IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH, NEW DELHI

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER, AND SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 5442/DEL/2015 [A.Y. 2011-12]

The A.C.I.T. TDS, Noida	Vs.	Noida Power Company Ltd Commercial Complex Block H, Alpha - II Greater Noida PAN : AAACN 4984 D
[Appellant]		[Respondent]

Date of Hearing : 27.11.2017
Date of Pronouncement : 29.11.2017

Assessee by : Smt. Sushmita Basu, Adv

Revenue by : Shri Arun Kumar Yadav, Sr. DR

ORDER

PER B.P. JAIN, ACCOUNTANT MEMBER,

This appeal of the Revenue arises from the order of the ld. CIT(A)-I, Noidai vide order dated 25.05.2015 for A.Y. 2011-12.

2. The assessee has raised the following solitary ground of appeal:

"The ld. CIT(A)-I, Noida has erred in law and all facts in deleting the demand raised by applying section 194J of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] as the assessee was liable to deduct tax on payment of transmission and wheeling charges."

3. Briefly stated, the facts of the case as emanating from the order of the ld. CIT(A) are that the assessee is public limited company engaged in the business of distribution and supply of electricity to consumers in the District of Gautam Budh Nagar. In this case TDS verification letter was issued on 18.03.2014 to check the correct applicability of TDS related provisions. During the assessment proceedings the AO noticed that the assessee has been making the payments under the head "transportation and wheeling charges to various persons under transportation service agreement without deduction of tax at source u/s 194J. In this regard, the assessee was asked to explain the reasons for failure to deduct tax at source u/s 194J as according to AO these payments qualified to be covered u/s 194J i.e. being fees for technical or professional services . In response, the appellant furnished submission explaining the reasons for above failure which was not acceptable to the AO. As such the AO held the assessee as assessee-in-default and passed order u/s 201(1)/201(1 A) dated 27.03.2014.

4. The ld. CIT(A) confirmed the action of the Assessing Officer.

5. At the very outset, it was brought to our notice by the ld. counsel for the assessee that the Tribunal has decided an identical issue in favour of the assessee for assessment year 2012-13 in ITA No. 5443/DEL/2015 vide order dated 16.11.2017, copy of which is placed on record.

6. We have heard the rival submissions and have perused the relevant material on record. We have gone through the facts of the ITAT order relied upon by the ld. counsel for the assessee [supra] in assessee's own case for assessment year 2012-13 where the facts assessment order identical and the addition so made was directed to be deleted by the ld. CIT(A) and the ITAT has dismissed the grounds raised by the Revenue. The relevant operative part of the said order is reproduced hereinbelow for ready reference:

> *"3. The brief facts of the case are that Assessee is a Public Limited Company engaged in the business of distribution and supply of electricity to consumers in the District of Gautam Budh Nagar. In this case TDS verification letter was issued on 18.3.2014 to check the correct applicability of TDS related provisions. During the assessment proceedings the AO noticed that the assessee has been making the payments under the head "transportation and wheeling charges" to various persons under transportation service agreement without deduction of tax at source u/s. 194J. In this regard, the assessee was*

asked to explain the reasons for failure to deduct tax at source u/s. 194J as according to AO these payments qualified to be covered u/s. 194J i.e. being fees for technical or professional services. In response, the assessee furnished submission explaining the reasons for above failure which was not acceptable to the AO. As such the AO held the assessee in default and passed order u/s. 201(1)(201(1A) of the Act dated 28.3.2014 and made the total tax liability and interest u/s. 201(1A) on non-deduction of tax on payment of transmission charges and wheeling charges paid by the assessee. Against the aforesaid AO's order dated 27.3.2014, assessee appealed before the Ld. CIT(A)-I, Noida who vide his impugned order dated 25.5.2015 has allowed the appeal of the assessee. Aggrieved with the order of the Ld. CIT(A), the Revenue is in appeal before the Tribunal.

4. Ld. DR relied upon the Order of the AO and reiterated the contentions raised in the grounds of appeal.

5. On the contrary, Ld. Counsel of the assessee relied upon the order of the Ld. CIT(A). She also filed a Paper Book containing pages 1 to 237 which are the copies of the various decisions of the Tribunal, Hon'ble High Courts and the Hon'ble Supreme Court, favouring assesse's case. In order to support her view, he also draw our attention towards the decision of the Hon'ble Delhi High Court in the case of CIT vs. Delhi Transco Ltd. (62 taxmann.com 166) (Del) (2015), which was affirmed by the Hon'ble Supreme Court of India in SLP(C) No. 853/2016 in the case of CIT(TDS) vs. Delhi Transco Limited and stated that the issue involved in the present appeal is squarely covered by the aforesaid decision of the Hon'ble Delhi High Court.

6. We have heard both the parties and perused the relevant records, especially the impugned order and the case laws cited by the Ld. Counsel of the assessee. We find that section 194J would have application only when the technology or technical knowledge, experiences/skills of a person is made available to others which can

be further used by him for its own purpose and not where by using technical systems, services are rendered to others. Rendering of services by allowing use of technical System is different than charging fees for rendering technical services. In the present case no scientific knowledge, experience or skill is made available/rendered by the PGCIL to the assessee. From the records, we have seen that the assessee itself has its own engineers and technicians who consistently monitor and supervise the flow of the electricity to its system and ultimately supplies to its customers which according to Ld. CIT(A) are the designated function of power grid which do not amount to providing technical services within the meaning of expln.2 to section 9(i)(vii) of the Act. Moreover, we also in complete agreement with the judgment of Hon'ble Delhi High Court in the case of CIT vs. Bharati Cellular Limited [175 Taxmann 573 (Del)] affirmed by the Hon'ble Supreme Court in 193 Taxman 97(SC) wherein, it has been held that technical services which are relevant for the purpose of section 194J would be those technical services which involve human interface/element. In other words, the expression 'technical service' could have reference to only technical service rendered by a human and that it would not include my service provided by machines or robots. However as against above contention we find that the AO has completely failed to bring relevant materials, whatsoever, on record to prove the existence of human interface/element in the present case. In view of the above, we find that such transmission and wheeling charges paid by the assessee does not come within the purview of fees for technical service as defined under Explanation 2 to sec 9(1)(vii) of the Act and accordingly no tax is required to be deducted by the assessee u/s. 194J therefrom. Hence, the action of the AO in treating the assessee to be an assessee-in-default u/s. 201(1) of the Act and the order dated 27.3.2014 passed u/s. 201(1)/201(1A) of the I.T. Act were rightly deleted by the Ld. CIT(A),

which does not need any interference on our part, hence, we uphold the action of the Ld. CIT(A) and reject the ground raised by the Revenue. Our aforesaid view is also fortified by the decision of the Hon'ble Delhi High Court in the case of CIT vs. Delhi Transco Ltd. (62 taxmann.com 166) (Del) (2015), wherein the Hon'ble Delhi High Court vide para no. 34 & 35 held as under:-

> *"34. To reiterate, by virtue of the BPTA agreement between DTL and PGCIL there is transportation of the electricity from PGCIL to DTL, through the equipment and network required statutorily to be maintained by PGCIL through its technical personnel using technical expertise. This, however, does not result in PGCIL providing technical services to DTL. Therefore the wheeling charges paid by DTL and PGCIL for such transportation of electricity cannot be characterized as fee for technical service.*
>
> *35. The ultimate conclusion of the ITAT is therefore not erroneous. Accordingly the question framed by the Court is answered in the negative i.e., against the Revenue and in favour of the Assessee. Since the same question is involved in all the AYs in question, all these appeals are dismissed affirming the impugned order of the ITAT, but in the circumstances with no order as to costs."*

6.1 We further find that against the aforesaid decision of the Hon'ble Delhi High Court in the case of CIT vs. Delhi Transco Limited (Supra), the Department went in Appeal before the Hon'ble Supreme Court of India in SLP(C) No. 853/2016 in the case of CIT(TDS) vs. Delhi Transco Limited, which has since been dismissed by the Apex Court vide its order dated 22/01/2016 by holding as under:-

> *"We find no reason to entertain this Special Leave Petition, which is, accordingly dismissed."*

7. In the result, the Appeal filed by the Department stands dismissed."

7. Finding no merit in the ground raised by the Revenue and respectfully following the ITAT order [supra], we dismiss the ground of appeal raised by the Revenue. Thus, the sole Ground raised by the Revenue is dismissed.

8. In the result, the appeal of the Revenue in ITA No. 5442/DEL/2017 is dismissed.

The order is pronounced in the open court on 29 .11.2017.

Sd/- **Sd/-**

[SUDHANSHU SRIVASTAVA] **[B.P. JAIN]**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Dated: **29th November,** 2017

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi