

(2014) 03 DEL CK 0192

In the Delhi High Court

Case No : W.P. (C) 6085/2013, C.M. Nos. 13383/2013, 13384/2013 & 13385/2013

Indus Towers Ltd.

APPELLANT

Vs

CIT and Others

RESPONDENT

Date of Decision : 31-03-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 65B, 65B(44), 66B, 66D, 66E
Income Tax Act, 1922 — Section 12(4)
Income Tax Act, 1961 — Section 194, 194A, 194C, 194J, 197
University Grants Commission Act, 1956 — Section 3

Citation : (2014) 269 CTR 129 : (2014) 364 ITR 114

Hon'ble Judges : S. Ravindra Bhat, J; R.V. Easwar, J

Bench : Division Bench

Advocate : N. Venkatraman, Sr. Advocate, Sh Gajendra Maheshwari, Sh Puneet Siddhartha and Sh Sumeet Batra, Advocate for the Appellant; Kamal Sawhney, Sr. Standing Counsel and Sh Raghvendra Singh, Advocate for the Respondent

Judgement

S. Ravindra Bhat, J.—The Petitioner in these proceedings under Article 226 of the Constitution of India (hereafter "Indus") is aggrieved by an order ("impugned order") of the Commissioner of Income Tax ("CIT") u/s 197 of the Income Tax Act, ("the Act") declining its request for determination of lower rate of tax deduction at source ("TDS"). The order was made after a hearing given to Indus, in terms of this Court's previous order in WP(C) No. 4518/2013 dated 19.07.2013. Indus owns a countrywide network of telecom towers and network infrastructure services to major telecom operators in the country. Till 2012, it sought for issue of a lower tax deduction certificate, u/s 194-I of the Act, on its projected receipts and such lower deduction certificates were issued treating those receipts as rent. In F.Y. 2012-13, lower TDS certificate @ 3% in respect of the receivables u/s 194I was issued. Indus applied for issue of a lower deduction certificate @ 0.5% on 01.04.2013 for F.Y. 2013-14 on the projected receipts of Rs. 16,334.16 crores u/s 194C of the Act. Opportunity of hearing was granted to

Indus by the Assessing Officer ("AO"). The Assessing Officer issued a deduction certificate u/s 197 on 22.05.2013 @ 2.5% for projected receipts covered u/s 194-I for F.Y. 2013-14 based on the average rates of tax to turnover for the last three years shown at 1.44%, pendency of assessment proceedings for A.Y. 2011-12 and penalty proceedings u/s 271(1)(C) for A.Y. 2010-11. Aggrieved by that certificate, Indus filed a writ petition (W.P. (C) No. 4518/2013) before this Court, which by its order dated 19.07.2013 directed the petitioner to prefer a Revision Petition before the CIT who was to dispose it of expeditiously. It was in these circumstances that the petitioner approached the CIT who made the impugned order.

2. Indus submitted that it merely provided passive infrastructure services to its customers, i.e. telecom service providers and that there was no intent to rent the premises. To say this, it relied extensively on the Master Service Agreement, saying that it contained stringent conditions as to the kind of services it had to provide, the controlled and sustained temperatures it had to maintain etc. The intention of the parties to the agreement, i.e. the passive infrastructure service provider and the telecom service provider, was not to let out or rent the tower and the facilities, but to extend and receive highly specialized technical services.

3. The CIT rejected the contentions of Indus, in the impugned order, which inter alia, stated that:

5.3.3 It is not in dispute that the right, title and control in the passive infrastructure located at the telecom site including and not limited to the tower, shelter, diesel generator sets, batteries, air conditioners and electrical and civil works including any enhancement carried out by the assessee vests solely with the assessee. It is also not in dispute that the mobile operator has the right to install equipment such as BTS equipment, associated antennae and active infra network equipment and other requisite equipment required to provide telecom services by them to their customers. The right, title and interest in all such equipment installed on the site by the mobile operators would remain with such operators only.

4. After stating that regardless of what term is used, the mobile operators are actually given access to the premises and property, which is what the essence of a renting transaction is, the CIT held that:

5.3.5. The meaning of "rent" in section 194I is wide in its ambit and scope. The assessee has a legal obligation to provide its site/towers to the mobile operators during the currency of the said arrangement. The arrangement entered into by the assessee with its mobile operators is to allow use of "any land or building together with... machinery, plant, equipment and land appurtenant thereto" for the purpose of providing telecom services to the customers. Since the definition of "rent" is placed u/s 194I itself, the intent of the legislature to include such an arrangement (MSA) is beyond any doubt. Hence, such payments made to the assessee would be construed as "rent" for the purposes of section 194-I.

5. The CIT rejected the submission based on the judgments of the Karnataka High Court and of this Court, reasoning as follows:

5.4.1 The assessee has placed reliance on the Hon"ble Karnataka High Court Judgment cited above. The issue agitated by the assessee before the Hon"ble Court was that their activity did not involve any sale or any transfer of right to use and, therefore, the same could not be subjected to VAT under KVAT Act, 2003. The assessee has also placed reliance on the Hon"ble Delhi High Court Judgment cited above. A careful reading of the decision of the Hon"ble Delhi High Court shows that the question of law for examination was whether the receipts were subject to levy of service tax by Union of India or levy of Value Added Tax by the Delhi Government. The decisions of the Hon"ble Karnataka High Court and the Hon"ble Delhi High Court cannot be applied in the facts and circumstances of this case and are clearly distinguishable. The observations of both the Courts as mentioned above have to be read in the context in which the reference was made before them by the assessee and cannot be ipso facto applied to ascertain the nature of receivables u/s. 194C or 194I within the meanings prescribed to such receipts in the respective provisions of the I.T. Act. The nature of receivables, whether covered u/s. 194C or 194-I, was not examined by the Courts.

5.4.2. It may also be relevant to discuss here the provisions of the Service Tax Act in the context of the reliance placed by the assessee on the decision of Hon"ble Karnataka High Court that standard services have been rendered by the assessee to the mobile operators and are hence in the nature of services provided by the assessee. I find that service tax is leviable u/s 66B of the Chapter V of the Finance Act, 1994, as amended w.e.f. 01/07/2012 @12% on the value of all services, other than those services specified in the negative list (as specified u/s 66D of the said Act). Section 65B(44) of the said Act defines "service" as any activity carried out by a person for another for consideration and includes a declared service but does not include certain activities specified in the said sub-section. "Renting of immoveable property" has been constituted as a declared service u/s 66E of the said Act. Service tax is chargeable on the gross amount of rent received or receivable on account of rendering of taxable service of "renting of immovable property" in India," These provisions indicate that Service Tax is also leviable on renting of immovable property. Merely because the nature of certain receipts of the assessee has been treated as "service" by the Hon"ble Karnataka High Court, it does not preclude the payments received from the said activity as "rent" for the purposes of 1941 of the I.T., Act. These two Statutes are different from each other and are not mutually exclusive. Certain receipts from an activity can have a "rent" component within the meaning of Section 194I and "a service fee" component if it is a declared service u/s 65B of the Finance Act, 1994.

5.4.3. Similarly, the reliance placed by the assessee on Circular no. 1/2008 relating to cold storage units is misplaced. The said Circular clarified that "the

main function of the Cold Storage is to preserve the perishable goods by means of a mechanical process, and storage of such goods is only incidental in nature. The customer is also not given any right to use any demarcated space/place or the machinery of the cold storage (emphasis supplied) and thus does not become tenant. Therefore, the provision of 194/is not applicable to the cooling charges paid by the customers of the cold storage". In the present case the right has been conferred on the mobile operator to install equipment required to provide telecom services by them to their customers. In other words, specified and fixed space, unlike cold storage units have been provided to the mobile operators for their equipment.

5.4.4. These units merely provide service for preserving the essential food items including perishable goods at various temperature suitable for specific food items for required periods. The customer brings its packages for preservation for a required period and takes away its packages after paying cooling charges. The customers do not use the building, plant/machinery in any manner and does not become a tenant of any kind, Therefore, in the said Circular, the provision of 1941 was said to be not applicable to the cooling charges paid by the customers of the cold storage.

5.4.5. The plea of the assessee that the mobile operators do not have access or control over the site/towers/designated area of the site except for the purposes of maintenance/rectification of any defects in the equipment installed by such customers is not borne out from MSA as it is evident that the mobile operator has the right to install equipment such as BTS equipment, associated antennae and active infra network equipment on the tower/site/designated site of the assessee. Further, the mobile operators are not merely enjoying the benefit of appropriate temperature and humidity levels at all times and continuous power supply at the prescribed voltage so as to operate the equipment. These equipment remain installed on the site/tower of the assessee during the currency of the agreement. Hence, the said circular of the CSOT is not applicable in this case.

5.5.1. In the case of United Airlines Vs. Commissioner of Income Tax and Others, it was held that landing and parking charges paid by the Airlines are rent and liable to TDS on rent. It was held that under Explanation (i) of section 194-I, even the landing of aircrafts or parking of aircrafts amounts to use of the land of the airport. Hence, it was held that the landing fee and parking fee will amount to "rent" within the meaning of the aforesaid provision, even if it cannot have such a meaning in common parlance. In the assessee's case, it is reiterated that the mobile operators have the right to install equipments on the tower owned by the assessee and hence, as in the case of United Airlines, amounts to use of the land/telecom site and the tower owned by the assessee.

5.5.2. Similarly, it has been clarified by the CSOT from file No. 275/27/2001-ITO that payments made to hotels for hotel accommodation would be construed to be rent whether they are covered in the nature of lease or license agreements so

long as such accommodation has been taken on regular basis and the rooms are let out for a specified rate and specified period. As long as the hotel has a legal obligation to provide such types of rooms during the currency of the agreement, the same will be considered within the meaning of "rent" for the purposes of section 194-I. In the present case also, the towers/site of the assessee are used by the mobile operators during the currency of the agreement for providing telecom services. Therefore, the payment received by the assessee from the mobile operators constitutes "rent" within the meaning of section 194-I.

5.6. In view of the above discussions, I hold that the receivables of the assessee are clearly liable for withholding tax under the provisions of section 194I of the LT. Act.

The rate of tax to be applied for issue of certificate:

6.1. The lower deduction certificate for F.Y. 2013-14 was issued @ 2.5% on receivables~: covered u/s. 194-I. The assessee has brought to notice that TDS of Rs. 256.7 crore has already been deducted from it up to 31.07.2013. Therefore, it has requested to issue revised certificate u/s. 197(1) at Nil rate. It is seen from the records that the assessee has been able to furnish evidence only to the extent of Rs. 164.01 crore of tax deducted up to 30.06.2013 in Form No. 26AS. However, it also includes receivables covered under other sections of the Act (like 194, 194A, 194C, 194J etc.)..."

6. Indus argues that it is registered with Department of Telecommunications for providing passive telecom infrastructure services to telecom service providers. For the purpose of providing telecom network infrastructure services, it enters into standard service agreements titled Master Services Agreement ("MSA") with its customers for provision of services such as continuous power supply at the desired voltage and air conditioning required for optimal functioning of the customers' equipment and security service for securing the equipment installed on the towers/sites. It argues that the customers do not have access, control or possession over the towers, sites or designated areas (of the site) which are limited to rectification or maintenance of any defects in the equipment installed by such customers. It argues that it does not transfer any right to use any specific goods or any part of the property. Its responsibility is to provide the entire passive infrastructure service with the aid of equipment belonging to it which is fully operated, controlled and managed by it. It was consequently contended that the intention of the parties was not to receive any goods for use and that-quite to the contrary-the dominant intention was to receive standard services. It is argued that Indus is registered with the Service Tax Department and pays service tax on the entire service revenue.

7. Indus relies on the judgment of the Karnataka High Court dated 25.05.2012 (in W.C. No. 3403-3439/2011), where the Court ruled that in terms of the contract there is no transfer of the right to use the passive infrastructure conferred on the sharing/mobile operator, and what is allowed is a license to

have access to the passive infrastructure and permission to keep the equipment of the mobile operator in the prefabricated shelter, and to have ingress and egress only to the authorized representative of the mobile operator. The right so given to the mobile operator is permission to keep Indus' active infrastructure in the site, permission to mount the antenna on the tower erected by it and to have the benefit of a particular temperature so as to operate the equipment belonging to the mobile operator. The infrastructure continues-according to the High Court-to be in possession of the transferor and what is used by the transferee is the service which is provided by the transferor. The assessee submitted, therefore, that its customers do not pay for any leasing rights, but only for the services. Therefore, provisions of Section 194-I of the Act relating to rent would not be applicable in the assessee's case. Indus states that the judgment of the Karnataka High Court has been followed by this Court in W.P. No. 4976/2011.

8. Reliance is placed on Circular No. 1/2008 dated 10.01.2008 issued by Central Board of Direct Taxes in case of cold storage units. That circular clarified that payment for cold storage services are liable to withholding tax @ 2% u/s 194C of the Act. It was argued that the rationale applicable for cold storage services and telecom network infrastructure support services is identical since in both cases, customers are only interested in an appropriate temperature and humidity levels.

9. Arguing that the activity and the transaction between Indus and its customers is not renting or dealing in property, learned senior counsel stated that the essence of the activity was the provision of highly skilled and technical services. These included the provision of creation and maintenance of highly controlled artificial temperatures, conducive to the functioning of the mobile service providers' signal transmission. The agreements, it was submitted, insisted upon this even as a prerequisite for the payment of monthly consideration or fee. In this respect, reliance was placed on the express terms of such agreements, which provided that if Indus failed to ensure that the temperature specified was not maintained and there was failure more than five times a month, no payment towards consideration would be made. Further, counsel submitted that the express provisions in the agreement stipulated that the arrangement was neither a lease, nor created any rights in the property; access provided was merely incidental to the main purpose of providing service.

10. Learned counsel relied on the observations of this Court in its case, rejecting the contention that VAT was applicable and holding that the activity in question was a service provided by the petitioner. Particular reliance was placed on the following observations and findings in W.P. No. 4976/2011:

19...The right to use the goods-in this case, the right to use the passive infrastructure-can be said to have been transferred by Indus to the sharing telecom operators only if the possession of the said infrastructure had been transferred to them. They would have the right to use the passive infrastructure if they were in lawful possession of it. There has to be, in that case, an act demonstrating the intention to part with the possession of the passive

infrastructure. There is none in the present case. The passive infrastructure is an indispensable requirement for the proper functioning of the active infrastructure which is owned and operated by the sharing telecom operators. The passive infrastructure is shared by several telecom operators and that is why they are referred to as sharing telecom operators in the MSA. The MSA merely permits access to the sharing telecom operators to the passive infrastructure to the extent it is necessary for the proper functioning of the active infrastructure. The MSA also defines "site access availability" as meaning the availability of access to the sharing operator to the passive infrastructure at the site. Clause 2 of the MSA which has been quoted above provides for "site access" and Clause 1.7 limits the site access availability to the sharing operator on use-only basis so far as it is necessary for installation, operation and maintenance etc. of the active infrastructure; the clause further states that the sharing operator does not have, nor shall it ever have, any right, title or interest over the site or the passive infrastructure. The Clause also takes care to declare that the sharing operator shall not be deemed to be the tenant of Indus and no tenancy rights shall be deemed to exist over the site/passive infrastructure. Clause 2.1.8, presumably by way of abundant caution, states that it is expressly agreed by the sharing operator that nothing contained in the MSA or otherwise shall create any title, right, tenancy, or any similar right in favour of the sharing operator.

20. There are other provisions in the MSA which control the right of the sharing operator to gain access to the site and the passive infrastructure. For instance, Clause 3.1.2 states that the access shall be limited to the purpose of carrying out operation and maintenance activities and that too only to the authorised representatives or properly authorise sub-contractors of the sharing operator. Clause 1.8 of the Schedule 2 of the MSA has to be read along with the above clause. The tables set out in this schedule providing for payment of service credits by Indus to the sharing operators for failure to achieve the uptime service levels and those prescribing payment of service credits by Indus to the sharing operators for non-submission of the reports and providing for stiff penalties for any failure on the part of Indus show that it is the responsibility of Indus to ensure that the passive infrastructure functions to its full efficiency and potential, which in turn means that it has to be in possession of the passive infrastructure and cannot part with the same in favour of the sharing telecom operators. With several such restrictions and curtailment of the access made available to the sharing telecom operators to the passive infrastructure and with severe penalties prescribed for failure on the part of the Indus to ensure uninterrupted and high quality service provided by the passive infrastructure, it is difficult to imagine how Indus could have intended to part with the possession of part of the infrastructure. That would have been a major impediment in the discharge of its responsibilities assumed under the MSA. The limited access made available to the sharing telecom operators is inconsistent with the notion of a "right to use" the passive infrastructure in the fullest sense of the expression. At best it can only be termed as a permissive use of the passive infrastructure for very limited

purposes with very limited and strictly regulated access. It is therefore difficult to see how the arrangement could be understood as a transfer of the right to use the passive infrastructure.

21. When Indus has not transferred the possession of the passive infrastructure to the sharing telecom operators in the manner understood in law, the limited access provided to them can only be regarded as a permissive use or a limited licence to use the same. The possession of the passive infrastructure always remained with Indus. The sharing telecom operators did not therefore, have any right to use the passive infrastructure...

11. It was argued that Section 194-I could not be invoked in the circumstances of the case at all, because that provision is premised on the leasing, renting out, or giving property (including machinery or equipment) on exclusive and control of the lessee. It was submitted that the predominant intention of the agreement in the present case was to ensure the availability of service to the clients and customers of Indus, i.e. the mobile operators whose activities depended on highly skilled technical services. The onward delivery of their service, in other words, depended on the expertise and efficient service provided by Indus' equipment which they were allowed to use. Stressing that at no point of time do such mobile operators get any kind of uninhibited access or use, learned senior counsel relied on the several conditions in the MSA to say that it underlined at every stage and clarified beyond any doubt that neither the property nor the equipment was given on lease or a lease like agreement. Learned counsel also argued that reliance on Circular no. 1/2008 relating to cold storage units is misplaced. The said Circular clarified that "the main function of the Cold Storage is to preserve the perishable goods by means of a mechanical process, and storage of such goods is only incidental in nature. The customer is also not given any right to use any demarcated space/place or the machinery of the cold storage (emphasis supplied) and thus does not become tenant. Therefore, the provision of 194-I is not applicable to the cooling charges paid by the customers of the cold storage".

12. Learned counsel for the respondent, Mr. Kamal Sawhney, relied and emphasized on the expressions "any kind of"/"agreement...or arrangement" to say that the nature of the transaction need not fall within the traditionally acknowledged or understood concept of leasing or hiring of property. It was submitted that the MSA repeatedly stated that the mobile service operators were given site access. Counsel also stated that the agreement or arrangement between Indus and its clients envisioned permitting the latter to use of such portion of the premises as was contemplated by the parties. The portion allowed to be used, i.e. the passive infrastructure, to that extent was exclusively that of the mobile operators, for the duration of the agreement. It was emphasized that though the aggregation of all passive infrastructure was achieved through Indus, an entity into which the passive infrastructure entities of each mobile operator merged, that was with the object of improving efficiency and optimising the use

of scarce resources, such as land and building, which is extremely hard to come by and expensive, in terms of lease rentals, in urban, especially metropolitan areas. It was submitted that the mobile operator has the right to maintain its equipment on site, and deploy personnel; clause 3 further provides for operation and maintenance of the equipment of the sharing operator. He also emphasized on the expression "use" in Explanation to Section 194-I and submitted that regardless of the findings of this Court in respect of VAT applicability, tax deduction was obligatory since the letting purpose was to allow access to the mobile operators, of the facilities, housed in the property admittedly owned or leased by Indus.

13. Counsel for the revenue also relied on the decision of this Court in *United Airlines Vs. Commissioner of Income Tax and Others*, and of the Andhra Pradesh High Court in *Krishna Oberoi Vs. Union of India (UOI) and Others*, to say that renting has to be seen in the context of the extended definition given to the expression in Section 194-I and not in terms of common understanding, or those situations where the background of its application differs from this case.

Provisions of the Income tax Act

14. The relevant provisions of the Income Tax Act are as follows:

Payments to contractors.

194C. (1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person shall, at the time of credit of such sum to the account of the contractor 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-

(i) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family;

(ii) two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family, of such sum as income tax on income comprised therein.

(2) 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 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.

(3) Where any sum is paid or credited for carrying out any work mentioned in sub-clause (e) of clause (iv) of the Explanation, tax shall be deducted at source-

(i) on the invoice value excluding the value of material, if such value is mentioned separately in the invoice; or

(ii) on the whole of the invoice value, if the value of material is not mentioned separately in the invoice.

(4) No individual or Hindu undivided family shall be liable to deduct income tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.

(5) No deduction shall be made from the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor, if such sum does not exceed [thirty] thousand rupees:

Provided that where the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year exceeds 18[seventy-five] thousand rupees, the person responsible for paying such sums referred to in sub-section (1) shall be liable to deduct income tax under this section.

(6) No deduction shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, on furnishing of his Permanent Account Number, to the person paying or crediting such sum.

(7) The person responsible for paying or crediting any sum to the person referred to in sub-section (6) shall furnish, to the prescribed income tax authority or the person authorised by it, such particulars, in such form and within such time as may be prescribed.

Explanation.-For the purposes of this section,-

(i) "specified person" shall mean,-

(a) the Central Government or any State Government; or

(b) any local authority; or

(c) any corporation established by or under a Central, State or Provincial Act; or

(d) any company; or

(e) any co-operative society; or

(f) any authority, constituted in India by or under any law, engaged either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both; or

(g) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India; or

(h) any trust; or

(i) any university established or incorporated by or under a Central, State or

Provincial Act and an institution declared to be a university u/s 3 of the University Grants Commission Act, 1956 (3 of 1956); or

(j) any Government of a foreign State or a foreign enterprise or any association or body established outside India; or

(k) any firm; or

(l) any person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, if such person,-

(A) does not fall under any of the preceding sub-clauses; and (B) is liable to audit of accounts under clause (a) or clause (b) of Section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the contractor;

(ii) "goods carriage" shall have the meaning assigned to it in the Explanation to sub-section (7) of Section 44AE;

(iii) "contract" shall include sub-contract;

(iv) "work" shall include-

(a) advertising;

(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) carriage of goods or passengers by any mode of transport other than by railways;

(d) catering;

(e) manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer, but does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer.]

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Rent 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.

Analysis and Reasoning

15. Some of the relevant conditions in the MSA dated 07.03.2008 are discussed below. Clause 2 provides for "site access". Clause 2.1 provides for "provision of passive infrastructure" by Indus. This clause reads as under:-

2.1 Provision of Passive Infrastructure

2.1.1 Indus shall provide Site Access Availability to the Sharing Operator in

accordance with the terms and conditions of this Agreement.

2.1.2 Throughout the Term of this Agreement, the Sharing Operator shall be entitled to provide notice to Indus of those Sites in relation to which it wishes to be granted Site Access Availability (a "Service Order"). The process for issuing a Service Order shall be as specified in Schedule 1 (Site Access Availability).

XXXXXX XXXXXX XXXXX

2.1.4 In the event that the Service Orders received by Indus in respect of any Site(s) mean that the available Passive Infrastructure at such Site(s) are over-subscribed, an applicant whose Service Order was received by Indus prior to another Service Order shall be given priority by Indus while allocating such Passive Infrastructure to the relevant applicants.

2.1.5 With respect to each Site in relation to which Indus is able to grant Site Access Availability, the Parties shall execute a Service Contract in accordance with the procedure set out in Schedule 1 (Site Access Availability), and the provisions of each Service Contract shall include the standard terms set out in Schedule 5 (Standard Site Access Terms). Each Service Contract shall be duly stamped and the applicable stamp duty shall be at the Sharing Operator's expense.

2.1.6 Upon the execution of a Service Contract in respect of a Site, the Sharing Operator shall have the right to install the Sharing Operator Equipment or any portion thereof at such Site at the mutually agreed place. The Sharing Operator shall have access to each such Site for all installation activities and Indus shall provide to the Sharing Operator the necessary means of access for the purpose of ingress and egress from each such Site in accordance with the terms of the Service Contract. Provided, however, that only the representatives of the Sharing Operator with proper identification or its properly authorised sub-contractors shall be allowed such access to the Sites.

2.1.7 The right, title and interest in and to the Site and Passive Infrastructure, including any enhancements carried out by Indus, shall vest with Indus and all such enhancements thereto shall be at the sole cost and expense of Indus. Enhancements in this context means the augmentation in capacity carried out by Indus to achieve increased sharing.

16. In terms of Clause 2.5, site access availability right is non-exclusive and Indus retains the right to provide site access availability to other telecom operators and the sharing operator would retain the right to seek passive infrastructure services from other passive infrastructure providers. Clause 3 provides for operation and maintenance of the equipment of the sharing operator. Under clause 3.1.2, the equipment installed by the sharing operator shall be operated and maintained by the sharing operator and in order to conduct the operation and maintenance activities, it shall have the right to replace, repair, add or otherwise modify the sharing operator equipment and the

frequencies over which the equipment operates. In order to do so, the sharing operator shall be provided access to the sites by providing ingress and egress from such site by only the authorized representatives of the sharing operator or its properly authorized sub-contractors. Clause 3.2 requires Indus to ensure that the operation and maintenance services which are provided by it to the sharing telecom operators are in accordance with "good industry practice" by suitably qualified, skilled and experienced personnel. Information about processes and proceedings to monitor the performance is to be shared with the sharing operators on a monthly basis. Consequences follow if operation and maintenance service levels fall short of the required standards.

17. Clause 4 outlines Indus' rights; clause 4.1 provides Indus the right to require that whenever any access to the site is needed by the sharing operator or its approved contractor, such access is supervised by it (Indus) or its nominees. Indus is also enabled with the right to use and grant access to any site including the infrastructure provided by it (including passive infrastructure) for provision of such services to any party or for such other purposes as Indus may in its discretion decide to support from time to time. Clause 4.2 enables Indus to ask for relocation of the equipment of the sharing telecom operator; which may be for the acquisition of a site or action by a Government authority or any order of Court etc. Clause 5.2 obliges Indus to ensure that any other operators on the site do not cause any damage or install any equipment which would harmfully interfere or physically obstruct the equipment of any sharing operator existing at the site. The agreement further stipulates that the infrastructure of Indus (the passive infrastructure) shall be maintained by it in proper state of repair and condition. Clause 5.3 provides for the warranties and covenants of the sharing operator such as generally to ensure that its employees and agents and sub-contractors comply with the terms and conditions of the contract, to comply with all applicable laws and desist from doing anything which might cause or otherwise result in a breach by Indus, maintain its equipment in a good and safe state of repair and condition, to desist from installing equipment or machinery of a type or frequency which would cause harmful interference or physical obstruction to any equipment belonging to Indus or of any other sharing operator of the site, and to generally share information with Indus and cooperate with and assist Indus in connection with the purpose of the obligations under the contract etc. Clause 6 speaks of "charges". Clause 6.1 provides that Indus shall charge the sharing telecom operator the charges in accordance with Schedule 3. The charges can be revised or reviewed on an annual basis. Clause 6.2 provides that all invoices submitted by Indus shall be paid within 15 days of the receipt thereof. Clause 6.3 provides for consequences of late payment which are not relevant for our purpose. Clause 10 confers upon Indus the right to advertise on the passive infrastructure. It says that Indus shall have the exclusive right to lease, license or grant space on each site or passive infrastructure on the site to any third party for the purposes of placing hoardings, banners and other advertisements and the sharing telecom operator shall not have any right of

objection. However, Indus' right to do so shall not adversely affect the connectivity network or passive infrastructure of the sharing telecom operator in any manner; in case of any such complaint from a telecom operator the hoardings/advertisement shall be removed.

18. Schedule 1 to the contract provides for "site access availability" and lists several technical details and requirements relating to the antenna, ground based tower, roof top tower, time lines for site deployment, site access service credit for acquisition and deployment etc. Schedule 2 provides for "operation and maintenance service". Clause 1.8 obliges Indus to ensure proper access to the sites for all authorized personnel of sharing telecom operator for the purposes set out in Clause 3.1.2. Clause 1.9.3 sets out the rates at which the petitioner has to pay the operation and maintenance service credits to the sharing operator for its failure to ensure the required uptime service levels. The Credits payable by Indus to the Sharing Operator for failure to achieve the above Uptime Service Levels are as set out below:

Operation and Maintenance Service Level

% of Total Rate Payable by Indus

99.95% or greater

0.0%

99.90% or greater but less than 99.95%

5.0%

99.70% or greater but less than 99.90%

7.5%

99.50% or greater but less than 99.70%

10.0%

99.00% or greater but less than 99.50%

25.0%

Less than 99.00%

30.0%

The Service Credits payable, by Indus, in the above terms apply to the sites in the relevant Circle mentioned below the Operation and Maintained Service Level spelt out in 1.9.2. Clause 1.10 requires Indus to report the reasons for any unplanned downtime, to the sharing operator within five business days of the rectification of the downtime. In case of breach Indus has to pay service credits in accordance with pre-determined rates indicated below:

Time period of Indus Downtime

% of Total Rate payable by Indus

24 consecutive hours or more, but less than 36 consecutive hours

50%

36 consecutive hours or more, but less than 48 consecutive hours

75%

48 consecutive hours or more

100%

19. The crucial question which has to be decided is whether the activity, i.e. provision of passive infrastructure by Indus to the mobile operator constitutes renting within the extended definition under Explanation to Section 194-I or whether the activity is service, pure and simple without any element of hiring or letting out of premises. The assessee urges that there is no intention to rent or lease the premises or facilities or equipment and what is contemplated by the parties is a service; the revenue contends that the use of the premises, and the right to access it, amounts to renting the premises.

20. This area of law is relatively well settled (see, for example, Puzhakkal Kuttappu Vs. C. Bhargavi and Others, and Faqir Chand Gulati Vs. Uppal Agencies Pvt. Ltd. and Another,). In the case of property, the age old controversy that courts have grappled with in diverse and countless situations (and contexts) is whether the arrangement amounts to a lease or a mere licence. There is no bright line that applies universally. To quote the Supreme Court in Rajbir Kaur and Another Vs. S. Chokesiri and Co., , it is the "operative intention of the parties" which has to be ascertained, rather than viewing the matter from the standpoint of whether possession is exclusive, because:

exclusive possession itself is not decisive in favour of a lease and against a mere licence, for, even the grant of exclusive possession might turn out to be only a licence and not a lease where the grantor himself has no power to grant the lease. In the last analysis the question whether a transaction is a lease or a licence "turns on the operative intention of the parties" and that there is no single, simple litmus-test to distinguish one from the other. The "solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties.

21. In Krishna Oberoi (supra), the facts were that the assessee owned a hotel which provided to its customers various types of furnished rooms with certain other facilities for a consideration called "room charges". Room charges were composite in nature and it included charges for various services catered by the hotel. It was argued that consideration received by the hotel management could not be treated as rent within the meaning of Section 194-I. Indian Airlines Limited and Asian Paints India Limited were the assessee's regular customers. Indian Airlines had entered into an agreement with the assessee to utilise its

hotel services for accommodating their cock-pit crew and Indian Airlines officials. As against the normal room tariff of Rs. 2,000/- per day, the Indian Airlines crew were provided accommodation for a sum of Rs. 825/-. The court repelled the assessee's contention that the transaction did not envision payment of rent and held that Section 194-I applied. Similarly, rejecting the argument that "rent" did not contemplate a situation where use of airport charges were collected, it was held in *United Airlines (supra)* in the context of applicability of Section 194-I, that:

...the definition of the word "rent" in Expln. (i) of Section 194-I is very clear and the plain meaning of that provision shows that even the landing of aircraft or parking aircraft amounts to user of the land of the airport. Hence, the landing fee and parking fee will amount to "rent" within the meaning of aforesaid provision, even if it could not have such a meaning in common parlance.

This Court also recollects that in *Sultan Brothers (P) Ltd. Vs. Commissioner of Income Tax*, a Constitution Bench, dealing with the old Section 12(4) of the Income Tax Act, 1922, held that a composite letting out or hiring of building, machinery etc. would be treated as "inseparable" and falling under the residuary head of income. The court held that whether a particular letting or permission to use was business is to be decided in the circumstances of each case, when seen from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. It was held that in cases which arose before the Courts involving commercial or residential buildings, it was held that the income realised by such owners by way of rental income from the building, whether a commercial building or residential house, is assessable under the head "income from house property". The only exceptions are cases where the letting of the building is inseparable from the letting of the machinery, plant and furniture. In such cases it has been held that the rental would not have been realised but for the letting out of the machinery, plant or furniture along with such building and, therefore, the rental received for the building is to be assessed under the head of "income from other sources". It was held that:

when a building and plant, machinery or furniture are inseparably let, the Act contemplates the rent from the building as a residuary head of income...

22. It can be, therefore, seen that there cannot be any generic observation on the question whether a particular transaction amounts to leasing, or letting out or hiring premises or other properties. Courts' endeavor should in all cases be to ascertain the parties' "operative intention" and the mandate of the law, which defines what is rent or amounts to letting out, etc. Section 194-I through the Explanation does enlarge the scope of what can be termed as traditional concept of letting or renting, by using the expression "other arrangement" aimed at permitting "use" of either immovable property (land and buildings) or other properties (plant, equipment, machinery, etc). The assessee's argument that in the previous decision of this Court the finding that there was no transfer of the

right to use the premises concludes the issue entirely in its favour is not correct. The findings or reasoning of a court rendered in the context of one statute or enactment cannot be dispositive of a like intent in the other. It is well known that words do not have a fixed, invariable meaning; being "the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." (Oliver Wendell Holmes).

23. In this case, the terms of the MSA Indus makes available:

- (1) Infrastructure and specialized services for use by mobile operators;
- (2) The infrastructure and equipment are always in the control of Indus;
- (3) Though its customers are given access to the infrastructure and services, the possession and control of the property is with Indus; in more places than one, it is expressly agreed that there is no lease arrangement.
- (4) The arrangement of allowing access to the infrastructure and the maintenance of strict standards, for its use are an inseparable part of the entire transaction.

On the other hand, it is evident that the mobile operators have-

- (a) the right to install equipment such as BTS equipment, associated antennae, active infra network equipment on the tower or designated site belonging to Indus.
- (b) Enjoyment of the benefit of specified temperature and humidity levels at all times and continuous power supply at the prescribed voltage so as to operate the equipment; their equipment remains installed on the site/tower of Indus for the duration of the agreement as well.

24. The definition of "renting" has to be viewed in perspective. The Explanation to Section 194-I, which is determinative, states 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 (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....(h) fittings, whether or not any or all of the above are owned by the payee...

25. What strikes instantly is that the definition is clear as to the nature of transactions it covers ("means"). Secondly, it is expansive in sweep ("any other...arrangement for the use, (either separately or together)" any land, building, machinery or plant irrespective of ownership of the payee is covered. The Parliamentary intent was clear that transactions-the consideration for which otherwise may not be covered by rent-also ought to be within Section 194-I, by use of the expression "other ... arrangement for the use". Whilst there is no doubt that the intention of the parties in the present case was to ensure that the use of technical and specialized equipment maintained by Indus should be

resorted to; at the same time, there is no escape from the fact that the infrastructure is given access to, and in that sense, it is given for the "use" of the mobile operators. The towers in a sense are the neutral platform without which mobile operators cannot operate. If one goes back in time each mobile operator-which is now Indus" customer-used to carry out this activity, by necessarily renting premises and installing the same equipment. Of course, the rent paid then to the owner, whenever such transactions were leases, were business expenses. Yet leases or such like arrangement had to be resorted to. That situation has remained unchanged; now instead of the mobile operator performing the task, it is done exclusively by Indus. The dominant intention however, in these transactions-between Indus and its customers-is the use of the equipment or plant or machinery. The "operative intention" here, to borrow the phrase from *Rajbir Kaur (supra)*, was the use of the equipment. The use of the premises was incidental; in that sense there is an inseparability to the transaction as spelt out in *Sultan Brothers (supra)*. Therefore the submission of Indus, that the transaction is not "renting" at all, is incorrect; equally, the revenue's contention that the transaction is one where the parties intended the renting of land (because of the right to access being given to the mobile operators) is also incorrect. The underlying object of the arrangement or agreement (in the MSA) was the use of the machinery, plant or equipment, i.e. the passive infrastructure. That it is necessary to house these equipment in some premises is entirely incidental. In view of the above conclusions, it is held that the writ petition is entitled to succeed to the extent that the tax deductions to be made by Indus are to be at the rate directed in Section 194-I(a) for the use of any machinery or plant or equipment at the rate indicated for that provision, i.e. two percent. The revenue's contentions to the contrary are rejected. A consequential direction to give benefit to the petitioner, Indus, in these terms is accordingly given. The writ petition is allowed in the above terms without any order as to costs.