IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of decision : 03.08.2022

1. ITA-17-2021 (O&M)

Principal Commissioner of Income Tax, Hisar .... Appellant

Versus

Dakshin Haryana Bijli Vitran Nigam Ltd. .... Respondent

2. ITA-30-2021 (O&M)

Principal Commissioner of Income Tax, Hisar .... Appellant

Versus

Dakshin Haryana Bijli Vitran Nigam Ltd. .... Respondent

3. ITA-51-2021 (O&M)

Principal Commissioner of Income Tax, Hisar .... Appellant

Versus

Dakshin Haryana Bijli Vitran Nigam Ltd. .... Respondent

4. ITA-33-2021 (O&M)

Principal Commissioner of Income Tax, Hisar .... Appellant

Versus

Dakshin Haryana Bijli Vitran Nigam Ltd. .... Respondent

5. ITA-105-2021 (O&M)

Principal Commissioner of Income Tax, Rohtak .... Appellant

Versus

Dakshin Haryana Bijli Vitran Nigam Ltd. .... Respondent

6. ITA-119-2021 (O&M)

Principal Commissioner of Income Tax, Rohtak .... Appellant

Versus

Dakshin Haryana Bijli Vitran Nigam Ltd. .... Respondent

7. ITA-87-2021 (O&M)

Principal Commissioner of Income Tax, Rohtak .... Appellant

Versus

Dakshin Haryana Bijli Vitran Nigam Ltd. .... Respondent

CORAM: HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA
HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Vaibhav Gupta, Jr. Standing Counsel
for the appellant.

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<u>PANKAJ JAIN, J.</u>

These seven appeals at the instance of revenue involve common issue. Question relates to applicability of Section 43B of the Income-tax Act, 1961 (hereinafter referred to as '1961 Act') to the electricity duty collected by the assessee as per the provisions of Punjab Electricity (Duty) Act, 1958 (hereinafter referred to as '1958 Act'). Facts are being taken from ITA-33-2021.

2. Assessee is a licensee under the Electricity Act, 2003 engaged in the distribution of power in State of Haryana. Assessee filed return for the assessment year 2008-09 declaring nil income. Assessment under Section 143(3) was completed on 23.12.2010 at nil income. Commissioner Income Tax revised the same exercising power under Section 263 of the 1961 Act. Assessment order dated 30.01.2014 was passed under Section 143(3)/263 of the 1961 Act whereby certain deductions were disallowed and added back.

3. Aggrieved by the order, assessee approached CIT (Appeals). The appellate authority deleted disallowance made by A.O. w.r.t. electricity duty under Section 43B of the 1961 Act.

4. The matter was taken before the Income Tax Appellate Tribunal (hereinafter referred to 'Tribunal') by both the parties. Tribunal vide order dated 19.02.2020 (Annexure A-3) upheld the order passed by CIT(A) on the issue of applicability of Section 43B of the 1961 Act.

5. Counsel for the revenue claims that since the assessee in the present case was following mercantile system of the accounting, thus provision of Section 43B of the 1961 Act will be applicable to the amounts covered under electricity duty as held by Gujarat High Court in **ITA No.57 of 1989** titled as **'Commissioner of Income-Tax vs. Ahmedabad Electricity Co. Ltd.'** reported as **(2003) 181 CTR-Guj-222.**

6. We have heard learned counsel for the appellant(s) and have gone carefully gone through the record of the case.

7. As per section 43B(a) of the 1961 Act, a deduction otherwise allowable under the Act in respect of any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in Section 28 of the previous year in which such sum is actually paid by him.

8. Thus, the question arises as to whether the amount towards electricity duty is payable by the assessee or it is merely a collection agency discharging its duty under a statutory arrangement.

9. In the year 1958, State legislature enacted the Punjab Electricity (Duty) Act, 1958. Section 2(b), (d), 3, 4, 5, 9 and 10 read as

under:-

> "**2. Definitions**.- In this Act, unless the context otherwise requires,-
>
> (b) "consumer" means a person, other than a licensee, who is supplied with energy-
>
> (i) by a licensee; or
>
> (ii) by the Board;
>
> **3. Electricity duty on energy supplied to consumer or licensees by Board, etc.**
>
> [(1) There shall be levied and paid to the State Government on the energy supplied by the Board to a consumer or a licensee a duty, to be called the "electricity duty", computed at the following rates, namely:-
>
> (i) where the energy is supplied to a domestic consumer, not exceeding twenty-eight paise per unit;
>
> (ii) where the energy is supplied to a commercial consumer, not exceeding twenty-eight paise per unit; and
>
> (iii) where the energy is supplied to any other category of consumers, not exceeding fifty per cent on the price of energy so supplied in a month.
>
> as the State Government may, from time to time by notification, specify in this behalf:
>
> Provided that the State Government may specify different slabs for different categories of consumer and specify different rates for each slab :
>
> Provided further that if such a consumer uses any part of the energy so supplied to him for a domestic or commercial purpose, -
>
> (a) where a separate meter is installed for measuring energy so used for domestic or commercial purpose, the rate of electricity

duty on the part of the energy so used shall be as notified under clause (i) or clause (ii), as the case may be, and

(b) where a separate meter is not installed for measuring energy so used for domestic or commercial purpose, the rate of electricity duty on the whole of energy so supplied, including the energy so used, shall be as notified under clause (i),

(iv) where the energy is supplied to any consumer, not being a licensee, through a temporary connection or a temporary extension of an existing connection for the purpose of illumination on the occasion of a marriage or other religious or social function, at such rate not exceeding ten rupees per unit of the energy so supplied, as the State Government may, from time to time by notification, specify in this behalf, notwithstanding anything to the contrary contained in the preceding clause; and

(v) where the energy is supplied to a licensee, twenty-five per cent on the price of energy so supplied in a month.

Provided that on the supply of energy which is sold by a licensee not being a licensee specified in sub-clause (ii) or clause (d) of section 2, -

(a) to a domestic consumer or a commercial consumer the rate of electricity duty on the energy so sold shall be as notified under clause (i) or clause (ii), as the case may be

(b) to any other category of consumers and such a consumer uses any part of the energy so sold to him for a domestic or commercial purpose, -

(i) where a separate meter is installed for measuring energy so used for domestic or commercial purpose, the rate of electricity duty on the part of the energy so used per unit shall be as notified under clause (i) or clause (ii), as the case may be, and

(ii) where a separate meter is not installed for measuring energy so used for domestic or commercial purpose, the rate of electricity duty on the whole of energy so supplied including the energy so used, per unit shall be as notified under clause (i), and

(c) to any consumer, through a temporary connection or a temporary extension of an existing connection for the purpose of illumination on the occasion of a marriage or other religious or social function, the rate of electricity duty, on the energy so sold per unit shall be as specified in clause (iv).]

(2) There shall be levied for and paid to the State Government the electricity duty at the rate of one and half naye paise per unit also by -

(a) a licensee generating energy himself or the energy supplied by him to the consumers; and

(b) a person generating energy for his own use or consumption on the energy used or consumed by him in a month.

(3) Nothing in sub-sections (1) and (2) shall apply to the consumption or sale of energy which is-

(a) [consumed by or sold to the Government of India for consumption by that Government; or]

(b) consumed in the construction, maintenance or operation of any railway by the Government of India or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway.

(4) For the purpose of computing the electricity duty under this section the consumption shown by the meters starting after the first meter reading date falling after the commencement of this Act shall be taken into account.

[Provided that for the purpose of computing the electricity duty at rate specified in section 3 of the Punjab Electricity (Duty) Amendment Act, 1963, the consumption shown by the meters commencing with the first meter reading date falling after the first day of April, 1963, shall be taken into account:

Provided further that, for the period commencing with the first April, 1963, and ending with the first meter reading date falling after the first day of April, 1963, the electricity duty shall be computed as if the Punjab Electricity (Duty) Amendment Act, 1963, had not been enacted]

4. Collection and payment of electricity duty.- The electricity duty shall be collected and paid to the State Government by the Board or a licensee or a person who generates energy for his own use or consumption as the case may be:

5. Licensee not to reimburse himself from consumer without sanction of State Government. - No licensee shall, without the previous sanction of the State Government and subject to such conditions as the State Government may impose, recover from any person to whom energy is sold, the duty which falls to be paid by the licensee [under this Act].

Explanation. - Where the State Government permits a licensee to charge duty from the consumer, the duty shall not be deemed to be part of the price charged for the energy by the licensee.

9. Recovery of duty.- Any duty due under this Act or penalty imposed under section 8 which remains unpaid, whether by a consumer to the Board or by the Board or a licensee or a person generating energy for his own use or consumption to the State Government, shall be recoverable as an arrears of land revenue or by deduction from amounts payable by the State Government to the Board or the licensee or such person.

10. Power to disconnect supply for non-payment of duty.- Where a consumer or a licensee fails to pay the electricity duty to the Board or a consumer fails to pay such duty to a licensee who is authorised to recover the duty from the consumers under section 5, the Board or the licensee may exercise the power conferred on a licensee by sub-section (1) of section 24 of the Indian Electricity Act, 1910, for the recovery of any charge or sum due in respect of energy supplied by it or him."

10. From the bare reading, it is thus clear that the liability to pay electricity duty lies on the consumer. Further, the electricity duty is to be paid to the State Government.

11. Section 4 casts duty on the licensee to collect the electricity duty from the consumers and to pay the same to the State Government. Licensee is only a collecting agency. It will be further apposite to notice here that exercising powers under Section 13 of the 1958 Act, rules have

been framed. The rules called as Punjab Electricity (Duty) Rules, 1958 prescribes for collection and payment of duty. Rules 9 and 10 read as under:-

> "**9. Duty leviable on the energy supplied by the Board**.- The duty leviable under sub-section (1) of section 3 of the Act on the energy supplied by the Board to a consumer or a licensee, shall be collected by the Board along with the [-] bills for the energy supplied and shall be deposited in Government Treasury, Sub-Treasury or the State Bank of India, as early as possible and [in no case later, than the 20th day of the following month].
>
> **10. Duty leviable on the energy supplied by a generating licensee**.- The duty leviable under clause (a) of sub-section (2) of section 3 of the Act shall be deposited by a generating licensee in Government Treasury, Sub-Treasury or the State Bank of India within 15 days of the close of the month to which the duty relates."

12. Thus, the amount collected by the licensee as electricity duty leviable under 1958 Act is required to be deposited in the Government treasury by the licensee.

13. Section 43B is a non-obstente clause. It was inserted by Finance Act, 1983 with an intent to curb the malpractice at the hands of certain tax payers, who claimed statutory liability as a deduction without discharging the same and pleaded mercantile system of accounting as defence.

14. The argument raised by counsel for the appellant(s) that Section 43B will be attracted merely for the reason that the appellant(s) is following mercantile system of accounting deserves to be rejected.

The revenue is required to show that the duty, tax, cess or fee (in the present case electricity duty) is payable by the assessee. The reliance placed on judgment passed by Gujarat High Court in Ahmedabad Electricity Co. Ltd.'s case (supra) is misplaced. In the said case, after examining the provision of Bombay Electricity Duty Act, 1958 it was found that the clear liability of the licensee is made out. It was under those circumstances that the Court found that since electricity duty was payable by the assessee and thus Section 43B was attracted. In the present case, there is no such provision contained in 1958 Act which shows that the liability to pay the electricity duty rests upon the assessee. Rather Section 4 of the 1958 Act read with provisions contained in 1958 Rules makes it abundantly clear that assessee is merely an agency assigned with a statutory function to collect electricity duty from the consumers and to pay the same to the State Government. Calcutta High Court in **ITA No.82 of 2004**, decided on 14.05.2015 titled as **'CESE Ltd. vs. CIT-II, Kolkata'** reported as **(2003) 262 ITR 9,** after examining provision of Bengal Electricity Duty Act, 1935 held that:-

> "xx xx xx
>
> 19. Thus, in our view, the electricity duty, not being a sum payable by the assessee as a primary liability by way of tax, duty, cess or fee, Section 43B is not attracted to the licensee/assessee in respect of electricity duty collected by it for being passed on the State Government."

15. In view of the discussion held hereinabove, we find that the question w.r.t. the applicability of Section 43B on the electricity duty, needs to be answered against the revenue and in favour of the assessee.

16. Resultantly, present appeals are dismissed.

17. Since the main appeals have been decided, the pending civil miscellaneous applications, if any, also stand disposed off.

18. A photocopy of this order be placed on the files of other connected cases.

(TEJINDER SINGH DHINDSA)
JUDGE

(PANKAJ JAIN)
JUDGE

03.08.2022
Dinesh

Whether speaking/reasoned	:	Yes
Whether Reportable	:	Yes