sas

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.336 OF 2013

The Commissioner of Income Tax (TDS),
900B, Smt. K.H. Mittal Ayurvedic
Hospital Building, Charni Road (W),
Mumbai – 400 002. ..Appellant.

V/s.

M/s. Maharashtra State Electricity
Distribution Company Limited,
Prakashgad, Anant Kanekar Marg,
Station Road, Bandra (East),
Mumbai 400 051. ..Respondent.

Mr.P.C.Chhotaray for the appellant.

Mr.J.D. Mistri, Senior Advocate I/b Mr.Atul K. Jasani for the respondent.

CORAM : S.C.DHARMADHIKARI AND A.K. MENON, JJ.

RESERVED ON : 22ND APRIL, 2015

PRONOUNCED ON : 8TH MAY, 2015

JUDGMENT (PER A.K.MENON, J.)

1. By this appeal, the revenue has proposed the following questions to be substantial questions of law :-

(a) Whether on the facts and in the circumstances of the case and in law, the Income Tax Appellate Tribunal was justified in holding that the payments of wheeling and transmission

charges made by the assessee to entities like Maharashtra State Electricity Transmission Company Limited (MSETCL) and Power Grid Corporation of India Limited (PGCIL) for the use of transmission lines or other infrastructure i.e. plant, machinery and equipment could not be termed as rent under the provisions of section 194I of the Act and consequently the provisions of sections 201 and 201(1A) could not be applied ?

(b) Without prejudice to the above, whether on the facts and in the circumstances of the case and in law, payment of WT charges to entities like MSETCL and PGCIL should have been treated as fees for technical services and tax should have been deducted at source u/s.194J of the Act from the payments ?

(c) Whether on the facts and in the circumstances of the case and in law, the Income Tax Appellate Tribunal was justified in holding that payments made for use of transmission lines could not be considered as rent under section 194I without properly appreciating the factual and legal matrix brought out by the Assessing Officer in the assessment order wherein, in respect of payment of WT charges made without deduction of tax at source made without deduction of tax at source, the Assessing Officer had treated the assessee in default under section 194J as well as 194I which was modified by the CIT(A) as payment covered under section 194I only and the same was not appealed further by the Revenue as there was no loss of revenue as the rates of TDS for the sections 194I and 194J were the same ?

(d) Whether on the facts and in the circumstances of the case and in law, the Income Tax Appellate Tribunal was justified in

mechanically following the earlier order of the ITAT in the case of Chhattisgarh State Electricity Board without appreciating that the law in this new area was evolving as is evidence from the recent decision of the Authority of Advance Ruling dated 27th August, 2012 in the case of Ajmer Vidyut Vitran Nigam Limited as reported in (2012) 24 Taxmann.com 300 where it has been held that WT charges are fees for technical services ?

In our view, the questions are of some importance. We have, therefore, proceeded to admit this appeal. With the consent of both sides we have taken it up and heard it finally.

2. The relevant facts are as under:-

The assessee is a company established by the Government of Maharashtra incorporated on 31st May, 2005 pursuant to the provisions of Sections 131 of the Electricity Act of 2003. It came into being pursuant to the reorganization of the Maharashtra State Electricity Board on or about 24th January 2005 when the Government of Maharashtra notified four companies which are as follows:-

a) MSEB Holding Company Limited
b) Maharashtra State Electricity Transmission Company Limited (MSETCL);
c) Maharashtra Power Generation Co. (MAHAGENCO);
d) Maharashtra State Electricity Distribution Company Limited (MSEDCL).

3. The assessee purchases power from various sources and distributes and sells to its consumers. The assessee has entered into an agreement for the purpose of transmission of power titled Bulk Power Transmission Agreement (BPTA). Separate BPTAs have been entered into by the assessee with MSETCL and Power Grid Corporation of India Limited (PGCIL) for transmission of electricity and by using their transmission system from generation point to distribution point across the different regions. It transpires that on 18th December, 2008 a survey was conducted by the revenue authorities at the assessee's premises to verify compliance of the provisions in the Income Tax Act, 1961 (the Act) relating to tax deduction at source (TDS). In the course of the survey, it was noticed that the assessee had made payments to MSETCL and PGCIL under the BPTAs without deducting tax at source. Accordingly, the Assessing Officer (AO) had found that the payment was in the nature of fees for technical services.

4. The assessee had contended that in the present case, there is no question of payment of Wheeling charges and/or Transmission charges (hereinafter referred to '***WT charges***' being treated as a technical service since there was no human service element involved. The only activities are of transmission of the electricity produced to different locations. The AO rejected the

assessee's contention that the WT charges includes technical manpower services and it actually involves an intricate system of checking, managing of transmission losses, metering, management of interconnection points, managements of delivery voltages as per grid code connection conditions, management of protection systems including maintenance of the metering system regarding non involvement of human part. The AO found that the tax was to be deducted on all payments under Section 194J of the Act at the rate of 11.33%. Furthermore and without prejudice to these considerations though the assessee was liable to deduct tax under section 194J of the Act, the AO was of the view that TDS on payment of WT charges was required to be deducted under Section 194-J of the Act. Admittedly, he did not elaborate the rate of deduction of tax under Sections 194I or 194J of the Act.

5. According to the revenue, the total amount of WT charges paid during the year upto the date of Survey on 18th December, 2008 was ₹1554.10 crores and the tax ought to have been deducted amounting to ₹176.08. The assessee was treated as assessee in default, pursuant to Section 201(I) of the Act. It was contended that the assessee was liable to pay interest under section 201(1A) quantified at ₹8.2383 crores.

6. Being aggrieved by the assessment order the assessee

filed an appeal before the Commissioner of Income Tax (Appeals) who dismissed the appeal of the assessee. The Commissioner preferred an alternate interpretation to that of the AO, namely, the WT charges constituted “rent” and thereby inviting the application of Section 194-I of the Act. According to the Commissioner, WT charges were payable for utilisation of the machinery and equipment and although it is described as rent, the WT charges are equivalent to payment of rent for use of the facilities of MSETCL and PGCIL. He ruled that no regular rental or hiring agreement was necessary and the expression “any agreement or arrangement” referred to in the Explanation to Section 194-J would bring the WT charges within the definition of rent. According to the Commissioner the BPTA was an agreement or arrangement under which rent was payable. The BPTAs were certainly used to a specified effect and the assessee derived a right to utilise the assets of MSETCL and PGCIL. The Commissioner thus upheld the order of the AO.

7. Being aggrieved, the assessee filed an appeal before the Income Tax Appellate Tribunal. The Tribunal allowed the appeal of the assessee by relying on the Tribunal, Mumbai 'H' Bench order dated 30th November, 2011 in the case of Chhattisgarh State Electricity Board (CSEB) being ITA No.20 to 23/BLPR/2010 and an order dated 17th November, 2011 in the case of GRIDCO Ltd. in ITA No.404/CTK/2011 passed by the Cuttack Bench. The Tribunal

observed that both the parties, namely, the revenue and the assessee had agreed that the decision in the case of CSEB as also the decision of the Cuttack Bench in the GRIDCO case covers the issue since the facts were similar. The Tribunal extracted portions of its order in the case of CSEB. It appears that the CSEB along with other bulk beneficiaries, the M.P.State Electricity Board (MPSEB) and Gujarat State Electricity Board (GESB), the Maharashtra State Electricity Board (MSEB) collectively "the Boards" entered into bulk transmission agreement/s in which it was agreed inter alia that, PGCIL is desirous of transmitting energy from the Central Sector Power Station(s) to the bulk power beneficiaries (the Boards) and that the said Boards are desirous of receiving the same through the Power Grid Transmission System (PGTS) on mutually agreed terms and conditions. In this respect, the Boards are to pay to PGCIL monthly charges computed in the manner set out in the formula. It provided for a fixed charge which was divided between the beneficiaries in the ratio of the power evacuated by a beneficiary to the total sale of power from that delivery point. It is stated that the transmissions lines are in the physical control of PGCIL and these are maintained and operated by the PGCIL and so far as the assessee is concerned, its interest in the transmission lines is restricted to the fact that electrical power purchased by the assessee, along with electric power purchased by other bulk power beneficiaries were simultaneously transmitted through these

transmission lines. The Tribunal set out the modus operandi which reveals that the power available at delivery points, collectively for all the Boards is loaded for transmission on these transmission lines or power grid and each Board is allowed to utilize the power to the extent allocated to it. The Tribunal found that each of the purchasers' entitlements could not be physically identified and that a particular beneficiary is only allowed to use that unidentified portion of power. It is not the transmission of power from one point to another but availability of power on the entire power grid or transmission lines that enables the beneficiary to utilize the power to the extent of allocation. The Tribunal came to the conclusion that the utilisation of the transmission lines by the CSEB cannot be considered to be rent.

Submissions on behalf of the Revenue

8. On behalf of the revenue, Mr. Chhotaray submitted that important and substantial questions of law arise from the order of the Tribunal. On the one hand, it is submitted that the payment of WT charges amounts to rent and tax ought to have been deducted at source under section 194-I of the Act. Alternatively, Mr. Chhotaray submits that payment of WT charges should have been treated as fees for technical services and tax should have been deducted under section 194-J of the Act. Sections 194-I and 194-J read as under :-

*" **194-I.** Any person, not being an individual or a Hindu undivided family, who is responsible for paying to [a resident] any income by way of rent, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, [deduct income-tax thereon at the rate of—*

[(a) two per cent for the use of any machinery or plant or equipment; and

(b) ten per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings:]]

***Provided that** no deduction shall be made under this section where the amount of such income or, as the case may be, the aggregate of the amounts of such income 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 [one hundred and eighty thousand rupees]:*

***[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 income by way of rent is credited or paid, shall be liable to deduct income-tax under this section.]*

Explanation.—For the purposes of this section,—

[(i) "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together)

any,—

(a) land; or

(b) building (including factory building); or

(c) land appurtenant to a building (including factory building); or

(d) machinery; or

(e) plant; or

(f) equipment; or

(g) furniture; or

(h) fittings,

whether or not any or all of the above are owned by the payee;]

(ii) where any income 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 income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]

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.]

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."

9. According to Mr. Chhotaray, whether WT charges are treated as rent or fees for technical service, tax should have been deducted at source under Sections 194I or 194J, as the case may be. He submitted that since the rate of tax under section 194I and 194J is the same, the choice was only which section to attribute the deductions to. He defended the interpretation of the AO and the Commissioner. While canvassing the revenue's case, Mr. Chhotaray submitted that the tariff is paid by the assessee under the BPTAs as determined by the Maharashtra Electricity Regulatory

Commission (MERC). He submitted that the tariff was fixed and it should be treated as “rent”. Making reference to Section 194-I, Mr. Chhotaray submitted that the explanation to Section 194I clarifies that “rent means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of land, building, plant, machinery, equipment etc either separately or together. Thus, according to Mr. Chhotaray, the MSETCL and PGCIL, transmission system fits the description of equipment and machinery and the payment being made for the said use of the system amounted to rent. According to him, the assessee's business included transmission of electricity to its customers against payment of charges and in terms of the BPTAs between the parties, the assessee had paid WT charges to MSETCL and PGCIL for transmission of electricity by using the transmission lines from the generation point to distribution point. He submitted that the assessee has paid advance tax in anticipation of income. Although the total sum of Rs.1,554.10 crores was paid towards the transmission charges upto December, 2008 and the relevant assessment years it had paid Rs.1,961.20 crores, TDS in respect of the said amounts to Rs.176.08 crores which the assessee had failed to deduct and pay. Accordingly, the assessee is visited with interest liability under section 201(1A) to the extent of Rs.8.238 crores whereby the totaling to Rs.181.2983 crores. He faulted the reasoning of the Tribunal and submitted that

since the assessee was already paying advance tax, tax should have been deducted at source while making payment of WT charges and not having deducted tax, the assessee is liable to the said amount along with interest.

10. In the alternative, Mr. Chhotaray submitted that facility for transmission of electricity through the transmission lines amounted to payment of fees for technical services. With reference to the definition to Section 9(vii) of the Act, he contended that any income by way of fees for technical service was liable to be taxed and and tax was to be deducted at source after 1st April, 1996. Explanation 2 of Section 9(vii) provides that 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".

11. Mr. Chhotaray further submitted that the Electricity Act in the statement of objects and reasons sets out the history of the electricity supply industry in India. He took us through the basic structure of the electricity industry and highlighted the fact that

Electricity Act, 2003 was intended to consolidate laws relating to generation, transmission, distributing and trading and use of electricity, apart from generally taking measures for development of the industry including rationalisation of tariffs, thereby permitting competition and promoting the interests of the consumers. Mr.Chhotaray then submitted that by virtue of formation of different entities, the business of distribution of electricity is now looked after by the assessee which is subjected to income tax and, therefore, the deduction of tax was mandatory. It is not as if the assessee were exempted from the ambit of taxation statutes and as such any payment made for use of the transmission lines and the transmission system to the owners of the system and by whatever name called, it will amount to payment of rent or fees for technical service.

12. He then relied upon definitions of “Open access” and “Wheeling” being transactions under section 2(47) and 2(76) of the said Act and a few other provisions of the Act as discussed hereafter. He also submitted that under Part II of the Electricity Act, the national electricity policy was laid down and further submitted that the State Transmission Utility (STU) was obliged to provide non discriminatory open access through these transmission systems for use (i) by any transmission licensee such as the assessee on payment of transmission charges or (ii) any consumer or as and

when open access is provided by the said MERC on payment of charges. According to Mr. Chhotaray, the principle underlying the WT charges was a 'Cost Plus' formula and whatever the MERC decides will form the basis for determining the tariff and upon payment of which the assessee is bound to deduct tax at source.

13. Mr. Chhotaray then relied upon the decision of the Delhi High Court in the case of **United Airlines V/s. Commissioner Income Tax & Ors.** reported in **(2006) 287 ITR 281 (Delhi)**, wherein the Division Bench of the Delhi High Court had occasion to consider whether landing fees and parking fees for aircraft amounts to rent. In the case of United Airlines, the Delhi High Court was called upon to consider whether use of the air field for landing of Aircraft and thereafter parking of Aircraft which would give rise to landing and parking fees could be defined as “rent”. The Delhi High Court was of the opinion that definition of word “rent” in Explanation (i) of section 194-I is very clear and the plain meaning of the word “rent” shows that the landing or parking of aircraft amounts to user of the land of the airport hence landing fees and parking fees were classified as “rent”.

14. Mr. Chhotaray then relied upon the decision of the Supreme Court in the case of the **Commissioner of Income Tax Vs. Podar Cement Pvt. Ltd. and Ors.** reported in **(1997) 226**

ITR 626 (S.C.) which deals with the interpretation of taxing statutes. He submitted that in construing a taxing statute, the construction beneficial to the assessee could be taken only in case of ambiguity. He submitted that only if two interpretations are possible one favorable to the assessee may be preferred but in the present case, according to Mr. Chhotaray, only one interpretation was possible viz. the WT charges was 'rent'. He then referred to the decision of Supreme Court in the case of **S. P. Gupta Vs. Union of India and others** reported in **1982 SC AIR 232** and submitted that the interpretation of the statutory provisions must keep pace with changing concepts and values to the extent its language permits and does not prohibit. Accordingly he submitted the term 'Rent' must be interpreted so as to include the WT Charges paid by the assessee to MSEDCL and PGCIL. He quoted from the said decision and submitted that the language of the statutory provision is not a static vehicle of ideas and concepts and as ideas and concepts change the Court is called upon to perform a creative function and inject flesh and blood into the dry skeleton provided by the legislature by process of dynamic interpretation and invest it with meaning which would be harmonious law. Relying upon this observation Mr. Chhotaray submitted that the WT charges must be equated to rent.

15. He then relied upon the decision of the Supreme Court

in **CIT Vs. Bharti Cellular and Hutchison Essar Telecom Ltd. (2011)** reported in **(2011) 330 ITR 239** wherein it was held that as far as technological matters were concerned, it would justify remanding matters for determination with technical assistance rather then merely examining the contract. This case is relied upon in support of his alternate submissions that if the WT charges are not treated as "rent" it would nevertheless amount to "fees for technical services".

16. Mr.Chhotaray then relied upon an Advance Ruling dated 27th August, 2006 in the case of Ajmer Vidyut Vitran Nigam Ltd. and sought to submit that by the advance ruling the Chairman had determined that the transmission and surcharge were technical charges and therefore, amenable to provisions of section 194-J. Be that as it may, we are not convinced that an advance ruling should be cited as a precedent. Mr. Chhotaray continued in his attempt to persuade us to hold that tax was deductible at source, whether the WT charges were found to be rent or fees for technical services.

The Assesee's Submissions

17. On the other hand Mr. Mistri, learned Senior Counsel appearing on behalf of the Respondent submitted at the outset that the revenue's appeal does not raise any substantial question of

law. According to Mr. Mistri the questions posed by the revenue could not have arisen from the order of the tribunal. He submitted that before the tribunal, the revenue had proceeded only on the basis that tax was deductible at source under section 194I and there was no mention of Sections 194K or 194J being applicable.

18. He submitted that in the case of Chhattisgarh State Electricity Board no appeal had been filed by the revenue and the revenue accepted the decision of the tribunal which was followed by the tribunal in the case of the present assessee as well. He further submitted that even an expanded definition of the expression “rent” cannot destroy the original meaning of the word. Even assuming the WT charges are to be considered as rent, the charge or levy must ex-facie bear characteristics of rent as normally understood. He submitted that the revenue's contention that electricity distribution involved lending of machinery and equipment is completely unsustainable. He relied upon the principle of contextual interpretation and requested us to read the word 'rent' in context of the Electricity Act. He differentiated the decision in United Airlines where the assessee's argument was that it has used land as a runway. The assessee in that case had used the runway to land its Aircraft and utilise Airport services and to park the aircraft in course of commercial flying operations. He submitted that specified services had been utilised in that case

whereas in the present case, there is no specific determinable usage of any equipment. Merely drawing power and carrying power through transmission lines and transmission system would not amount to renting up equipment or its charge or rent. He submitted that the Maharashtra State Electricity Board which was the erstwhile body which controlled the generation and distribution of power had been restructured into four entities. The erstwhile board, after enactment of the Electricity Act, 2003 had undergone comprehensive market reforms, namely, MSEB holding company. Maharashtra State Power Generation Co. Ltd., Maharashtra State Electricity Transmission Co. Ltd. (MSETCL), Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) which is the present assessee. All of these commenced operations on 6th June, 2005. It was further notified that with effect from 17th February, 2005 MSETCL would operate as State Transmission Utility for Maharashtra. Mr.Mistri has relied upon the order dated 27th August, 2006 passed by MERC pursuant to which the Electricity Act recognized transmission as two distinct activities that which deals with (a) facilitation of transmission by the transmission utility and (b) the access to the electricity by the transmission licensee. The order specifies that the transmission was licenced activity which is regulated as per licence conditions. The expression “Transmit” and “Wheeling” were distinct activities defined in the Electricity Act under section 2(74) and 2(76). It envisages that the transmission

charges would be determined in keeping in mind inter se state transmission systems so as to ensure adequacy of the revenue requirements of the transmission licensee.

19. Mr.Mistri then took us to an earlier decision of the tribunal in the case of Chhattisgarh State Electricity Board. In support of his submission he relied upon decision of the Division Bench of this Court in Income Tax Appeal No.269 of 2013 wherein the Division Bench observed that if the revenue omits to challenge another decision rendered on the same issue by filing an appeal, it must be construed that the revenue had accepted the order by not filing an appeal and, therefore, the revenue should not challenge a subsequent order on the same issue. That in case an appeal is preferred from the subsequent order (despite earlier order not being appealed against), the Memorandum of appeal must indicate reasons as to why the appeal is being preferred in later case. Relying upon the said order of this Court Mr.Mistri stated that the present appeal is not maintainable. We are however of the view that it would not be appropriate to shut out the revenue's case at the threshold on this preliminary ground especially in view of the fact that the issue raised has wide ranging effect although it would largely be relevant for the purpose of the present assessee. We have therefore proceeded to hear Mr.Mistri on merits as well.

20. Mr.Mistri relied upon the decision of the Supreme Court in **Commissioner of Income Tax Vs. Narendra Joshi (2002) 254 ITR 606** in which the Supreme Court observed that the revenue not having challenged the correctness of two decisions of the Gujarat High Court must be bound by the principle laid down therein.

21. He then relied upon the decision of **Berger Paints India Ltd. Vs. Commissioner of Income Tax (2004) 266 ITR 99 (SC)** and submitted that once a contention of an assessee has been accepted by the department by not challenging the correctness of the decision, it is not open for the department to challenge a decision on a similar issue in the case of another assessee without "just cause". In our view, although the facts in that case pertain to the Excise and Customs duty, the ratio will be applicable to the present case as well. In yet another case relied upon by Mr.Mistri that of **Commissioner of Income Tax vs. N.S. Getti Chettiar (1971) 82 ITR 599** the Supreme Court considered the meaning of word "gift" and whether gift amounted to transfer of property. In that case the facts pertain to portion of immovable property which was subject matter of a registered deed. The question was therefore whether by allotting greater share to the other members of the co-parcener and what they were entitled to the assessee could be held to have made "gift". The Hon'ble

Supreme Court held that partition did not affect any transfer as generally understood in law and did not therefore fall within the definition of “gift” under the Income Tax Act. Thus, the test which would apply, according to Mr.Mistri, is whether the WT charges would amount to rent as generally understood in law. He submitted that the transaction in question must takes its colour from the main clause that is to say the WT charges for transmission of the Electricity through the State Transmission Utility (STU) should take the colour of “rent”. We are inclined to agree with the submission of Mr.Mistri for more than one reason as hereafter set out.

22. Mr.Mistri then referred to the decision of the Supreme Court in case of **K.Govindan and Sons and Vs. Commissioner of Income Tax** reported in **(2001) 247 ITR 192** where the Supreme Court was concerned with the meaning of word “Regular Assessment”. The Court was of the view that the expression “Regular Assessment” would be taken to mean the first or initial assessment under section 147. Thus, the meaning has to be contextually derived. In the case of **Vania Silk Mills vs. CIT (1991) 191 ITR 647** the Hon'ble Supreme Court construed the expression 'capital gains' and expression 'transfer' under section 2(47). In that case the definition of 'transfer' under section 2(47) was found to be an exclusive definition and therefore extended to events and transactions which would otherwise not amount to

transfer. It found that if the Legislature intended to extend the definition to any “extinguishment of any rights” it would not have included the obvious instances of transfer, sale, exchange etc. It was held that the expression “extinguishment of rights” therein will have to be confined to the rights on account of transfer and cannot be extended to mean extinguishment of rights without such transfer. He further submitted that in **CIT Vs. Gwalior Rayon Manufacturing Co. Ltd. (1992) 196 ITR 149** the Supreme Court had observed that it is settled law that expressions used in a taxing statute would ordinarily be understood in the sense in which it is harmonious to the object of the statute. In order to adopt legislative intent, the contextual meaning has to be ascertained and given effect to and in the present case if the expression “rent” was to be considered, WT charges in the course of carriage of electricity could not be equated to rent.

23. Mr.Mistri also took us through the judgment of the Hon'ble Supreme Court in the case of **Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. & Others** reported in **(1987) 1 SCC 424** in which the Court was considering the contextual construction and considering what amounted to “prize chits”. In that case the Court observed that if the Legislature intended to enlarge the meaning of the words and phrases so as to take in ordinary, popular and natural sense of

words and included meaning by using words it would do so by using the word 'includes'. The interpretation, therefore, must depend on the text and the context as famously observed in the said decision as follows ; "*we may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important". That interpretation is best which makes the textual interpretation match the contextual."* The Supreme Court went on to observe that the statute is best interpreted when we know what is intended.

24. Mr.Mistri then relied upon the decision of **CIT vs. Shree Mahalaxmi Transport Company** reported in **(2011) 339 ITR 484** wherein the Gujarat High Court held that transactions in question being in nature of contracts for shifting of goods from one place to another would be covered as works contracts, thereby attracting the provisions of Section 194C of the Act. Similarly, in CIT vs. Swayam Shipping Services Pvt. Ltd. (2011) 339 ITR 647 wherein the Gujarat High Court held that contract of transportation of goods belonging to assessee through other vehicles was not payment of rent. Yet again in the case of **CIT Vs. Singapore Airlines Ltd.** reported in **(2013) 358 ITR 257** the Madras High Court held that payment for use of land under lease or agreement with reference to use of land for landing and parking aircraft was not rent.

25. This decision runs contrary to the decision of Delhi High Court in case of United Airlines (supra) which held that in the case of United Airlines the definition of “rent” covered landing and parking fees. The Court had not taken into consideration the facts projected in the Singapore Airlines case in which there is not only use of land but also services rendered by the airport authority in providing facility for landing including the navigational facilities and the payment is measured with reference to various parameters which were given by the International Airport Authority in various circulars. It was further observed that Hon'ble Delhi High Court's decision in United Airlines had not considered any of these aspects while dealing with the issue of “Rent” to whether charges would fit into definition of 'rent'. The Delhi High Court merely interpreted the provisions of law to come to a conclusion that when the wheels of an aircraft coming into an airport touches the surface of the air field, there is immediate use of the land.

26. The Madras High Court expressed disagreement with the decision of Delhi High Court and held that in the case of United Airlines the department neither produced any material before the Court on the nature of service rendered for any arrangement or agreement in the nature of a lease deed or licence deed for the use of land so as to characteristic of payments to be called as rent. According to the Madras High Court the explanation to Section 194I

contemplated systematic use of land specified, for a consideration under an agreement which carries the characteristic of lease or tenancy. It was held that mere use of land for landing and payment charged therefore is not use of land but for various services including navigational assistance and this would not automatically bring the transaction and the charges within meaning of either lease or sub-lease of tenancy attracting definition of 'rent'. Thus, the Madras High Court rejected the case of the revenue and confirmed the order of the tribunal. Adverting to this decision Mr. Mistri submitted that in the present case as well there was no justification in questioning the decision of the Tribunal.

27. Even otherwise he submitted that the alternate case under Section 194J was never pleaded. It was never case of the revenue that payment of transmission charges amounted to fees for technical services. Mr.Mistri submitted that perusal of the order of the Tribunal would reveal that no such case of payment of fees for technical services was ever made out. This is purely an afterthought.

28. Mr.Mistri also relied upon circular No.1 of 2008 dated 10th January, 2008 issued by the CBDT wherein the department clarified that in respect of cold storage facilities, section 194C would be applicable and provisions of section 194-IR are not

applicable to the payment of charges to the customers on account of cooling charges to the cold storage owners. The clarification came to be issued with reference to applicability of section 194-I to the cooling charges paid by various customers to cold storage owners. Mr.Mistri submitted that the revenue erroneously had taken a view that payment of WT charges by the assessee amounted to "rent". Likewise, he assailed the revenue's alternate contention that payment of transmission charges amounted to fees for technical services.

29. We have heard both learned counsel extensively. Mr. Chhotaray took us through genesis of the Electricity Act in an attempt to establish the revenue's case that the transmission charges that were paid were in fact the charge for using the transmission lines which constitute the STU. He has equated the same to machinery and equipment. We are unable to agree with Mr. Chhotaray. In our view the payment of WT charges neither amounts to rent nor fees for technical services. It is necessary and appropriate that we consider the definitions and the provisions of the Bulk Power Transmission Agreement. We have before us a copy of the BPTA dated 12th January, 2009 between the assessee, MSEDCL and MSETCL, a copy of which Mr.Mistri had provided us and at our request to Mr.Chhotaray as well. This is an admitted document. Both sides are agreed on its existence and contents.

30. The recitals deal with the distribution and supply of electricity to its consumers are quite revealing. The relevant ones are reproduced below as under :

> "(a) MSEDCL is a Distribution Licensee engaged in Distribution and Supply of Electricity to its consumers in its area of supply within the State of Maharashtra through MSEDCL's distribution business (hereafter referred to as "MSEDCL")
>
> (b) MSETCL is Transmission Licensee (and State Transmission Utility) within State of Maharashtra who is authorised to establish and operate transmission lines which forms Intra-State Transmission System (InSTS of Maharashtra).
>
> (c) MSEDCL agrees to use the transmission capacity allotted to it as per the terms and conditions of this Agreement and to pay the charge for the same in accordance with the terms of this Agreement, and,"

31. From the aforesaid recitals, it is clear that the assessee is a distribution licensee engaged in distribution of electricity to the consumers and MSETCL is a transmission licensee of the said STU during the licence period MSEDCL is authorised to operate the transmission lines which forms the Intra-State Transmission system. (ISTU). MSEDCL has allotted to MSETCL certain transmission capacity. MSEDCL exploits this transmission capacity allotted to it and distributes power in its area of supply, no doubt for

consideration. As far as relationship inter se MSEDCL and MSETCL is concerned, this is a Principal to Principal arrangement. The agreement refers to terms and conditions for distribution of electricity. The amount of consideration payable by the transmission licensee, namely, MSETCL is based on a tariff that is determined by MERC from time to time by issuing Tariff Orders on the terms and conditions of Tariff Regulations 2003. MSETCL gets its rights as Transmission Licensee by means of what is known as a 'Transmission License' which is the authority granted to it by MERC. It is thus seen that MSETCL is merely a licensee of the STU / transmission system. However, by virtue of clause (iv) of the BPTA it is MSETCL's obligation to maintain the transmission system in accordance with section 40 of the Electricity Act, 2003. The assessee MSEDCL a distribution license receives operating procedures from MSETCL with respect to dealing with operation interfaces. This includes round the clock communication between the two for handling defaults, disputes, safety rules and procedure, seeking permits for the work of planning even partial or total shut down, monitoring of transmission and general maintenance.

32. MSETCL as transmission licensee is to provide for superintendence for maintenance and provide skilled personnel for respective tasks. Clause 8 provides that tariff, billing and payment shall be governed by procedure and rules provided by the

STU and the tariff issued by MERC. The charges for use of Inter State transmission shall be determined on monthly basis and STU shall raise monthly bills comprising monthly transmission charges, late payment of surcharge, outstanding amount, if any. It is therefore, seen that the WT charges payable is not fixed amount describable to rent for use of any system. The transmission charge will fluctuate depending on MERC transmission licence conditions and the transmission license issued to MSEDCL and supply and demand parameters. The payment by assessee MSEDCL cannot be termed as rent for simple reason that the payment is not being made only to utilise any identified equipment or machinery or plant let alone land, building, furniture or equipment.

33. Mr.Chhotaray's contention that WT charges should be construed as rent notwithstanding its nomenclature has no merit. He had contended that whatever the nomenclature, the nature of charge will amount to rent. This in our view is incorrect since the charge in the present case is not only for accessing transmission lines of the STU but it is to access upto 8,672 mega watts during financial year 2008-09 in case of this agreement (See clause 4 (iv) of BPTA dated 12th January 2009), subject to availability of the elements of the transmission system. The charge payable by MSEDCL is determined by MERC and not MSETCL. Ownership is a non issue considering the Explanation to Section 194I MSEDCL

merely collects the amount in its capacity as a licensee of the system based on the license granted to it by MERC. Furthermore, we find that capacity that the assessee is entitled to utilise for given financial year is limited to what would be accessed at different times to different extents.

34. The utilisation of the STU was also subject to availability of electricity at inter connection points as provided in the agreement. It is pertinent to mention that under clause 8.2.2 the tariff transmission charges and other related charges are to be mentioned as per various orders of MERC and to be paid to said STU and the State Load Despatch Centre (SLDC). Thus, the payments are not made to any one entity.

35. The payment being made to any one or both of the entities will not be payment of rent. It is not possible to construe the same as rent even adopting to changing times and technology as suggested by Mr. Chhotaray. Moreover, as stated above MSETCL is merely a transmission licensee. The expression of transmission licensee is defined in schedule I of the definition of BPTA and which reads as under:-

> *" 'Transmission Licensee' or 'Licensee' means the entity to whom the Transmission License is granted by MERC. "*

36. A grant of such licence does not, therefore, entail that the licensee MSETCL will be vested with the right to collect WT charges as directed by MERC. The argument of the revenue that payments to MSETCL amounts to rent cannot be accepted. According to the Black's Law Dictionary, 'Rent' is defined as consideration paid for periodical use or occupancy of property. Various types of rent are contemplated such as ceiling rent, crop rent, ground rent, etc. Even taking the widest possible definition of rent, in our view the WT charges cannot be considered as rent. It is well settled that the Court may in its discretion construe the legislative provisions so as giving effect to the intended use and applying the test of contextual interpretation. We are of the view that the expression 'rent' used in Section 194-I does not apply to WT charges or any other part thereof.

37. In our view, the expression rent would also entail an element of possession. In each of the instances contemplated by the explanation to Section 194-I, we see in them an element of possession, be it land, building (including factory building), land appertaining to a building, plant, equipment, furniture or fittings. The person using it has some degree of possessory control, at least momentarily, although it cannot entrust the user title to the subject matter of the charge. Even the mere right to “use” is vested with an element of possessory control over the subject matter. In the

present case, WT charges are bereft of such possessory control and hence in our view, completely outside the purview of the Explanation to Section 194-I.

38. While holding as above we are conscious of the decision of the Delhi High Court judgment in the case of United Airlines (supra) which has been relied upon by the revenue. However, we have also to bear in mind the decision of the Madras High Court in the case of C.I.T. V/s. Singapore Airlines (supra) and while respectfully differing from the view of the Delhi High Court in the case of United Airlines (supra), we find ourselves in agreement with the view taken by the Madras High Court inasmuch as, the decision of United Airlines (supra) did not take into account the navigational services, etc. which go along with the landing of an aircraft and payment of charges for parking the aircraft thereof. Right from the moment a flight is permitted to land at a particular airport, a process is set into motion, to guide the aircraft to the runaway, for successful landing and after the aircraft had come to a halt it is led to a parking space allotted to it once again with the navigational help. It is only thereafter that the aircraft is said to be parked till it resumes it flight. As an example Mr.Mistri narrated the use of a toll road (instead of highway). If use of a toll road could be characterised as use of land, it would be an extreme view if we held that toll to be paid for use of a toll road would be subject to

deduction of tax at source only because it could also be characterised as rent for use of land. Such an extreme view will not be justified under any circumstances, particularly when we consider the context in the Peerless case (supra) and those line of cases. Thus, quite apart from the fact that the revenue has not challenged the decision of the Tribunal in the previous years, we believe that the issue involved deserved consideration on merits which is why we have proceeded to devote a good deal of attention to these aspects of the matter.

39. The Hon'ble Supreme Court has also shown us some direction in this behalf. While interpreting the expression 'rent', the applicability of Section 194-I must be gathered from whether the WT charge draws its colour from the basic meaning of the expression 'rent'. It is seen from the decision of the Supreme Court in Singapore Airlines (supra) that the meaning of 'rent' must be understood in the context in which they are used. In the present set of facts, it is not possible to equate WT charges payable MSETCL with rent. On facts it is seen that the MERC order dated 27th June, 2006 deals with MSEDCL's contentions, apropos the methodology proposed by MERC. The transmission charges contemplated by MERC includes the cross subsidisation of transmission charges across licensees when found to be uneconomical and uncompetitive. It is further observed that MERC has considered

pooling of transmission charges during bulk power transmission from one licensee to another licensee. It is after considering all these aspects that a composite charge method for any such transmission was adopted. Thus, it is seen that the methodology for determining of the transmission tariff could not be determined in a mechanical manner as if the charge was only for use of the STU. The MERC while passing this order on transmission charges had received various objections some, inter alia, supporting the composite tariff, some against. However, we need not divert our attention to the details of pricing formula finally adopted.

40. There is nothing on record to support the revenue's contention that the WT charges assumes the character of rent. We are in agreement with Mr.Mistri that the expression 'rent' must be conceptually understood. The concept of rent under the Income Tax Act does not encompass, in our view, the WT charges payable by the assessee especially when the assessee is discharging a public function. The expression of 'Transmission charges and / or “Wheeling charges' entails distribution of electricity in the area of the Corporation and they cannot be subjected to provisions of Section 194-I of the Act. We, however, clarify that this is restricted to the case of the assessee in view of the public function to be undertaken by it, as a result of the restructuring of the Maharashtra State Electricity Board.

42. Now having dealt the revenues arguments on the applicability of section 194-I, we now consider the revenue's contention that if WT charges are not rent, it would amount to payment of fees for technical services. The revenue has contended that MSETCL is deemed to have provided technical services to MSEDCL in consideration of which WT charges that are being paid. This contention is also unsustainable for the following reasons.

43. The MSEDCL is a licensee holding a transmission license which entitles it to non discriminatory use of the transmission lines. It uses the STU as and when required to draw electricity from the said transmission utility. MSEDCL will also access electricity by means of transmission lines as contemplated by the expression 'transmit' idefined in 2(74) of the Electricity Act. MSEDCL as a transmission licence may also engage any “Wheeling” operations as defined in Section 2(76), meaning thereby that the distribution system and facilities of the MSEDCL in its capacity as transmission licensee may be allowed to be used by other persons for conveyance of electricity in exchange for payment of charges to be determined under Section 62 of the Act. Section 62 provides for determination of the tariff of the MERC for transmission of the electricity and wheeling of electricity. Thus 'Wheeling' contemplated some form of permissive use of the STU by a third party for

consideration determined by MERC. This consideration termed 'Wheeling charge" would neither be 'rent' nor fees for technical services.

44. It is pertinent to mention here that section 62 of the Act provides that the Commission may, in the case of supply of electricity fix a maximum ceiling of the tariff, in an attempt to promote competition amongst the distribution licensees. Thus, the very concept of the charge for transmission of electricity and wheeling of electricity, as the case may be, is subject to the tariff that will be determined by the MERC in public interest. Hence it is incomprehensible that the tariff passes the test as fees for technical services. Once again applying the principles of conceptual interpretation to the tariff to be fixed for WT charges of electricity, it cannot be interpreted to mean fees for the providing technical services. Under the open access system, it is the MSEDCL which will be availing of the said transmission facility. No 'service' is being provided by the MSETCL or the STU. No doubt, MSEDCL as transmission licensee is required to provide superintendence, maintenance and repairs to the system. However, no such service is rendered by the MSETCL to MSEDCL. MSETCL is obliged to maintain the system by value of operation of law under the Electricity Act. MSEDCL accesses the STU and distributes electricity passing through the STU. Our views stand fortified by the very fact

that the revenue itself is confused and unsure as to the nature of the charge. The focus of the revenue is only the requirement of deduction of tax whether under Section 194-I or Section 194-J. This approach is erroneous. The revenue contends that the WT charges could be rent or fees for technical services but in our view it is neither. Wheeling charges represent the charge for permitting use of the STU by persons other than the Distribution licence. The Transmission charges simply constitute fees for availing of the said transmission utility to be used by open access concept for distribution of electricity to licensees and consumers. In view of the above discussion, we are of the view that the WT charges are neither rent nor fees for technical services. Keeping the said interpretation into effect into effect, we find that while interpreting the expression 'rent' in the present scenario, we must bear in mind that taking into account the functioning of MSEDCL which is a public utility, it will not be appropriate to equate the transmission charges or wheeling charges to rent or fees for technical service.

45. We are constrained to observe that although the revenue has taken up an alternative argument that wheeling charges on account of transmission amount to fees for technical service for the very first time in this appeal. Before the Tribunal, this submission is conspicuous by its absence although the Commissioner had taken this alternate view. We have heard Mr.

Chhotaray on this aspect and we have decided it on merits. We may note that it will not be permissible for either the revenue or the assessee to take such up contentions in Income Tax Appeals purporting to raise substantial questions of law when such issues were not before the Tribunal. We also find that the revenue itself has considered and recognized the impracticality of imposing Section 194 to cooling charges levied by a Cold Storage facility.

46. Before parting with this judgment, we must note that the Electricity Act of 2003 was enacted partly on account of deteriorating performance of the State Electricity Boards on account of various factors, including difficulties in power tariff fixation by the erstwhile electricity boards which were unable to take decisions on the tariff in a professional and independent manner. As a result, there were subsidies of unsustainable levels. The restructuring of the electricity boards had created various relationships amongst the four entities inter se namely, MSEB Holding Company Limited, Maharashtra State Electricity Transmission Company Limited, Maharashtra Power Generation Co., Maharashtra State Electricity Distribution Company Limited. Our decision in this appeal is restricted to the State Electricity Boards and the reconstituted entities, to exclusion of others in an attempt to avoiding any absurd results which was not intended by the Legislature. In this behalf, we find it appropriate to make a

reference to the following observations of the Hon'ble Supreme Court in the case of **Commissioner of Income-Tax, Bangalore V/s. J.S. Gotla Yadagiri** reported in **(1985) 4 SCC 343** in which while dealing with the object and purpose of the legislative provision held as under :-

> "…. If the purpose of a particular provision is easily discernible from the whole of the scheme of the Act which in this case, is to counteract the effect of the transfer of assets so far as computation of income of the assessee is concerned then bearing that purpose in mind, we should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result i.e. result not intended to be subserved by the object of the legislation found in the manner indicated before, and if another construction is possible apart from strict literal construction then that construction should be preferred to the strict literal construction. "

47. In our view the Transmission charges and / or Wheeling charges are not amounts paid under any arrangement for use of land, building, plant machinery, equipment, furniture, fitting, etc. and, therefore, not rent. Equally, the amounts are not fees for technical services. In the facts and circumstances of this case, we answer the question in favour of the Assessee and against the Revenue. The appeal is disposed of accordingly. There will be no order as to costs.

(A.K. MENON, J.) **(S.C.DHARMADHIKARI, J.)**