that in any case there were payments and the payments made by it to OPTCL of ₹145.38 Crores are not covered by the provisions of Section 194-I and as such, the Assessing Officer has gone wrong in making the disallowance u/s.40(a)(ia) of the I.T.Act. Therefore, here the provisions of Section 194-I are to be considered in order to ascertain whether they are applicable in respect of payments made on account of transmission charges of power. In the view of the Assessing Officer , as can be seen from the assessment order, is that the transmission/wheeling charges are for the use of equipments and as such liable for deduction u/s.194-I. The Assessing Officer has alleged wheeling charges are left by the transmission units for use of their network and as such payment of transmission charges and wheeling charges are payments in the nature of “rent” and the assessee was duty bound to deduct tax at source on such payments. The learned CIT(A) has confirmed the order of the Assessing Officer on this issue by rejecting the contentions of the assessee on the principles of *ejusdem generis.* The learned CIT(A) has also held that for applying the provisions of Section 194-I there is no need to restrict the meaning of term “physical use”.

26. The contention of the learned AR of the assessee is that the meaning of the word “rent” cannot be given such wide meaning to include every type of payments de hors the meaning of the words lease, sub-lease or tenancy. The learned AR of the assessee has tried to make out a case on the basis of the reasoning given by some of the Circulars issued by CBDT but we do notice that while interpreting the meaning of the word “rent” in the case of payment of hotel in Circular No.5 dt.30.7.2002, for payments made by film distributor to a film exhibitor owning a cinema theatre in Circular No.736

dt.17.2.1996 restricted meaning has been given to the word “rent”. However, in view of the judgments referred to by the learned DR in the case of United Airlines v. Commissioner of Income-tax [2006] 287 ITR 281 (Del), CIT v. Japan Airlines Co. Ltd. [180 Taxman 188 (Delhi)] and Vodafone Essar Ltd v. DCIT [135 TTJ 385 (Mum), we are of the considered view that the word “rent” will have wider meaning and accordingly, the contention of the learned AR of the assessee on this aspect is rejected.

27. However, after hearing t he argument of the learned AR of the assessee on the issue of use of equipments of OPTCL and not by the assessee, we are of the considered view that this issue has not been understood in the right perspective by the Revenue. A question to be decided as to whether the payment made by the assessee, if any, as has been alleged towards transmission and wheeling charges to OPTCL is for the use of such equipments, the assessee purchases power in bulk and sells the same to the distributing companies. This supply is affected through the transmission lines of OPTCL. In our considered view, the assessee merely obtains a service from OPTCL which has got the infrastructure in the form of equipments and transmission lines. In such circumstances it cannot be said that the assessee is using the equipments involved itself in transmitting the powers. The OPTCL was created as an independent company to carry out the work of transmission and wheeling of power. In fact, after the notification dt.9.6.2005 the assessee has transferred assets to the OPTCL and OPTCL is carrying out the transmission and wheeling by using its equipments for the same. It gets price for the same in terms of unit transmitted by the DISCOMs and the number of units transmitted at the rate as determined by the OERC. The payment is for service of transmission of power and not for use of plant and/or equipments. Transmission of power is the main business of the OPTCL.

For use of its infrastructure including equipment and transmission lines owned by it, it is immaterial in discharging its function OPTCL using its equipments. All the cost of maintenance of transmission lines, equipment, employees cost and other cost risk is on account of OPTCL.

28. The words used in relation to “any equipment” if understood in the broad sense of availing of the benefit of an equipment but it indicate that there must be some positive act of utilisation, application or employment of the equipment for the desired purposes. The advantage taken from sophisticated equipment installed and provided by another cannot be said that the customer uses the equipment. It would be a case of a customer merely making use of the facility without himself using the equipment. If the customers did nothing to add for the equipment did not exercise any possessory right in relation thereto it can only be said that he made use of the facility created by service provider who was the owner of the entire network and related equipments. This principle will also address the issue and examples given by the learned AR of the assessee in respect of use of books by an Advocate while providing consultation service to the clients. When a client walks into the room of an advocate and the advocate consulting the books and provides the advice and charges the client for the services rendered by him, it cannot be said that the client had made payment for use of the books. It is the Advocate who has used the books and not the client. Similar is the case where a Doctor carrying out operation. In that case the Doctor has used the equipment but not the patient. The situation would have been different had a person walks into the room of an Advocate and seeks permission of the Advocate to allow him to use his books for consideration and the person reads the books and makes payment for the same, in that situation it can be said that the payment has been made for use

of the books. In the present case on hand it is clear that OPTCL is providing power transmission services and accordingly OPTCL is using its equipments and machineries and it cannot be said that the assessee company has used the equipment and machineries of OPTCL. The person availing facility i.e., the assessee or the DISCOMs have made the payment for the services made by the OPTCL. The equipments have been used by the OPTCL for providing service of transmission. In view of these facts, we are of the considered view that Section 194-I of the I.T.Act is not applicable in respect of the transmission and wheeling charges. Similarly in the case of Power Grid Corporation of India Ltd and the NTPC Vidhyut Nigam Ltd, who are using the equipments and machinery and it cannot be said that the assessee Company has used the equipments and machineries. The assessee has made the payment for the services provided by them. This view is fortified by the judgment of ITAT, Mumbai Bench rendered in the case of VODAFONE ESSAR LTD. vs. DEPUTY COMMISSIONER OF INCOME TAX 135 TTJ 385 (Mumbai), wherein somewhat similar issue has arisen and it was held therein paragraph 10 of the order, as follows :

> “10. The question is whether the payment made by the assessee as national roaming charges to the other service providers is for the use of such equipment. We may refer to an analogous situation. Let us take for example a lathe. If a person takes a piece of steel rod for turning or grinding by a lathe, he would approach the owner of the lathe to carry out the work. It is the owner of the lathe who, while carrying out the turning or grinding job, would use the lathe and the person who requires the lathe owner to do the job is not the person who can be described as the user of the lathe. The service of turning or grinding the steel rod is rendered by the lathe owner by using the lathe for which charges are paid by the person who wanted the steel rod to be turned or

> ground. It is not possible to say that it is this person who "used" the lathe. All that he paid for was for the service rendered by the lathe owner. A similar situation arises in a very common example of the "Atta Chakki". The person who brings the wheat cannot be said to be the person who used the Chakki. What he paid to the owner of the Chakki was for the service of grinding the wheat into Atta. These may be commonplace examples but they do not put the point less effectively for that reason. The subscriber of the assessee who is entitled to use the roaming service merely obtains a service from the other service provider, say IDEA or Airtel, with whom the assessee has a GSM Roaming Agreement. He has neither seen the equipment nor has any direct contact with the same. All that he knows is that because he has the roaming facility in his cellphone, he can make a call from Delhi to any other place even though he is registered with the assessee only in Mumbai. He is the person who is entitled to the roaming service which is provided by the other service provider with whom the assessee has a working arrangement and for that reason he cannot be said to use the equipment involved in providing the roaming facility. Even if we assume for the sake of argument that the subscriber is the person who makes use of the equipment, the liability to deduct tax would be on him and not on the assessee."

29. This view also gets support from various CBDT Circulars on applicability of Section 194-I which have been referred to supra. We also rely on the judgment of AAR in the case of Dell International P. Ltd. (305 ITR 37 (AAR). It was held by the AAR that the word used "in relation to the equipment" is not to be understood in the broad sense of availing the benefit of equipment, but it indicated that there must be some positive act of utilisation, application, or employment of the equipment for the desired purposes. It has further held that an advantage taken from a sophisticated instrument installed and provided by another, it cannot be said that the customers use the equipment. It would be a case a customer making use of

facilities without himself using the equipment. In that view of the matter, we are of the considered view that the provisions of Section 194-I are not applicable to payments of transmission and wheeling charges and the Assessing Officer was not justified in invoking the provisions of Section 40(a)(ia) of the I.T.Act for disallowance of the transmission and wheeling charges.

30. The stand of the Department that this Tribunal has held in the case of DISCOMs in ITA Nos.191,192,193,194, 283,282 and 284/CTK/2010, wherein in paragraph 7 of the order, the ITAT observed that DISCOMs have not used the equipments of OPTCL. GRIDCO has used the equipment for delivery of the electricity to DISCOMs. The DISCOMs paid charges only to GRIDCO as per their agreement with GRIDCO and GRIDCO has paid to OPTCL as per the rate fixed. Bills are raised by the OPTCL in the name of DISCOMs . Basing on these observations, the ITAT concluded that the transmission and wheeling charges paid to the OPTCL towards use of equipments for transmission of power from the generators to DISCOMs and thereby comes within the purview of Section 194-I of the I.T.Act. This observation of the Tribunal will have no impact in the case of the assessee because the assessee has not participated in those proceedings. Hence, the mere obiter regarding that by the Tribunal cannot be used against the assessee. Since we have categorically stated supra that the assessee has never used the equipments of transmission lines of OPTCL but it has only asked the OPTCL to transmit power from generator to DISCOMs by using the services of OPTCL , the assessee has not used the transmission lines which are the assets of OPTCL as per its form notified in the gazette stated supra.

31. The learned AR of the assessee has also argued on the issue of applicability of Section 194J and 194C on the transmission charges. But the

Assessing Officer has invoked the provisions of Section 194-I only for making the disputed disallowance and therefore, we have not adverted to the issue of applicability of Section194J or Section 194C.

31. Since we have held that Section 194-I is not applicable in respect of transmission charges and consequently, no disallownce can be made u/s.40(a)(ia) in respect of transmission charges, the other grounds raised by the assessee including ground No.2 to the effect that it has not availed any services from the OPTCL and on the ground it is a merely debit and credit entry without any claim of expenditure and groundNo.10 regarding OPTCL being a loss making Company and as such, having no tax implication, is only academic and hence, they are not adverted to.

32. For the reasons discussed in the foregoing paragraphs, we are of the considered view that the Assessing Officer was not justified in invoking the provisions of Section 40(a)(ia) of the I.T.Act for disallowance of the transmission and wheeling charges. Hence, we direct deletion of the said disallowance.

33. In the result, the appeal of the assessee allowed.

Sd/- Sd/-

(K.K.Gupta) (K.S.S.Prasad Rao)
Accountant Member Judicial Member

Date: 17th November,2011

H.K.Padhee,
Senior Private Secretary.

Copy of the order forwarded to :

1. The Appellant:
2. The Respondent:
3. The CIT,
4. The CIT(A),
5. The DR, Cuttack
6. Guard File (in duplicate)

True Copy, By order,

Senior Private Secretary.