आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ बी, मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

सर्वश्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं** एन. के. बिलैय्या, लेखा सदस्य, के समक्ष ।

Before Shri Joginder Singh, Judicial Member
And Shri N. K. Billaiya, Accountant Member

ITA NO.6212 to 6215/MUM/2012
(A.Ys. 2006-07 to 2009-10)

ACIT (TDS) Range-2(1), Room No.702, 7th Floor, Smt. K.G. Mittal Ayurvedic Hospital Bldg., Charni Rd. Mumbai-400 002.	**बनाम**/ Vs.	Maharashtra State Electricity distribution Company Ltd. 1st Flr. Prakashgad, Anand Kanekar Marg, Bandra (E) Mumbai-400 051.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)
P.A. No.AAECM 2933 K		

अपीलार्थी **की ओर से /Appellant by :**	**Shri Vivek Batra**
प्रत्यर्थी **की ओर से /Respondent by :**	**S/Shri J.D. Mistry, Neeraj Seth, K.K. Ved - Advocates**

सुनवाई की तारीख / **Date of Hearing : 29.10.2014**		घोषणा की तारीख / **Date of Pronouncement : 29.10.2014**

आदेश / O R D E R

PER JOGINDER SINGH (JM) :

The Revenue is aggrieved by the impugned orders all dated 27/7/2012 on the ground that the ld. CIT(A) erred in law and on facts in holding that payments made for use of transmission lines or other infrastructure i.e. plant and machinery could not be termed as rent and

further holding that transmission charges cannot be considered as rent under the provision of section 194 I of the Act, consequently provision of sec. 201 and 201(1A) cannot be applied without appreciating alternative provision of sec. 194 J of the Act.

2. At the time of hearing the ld. DR Shri Vivek Batra defended the conclusion drawn in the assessment order by advancing his argument identical to the ground raised. On the other hand Shri J.D. Mistry along with Shri Neeraj Seth and Shri K.K. Ved supported the conclusion drawn in the impugned orders by further pleading that the impugned issue is covered in the own case of the assessee for Assessment Year 2007-08 and 2008-09. Reliance was also placed upon the decision in DCIT (TDS) vs. Reliance Infrastructure Ltd. (ITA Nos.2814 to 2819/Mum/2013 dt.20/8/2014). The assessee also filed paper book running into 1 to 60 pages mostly containing the aforesaid orders of the Tribunal .

2.1 We have considered the rival submissions and perused the material available on record. In view of the above we are reproducing hereunder the relevant portion from the aforesaid order dated 27/6/2012 of the Tribunal in the case of the assessee itself (ITA No.2872/Mum/2010) for ready refernce:-

"2. Assessee is a company established by the Govt. of Maharashtra and was incorporated on 31.5.2005 pursuant to the provisions of Section 131, 133 and 134 of Part-XII of the Electricity Act, 2003 relating to the reorganization of Maharashtra State Electricity Board, by the Govt. of Maharashtra which notified four companies, while restructuring the erstwhile Maharashtra State Electricity Board on 6.6.2005. Assessee purchases power from various sources and distributes and sells to the consumers. The power from the generation point to the customers is transmited through the transmission network of Maharashtra State Electricity Transmission Company Ltd (MSETCL) and Power Grid Corporation of India Ltd (PGCIL). The transmission tarrif and terms & conditions for the power to be transmitted by PGCIL from the Central Sector Station shall be as per the notification issued by the Ministry of Power/CERC from time to time. In terms of these agreements, assessee paid billing and transmission charges to MSETCL and PGCIL for transmission of electricity by using a transmission line from the generation point to the distribution point. AO in a survey conducted under section 133A noticed that assessee paid an amount of Z1554.10 crores towards transmission charges upto December, 2008 and in the year relevant for the assessment year paid to an extent of Z1961.20 crores on which the TDS of Z176.08 crores was supposed to have been deducted by assessee under section 1941 of the Income Tax Act. Since assessee has not furnished the details whether the deductee company has already paid taxes on the said amount, the entire demand of Z176.08 crores and interest thereon under section 201(1A) to the extent of Z8.238 crorees totalling to Z184.2983 crores was made. Assessee was unsuccessful before the CIT (A) and raised the following grounds:

> *"Ground No.1 The learned CIT (A) erred in confirming the levy of TDS of .184.32 crores on wheeling and transmission chartges paid to entities like the MSETCL (Maharashtra State Electricity Transmission Company Limited) and PGCIL (Power Grid Corporation of India Limited), without proper consideration of the underlying facts and the provisions of the Act and must therefroe be deleted".*

3. We have heard the learned Counsel and the learned DR.

4. In the course of arguments it was fairly admitted by both the parties that this issue is covered by the decision of ITAT Mumbai-H Bench in the case of Chhattisgarh State Electricity Board in ITA Nos. 20 to 23/BLPR/2010 dated 30.11.2011 and also by the ITAT Cuttack Bench, Cuttack in the case of GRIDCO Ltd in ITA No.404/ CTK/2011 dated 17.11.2011. Since the facts are similar in all the cases and deduction of TDS was considered under section1941 by AO on the transmission charges paid, we extract the relevant order of the Coordinate Bench in the case of Chhattisgarh State Electricity Board (Supra) which decided the issue as under:

"10. We have heard the rival contentions, perused the material on record and duly considered the factual matrix of the case as also the applicable legal position.

11. We find that the power purchase agreement entered into by the assessee with NTPC (copy placed before us at pages 15 to 27 of the paper book), specifically provides that 'Power shall be made available by the NTPC at the busbars of the station and it shall be obligation and responsibility of the CSEB to make the required arrangement for evacuation of power from such delivery points of NTPC". It is pursuant to these obligations that the assessee, along with other bulk power beneficiaries, namely, M. P. State Electricity Board, Gujarat Electricity Board, Maharashtra State Electricity Board, Electricity Department-Government of Goa, Administration of Daman & Diu, and Electricity Department-Administration of Dadra and Nagar Haveli, has entered into a "bulk power transmission agreement" with PGCIL. The preamble of this agreement, inter alia, notes that the PGCIL "is desirous to transmit energy from the Central Sector Power Station(s) to the bulk power beneficiaries and that the said bulk power beneficiaries are desirous of receiving the same through Power Grid Transmission System on mutually agreed terms and conditions". This agreement provides that "Power Grid shall operate and maintain the transmission system belonging to it in the western region as per agreed guidelines and the directives of the Western Regional Electricity Board and the regional load dispatch centres, and co-operate with the bulk power beneficiaries of the region, so as to maintain the system parameters within acceptable/ reasonable limits except where it is necessary to take measures to prevent imminent damage to any equipment". In respect of these services, the bulk power beneficiaries are to pay to PGCIL a monthly charges computed in the manner set out in clause 9 of the said agreement. This clause, in turn, refers to formula set out in A.4 of annexure 1 *which refers to the same ratio of agreed annual charges divided by 12 as is between power transmitted to each beneficiary to total sales from that particular point of delivery. In other words, while the annual charges are fixed, these are divided between the beneficiaries in the same ratio as is ratio of power evacuated by a beneficiary to the total sale of power* from that delivery point. It is, however, not in dispute that the transmission lines are in the physical control of PGCIL, 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, simultaneously along with electrical power purchased by other bulk power beneficiaries, is transmitted through these transmission lines. The way it works is like this. The power available at the delivery points, collectively for all the bulk power

beneficiaries, is loaded for transmission on these transmission lines or power grid and each of the beneficiaries is allowed to utilize the power to the extent allocated to him. It is not the case that purchases by each of the bulk beneficiary can be physically identified and that particular beneficiary is only allowed to use that physically identified portion of power. Strictly speaking, therefore, it is not the transmission of power from one point to another but availability of power on the entire power grid or transmission lines enabling the beneficiary to utilize the power to the extent of his allocation. On these facts, the question that requires our adjudication is whether or not the payment for transmission charges can be termed as "rent "for the purposes of section 194-I of the Act.

12. Let us now take a look at the statutory provision with regard to tax withholding from rent payments, which is set out in section 194-I of the Act, and analyze the same. Section 194-I provides as follows:

"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 tothe account of, or to, the payee, does not exceed (one hundred 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."

13. The case of the Assessing Officer, which has been sustained in the first appeal, is that since expression "rent", for the purpose of section 194-1, includes "any payment, by whatever name called, under any lease, sublease, tenancy or any other agreement or arrangement" for the use of machinery, plant or equipment, and since the assessee has made the payments towards transmission charges for use of the machinery, plant and equipment collectively constituting mode of transmission of power, theprovisions of section 194-I come into play on the facts of this case.

14. The core issue that we must deal with is whether the present arrangement under the bulk power transmission agreement can be termed to be covered by the scope of expression any other agreement or arrangement 'for the use of" appearing in Explanation (i) to section 194-I.

15. Explanation (i) to section 194-1, as we have noted above, defines rent as any payment, by whatever name called, under any lease, sub-lease, or tenancy or any other agreement or arrangement 'for the use of' land, building, plant, machinery or equipment, etc. As evident from a plain reading of the agreements under which impugned payments have been made, the payments have been made for the services of transmission of electricity and not the use of transmission wires per se. It is a significant fact that these transmission lines are not only being used for transmission of electricity to the assessee but also of transmission to electricity to various other entities. The transmission lines continue to be not only under control and possession of the PGCIL in legal terms, but, what is more important, these transmission lines are effectively in the control of PGCIL, without any involvement of the assessee in actual operations of the same. On these facts, in our humble understanding, the assessee has made the payments for transmission of electricity in which transmission lines have been used rather than for the use of transmission lines per se. The payments could be said to have been made for "the use of transmission lines" in a case in which the object of consideration for which payments are made was the use of transmission lines simplicitor, and such a use by the assessee does not extend beyond the transmission of electricity through such lines in the sense that the same transmission lines continue to be in the control of

PGCIL for transmission of electricity for other entities *and for all practical purposes. Even as electricity purchased by the assessee is transmitted to the assessee from the NTPC busbar to its landing points, the same transmission lines continue to be engaged in similar transmission of electricity for other entities and the assessee has no say in the manner in which such transmission lines can be controlled and used by the PGCIL. Undoubtedly, for the purpose of an arrangement being termed as in the nature of rent for the purpose of section 194-I, the "control" and "possession", in legal terms, of an asset may not be needed to be with the person benefitting from the asset in question, it is a condition precedent for invoking section 194-I that the asset, for the use of which the payment in question is made, should have some element of its control by the assessee. Here is a case in which the assessee has no control over the operations of the transmission lines, and all that he gets from the arrangements is that he can draw the electrical power purchased from PGCIL's transmission lines in an agreed manner.*

16. While on the issue of distinction between use of an asset and benefit from an asset, we may usefully refer to the following distinction brought out by the Karnataka High Court between leasing out of equipment and the use of equipment by its customer. This was done in the case of Lakshmi Audio Visual Inc v. Asst. Commr. of Commercial Taxes [2001] 124 STC 426 (Karn), which has been followed by Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd. v. Director of Income-tax [2011] 332 ITR 340 (Delhi), in the following terms (page 366 of 332 ITR):

> *"9. Thus if the transaction is one of leasing/hiring/letting simpliciter under which the possession of the goods, i.e., effective and general control of the goods is to be given to the customer and the customer has the freedom and choice of selecting the manner,* time and nature of use and enjoyment, *though within the frame work of the agreement, then it would be a transfer of the right to use the goods and fall under the extended definition of 'sale'. On the other hand, if the customer entrusts to the assessee the work of achieving a certain desired result and that involves the use of goods belonging to the assessee and rendering of several other services and the goods used by the assessee to achieve the desired result continue to be in the effective and general control of the assessee, then, the transaction will not be a transfer of the right to use goods falling within the extended definition of 'sale'. Let me now* clarify the position further, with an illustration which is a variation of the illustration used by the Andhra Pradesh High Court in the case of Rashtriya Isp at Nigam Ltd. v. CTO.
>
> > *(i) A customer engages a carrier (transport operator) to transport one consignment (a frill lorry load) from place A to B, for an agreed consideration which is called freight charges or lorry hire. The carrier sends its lorry to the customer's depot, picks up the consignment and*

proceeds to the destination for delivery of the consignment. The lorry is used exclusively for the customer's consignment from the time of loading, to the time of unloading at destination. Can it be said that the right to use of the lorry has been transferred by the carrier to the customer ? The answer is obviously in the negative, as there is no transfer of the 'use of the lor' for the following reasons: (i) The lorry is never in the control, let alone effective control of the customer; (ii)the carrier decides how, when and where the lorry moves to the destination, and continues to be in effective control of the lorry; (iii)the carrier can at any point (of time or place) transfer the consignment in the lorry to another lorry; or the carrier may unload the consignment enroute in any of his godowns, to be picked up later by some other lorry assigned by the carrier for further transportation and delivery at destination.

(ii) On the other hand, let us consider the case of a customer (say a factory) entering into a contract with the transport operator, under which the transport operator has to provide a lorry to the customer, between the hours 8.00 a.m. to 8.00 p.m. at the customer's factory for its use, at a fixed hire per day or hire per km. subject to an assured minimum, for a period of one month or one week or even one day ; and under the contract, the transport operator is responsible for making repairs apart from providing a driver to drive the lorry and filling the vehicle with diesel for running the lorry. The transaction involves an identified vehicle belonging to the transport operator being delivered to the customer and the customer is given the exclusive and effective control of the vehicle to be used in any manner as it deems fit; and during the period when the lorry is with the customer, the transport operator has *no control over it. The transport operator renders no other service to the customer.....*

17. It is thus clear that in a situation in which the payment in made for the use of an asset simpliciter, whether with control and possession in its legal sense or not, the payment could be said to be for the use of an asset. However, in a situation in which the payment is made only for the purpose a specific act, i.e. power transmission in this case, and even i an asset is used in the said process, the payment cannot be said to be for the use of an asset. When control of the asset (transmission lines in the present case) always remains with the PGCIL, any payment made to the PGCIL for transmission of power on the transmission lines and

infrastructure owned controlled and in physical possession of PGCIL can be said to have been made for "the use of' these transmission lines or other related infrastructure. Viewed in this perspective, section 194-I has no application so far as the impugned payments for transmission of electricity is concerned. For this short reason alone the impugned demands must be held to unsustainable in law.

18. We have taken note of learned Departmental Representative's reliance on the Hon'ble Delhi High Court's judgment in the case of CIT v. Japan Airlines Co. Ltd. [2010]325 ITR 298 (Delhi), which in turn follows its earlier decision in the case of United Airlines U. CIT [2006] 287 ITR 281 (Delhi), in support of the proposition that even in a situation in which landing and parking charges are paid by airlines to the Airport Authority, and when such charges are not in respect of the specific area of land, the provisions of section 194-I come into play. By the same logic, according to the learned Departmental representative, transmission charges are paid by the assessee, even though the same may not pertain to specific transmission lines which may be simultaneously used by more than one persons, the provisions for tax deduction at source from rent under section 194-I be held to be applicable. We are unable to see any merits in this submission. When an aircraft is parked in a portion of land in the airport, such a portion of land could still be viewed as being effectively used by the airlines owning the aircraft, and the same is the position with regard to the landing strip. The learned Departmental representative has also referred to the decision of the Hon'ble Andhra Pradesh High Court in the case of Krishna Oberoi v. Union of India [2002] 257 *ITR 105 (AP) but we see no merits in this defence either. This case only deals with the question whether payment for hotel rooms will be covered by the definition of rent, but then it was not, and could not have been, in dispute that the payment for hotel room constitutes payment for "the use of' an asset-the precise point of controversy in the present decision. Clearly, a hotel customer pays for the use of or the right to the use of the hotel room. It is for the same distinguishing feature that decisions in the cases of J. C. Bansal v. TRO [2009] 313 ITR (AT) 215 (Indore) and CIT v. Reebok India Co. [2007] 291 ITR 455 (Delhi) are not relevant in the present context.*

19. It is also important to bear in mind the fact that by the virtue of insertion of the Explanation to section 191 with effect from June 1, 2003, a person can be treated as an assessee in default under section 201(1) only when there is lapse in deduction of tax at source on his part and, in addition to this lapse, the recipient of income has also failed to pay such tax directly. The reasons are not difficult to fathom. Proceedings under section 201(1) are not penal proceedings. These are vicarious proceedings to make good the shortfall in tax collection, and when the tax liability is duly discharged by the recipient of income embedded in the payment, such a vicarious liability cannot be invoked. The lapse of non

deduction or short deduction of tax at source is to be visited with several consequences. The first and foremost consequence is that the tax deductor has to make good the shortfall in tax deduction and the tax deductor also has to compensate the revenue by way of interest for the period of late realisation of this tax to the Revenue authorities. These provisions, contained in section 201(1) and 201(1A), are set out in Chapter XVIIB titled as "Collection and Recovery of Tax". The next set of consequences are contained in section 271C and section 276B, covered by Chapter XXI-"Penalties imposable" and Chapter XXII-"Offences and prosecutions" respectively. Section 276B, as it stands now, is not applicable on the facts of this case which *comes to the play only when the assessee has deducted the tax at source but he does not pay, or does not pay in time, the taxes so deducted at source. Section 271C deals with levy of penalty for total or partial failure to deduct tax at source, i.e. for non-deduction and short deduction of tax at source. This provision is clearly a penalty provision which is applicable for the cases of tax deductor's not discharging, wholly or partially, statutory* obligations of deducting taxes at source, but then considerations which are relevant for examining a case having been made out for imposition of penalty are, as is the settled legal position, altogether different and the different yardsticks for such a case apply. However, unlike section 271C, section 201(1) is not of the penalty nature, and, therefore, the core consideration for invoking section 201(1) is not the lapse on the part of the tax deductor, but loss of revenue to the exchequer. As long as taxes payable by the recipient of income are paid, the provisions of section 201(1) cannot be pressed into service. The authorities below were thus quite unjustified in brushing aside the assessee's contentions to the effect that since PGCIL has already discharged all his income-tax obligations, demands under section 201(1) cannot be raised at all. However, now that we have held, on merits, that payments made for transmission of electricity by the transmission lines owned by PGCIL do not constitute payment for rent under section 194-1, it is not really necessary to go into this aspect of the matter. The question as to whether the definition of expression "rent", introduced in section 194-I with effect from July 2006, is prospective or clarificatory is also, given our findings that, even on the touchstone of the definition of rent under the aforesaid provision, the payment for transmission of power will not constitute "rent", not really relevant in the present context, and we see no need to deal with the same either.

20. In view of the above discussions, and bearing in mind entirety of the case, we are of the considered view that the provisions of section 194-I cannot apply in respect of payments made for transmission of power by the PGCIL, on the facts of the case before us. Accordingly, the impugned demands raised under section 201(1) read with sections 194-land 201(1A) read with section 201(1A) are cancelled. The assessee gets the relief accordingly".

5. Similar view was also taken by ITAT Cuttack Bench in the case of GRIDCO Ltd in ITA No.404/CTK/201 1 dated 17.11.2011. In view of the detailed discussions made by the Coordinate Benches in the above cases and since the agreement entered by assessee with

> MSETCL. and PGCIL are similar in nature, we hold that the payments made to the above companies cannot be considered as a 'rent' under the provisions of section 1941 and consequently the levy of interest under section 201(1A) also does not arise. Ground is accordingly allowed."

2.2 If the observation made in the assessment made in the assessment order, conclusion drawn in the impugned order, factual finding recorded by the Tribunal and the assertion made by the ld. Respective counsel, if kept in juxtaposition, no contrary facts or decision from any Hon'ble higher forum was brought to our notice. Similar view was taken by the Cuttak Bench of the Tribunal in the case of GRIDCO Ltd. (ITA No.404/CTK/2011 dated 17/11/2011) , therefore, in view of the detailed discussion by the co-ordinate Bench and the agreement entered by the assessee with MSETCL and PGCIL are of similar nature thus, we hold that the payments made to above companies cannot be considered as rent under the provisions of section 194 I of the Act, consequently, there is no question of levy of interest u/s.201 and 201(IA) of the Act. Thus we find no infirmity in the conclusion drawn by the ld. CIT(A).

3. Finally the appeals of the Revenue are dismissed.

Order pronounced in the open court in the presence of ld. Representatives from both sides at the conclusion of the hearing on 29th Day of October, 2014 .

आदेश की घोषणा दिनांकः 29.10.2014 को की गई ।

Sd/-	Sd/-
(N.K. Billaiya)	**(Joginder Singh)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : Oct. 2014.

वनि.स./JV, Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)-13, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**