(2016) 03 DEL CK 0102

DELHI HIGH COURT

Case No: W.P. (C) 1924 and 2130/1999

Apeejay Surrendera Park Hotels Ltd. and Others	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision: March 23, 2016

Acts Referred:

- Constitution of India, 1950 - Article 14, Article 19 (1) (g), Article 366, Article 366 (29A), Article 366 (29-A)
- Income Tax Act, 1961 - Section 10, Section 119, Section 194-I, Section 197, Section 199, Section 203, Section 32-A (2)(b)(ii), Sec

Citation: (2016) 287 CurTR 161

Hon'ble Judges: Dr. S. Muralidhar and Vibhu Bakhru, JJ.

Bench: Division Bench

Advocate: Lalit Bhasin, Ratna Dwivedi Dhingra and Bhavna Dhami, Advocates, for the Appellant; Ashok Manchanda, Senior Standing Counsel, Vibhooti Malhotra, Junior Standing Counsel and Amino Aziz, Advocate, for the Respondent

Final Decision: Dismissed

Judgement

Dr. S. Muralidhar, J.

1. These writ petitions seek a declaration that Section 194-I of the Income Tax Act, 1961 (''Act'') does not apply to the Hotel Industry since the charges for a room in a hotel is, according to them, not ''rent'' in terms of Explanation to Section 194-I of the Act.

Profile of the petitioners

2. Writ Petition (Civil) No. 1924 of 1999 is by M/s. Apeejay - Surrendera Park Hotels Limited (''ASPHL''), Petitioner No. 1 and Ms. Priya Paul, shareholder of Petitioner No. 1. ASPHL is a public limited company which runs a five star hotel in New Delhi by the name ''Park Hotel''. ASPHL offers a number of facilities and amenities to its guests. It

is stated that the charges for a room in the hotel includes not only charges for use and occupation of the room but also for water, electricity, air-conditioning, telephone facility, and various other items or amenities provided for guests in the room. The room tariff charge is therefore stated to be "a composite charge for all the above and not merely for occupying the room alone."

3. Writ Petition (Civil) No. 2130 of 1999 is by the Federation of Hotel & Restaurant Associations of India (''FHRAI'') (Petitioner No. 1), M/s. Asian Hotels Limited (''AHL'') (Petitioner No. 2) and Mr. Sushil Gupta, (Petitioner No. 3) who is the Managing Director (''MD'') and a shareholder of AHL. FHRAI is stated to be an apex body of hotels and restaurants in India and formed to protect their interests.

Section 194-I as enacted and at present

4. Section 194-I of the Act was inserted with effect from 1st June 1994. The said provision, as it existed at the time of the filing of these petitions, reads as under:

194 - I. "Any person, not being an individual or a Hindu undivided family, who is responsible for paying to any person 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. fifteen per cent if the payee is an individual or a Hindu undivided family; and

b. twenty per cent in other cases;

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 twenty thousand rupees.

Explanation - For the purpose of this section, -

(i) "rent" means any payment, by whatever name called, under any lease, sublease, tenancy or any other agreement or arrangement for the use of any land or any building (including factory building), together with furniture, fittings and the land appurtenant thereto, whether or not such building is 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."

5. It is necessary to note that the definition of ''rent'' in Section 194-I of the Act has since undergone a change. It now reads as under:

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

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

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

Provided that no deduction shall be made under this section where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed one hundred and eighty thousand rupees:

Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such income by way of rent is credited or paid, shall be liable to deduct income-tax under this section :

Provided also that no deduction shall be made under this section where the income by way of rent is credited or paid to a business trust, being a real estate investment trust, in respect of any real estate asset, referred to in clause (23FCA) of section 10, owned directly by such business trust.

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."

6. According to the Petitioners, initially even the Income Tax Department (''Department'') understood the above provision as not applying to the hotel industry and therefore, did not issue any orders or directions to any hotel in that regard.

7. The Central Board of Direct Taxes (''CBDT'') issued Circular No. 715 of 1995 which inter alia provided the following clarification:

"Question 20: Whether payments made to a hotel for rooms hired during the year would be of the nature of rent?

Answer: Payments made by person other than individuals and HUF''s for hotel accommodation taken on regular basis will be in the nature of rent subject to TDS under Section 194-I."

Initial challenge to Section 194-I

8. East India Hotels Limited (''EIHL'') challenged the applicability of Section 194-I of the Act to hotels by filing Writ Petition No. 105 of 1995 in the High Court of Bombay. By an order dated 2nd February 1995, the Bombay High Court stayed the applicability of Section 194-I of the Act. Letters by way of clarifications were issued by the Department in respect of the hotels of EIHL in Bangalore, Calcutta and Mumbai on 21st August 1995, 6th June 1996 and 21st March 1997 respectively stating that no instruction were issued to its clients to deduct the tax at source and that the clients need not be deduct tax at source as regards payment of room rent to the hotel under Section 194-I of the Act in view of the stay granted by the Bombay High Court.

9. Meanwhile, the tour operators and travel agents sought clarifications from the Department in respect of deduction of tax at source on payments being made to the hotels on behalf of the clients. This request, which was also made by the members of FHRAI, was declined by a letter issued by the Director, CBDT on 19th/20th June 1997.

The present petitions

10. The immediate provocation for the filing the present writ petitions was a Circular No. DEL/056/99 dated 12th March 1999 received from Indian Association of Tour Operators along with a copy of letter dated 2nd February 1999 issued by the Deputy Commissioner of Income Tax (''DCIT'') clarifying that the tour operators/travel agents were required to deduct TDS under Section 194-I of the Act while making

payments to the hotels on behalf of foreign tourists. The tour operators informed the hotels that they would be deducting TDS @ 20% for the year 1998-99 from the payments made to the hotels wherever the payments had crossed the limit of Rs. 1.20 lakhs in any financial year.

11. The Petitioners stated that by an administrative letter of the DCIT, a tax liability was being imposed on foreign guests in a hotel. It was accordingly contended that the Department was enlarging the scope of Section 194-I and that this was legally impermissible. Further, a distinction was being sought to be drawn between Indian and foreign guests when the provision itself did not envisage it. According to the Petitioners this was also contrary to the stay order granted by the Bombay High Court.

12. Writ Petition (Civil) No. 2130 of 1999 was listed on 12th April 1999 and while directing notice to issue, it was directed that "provisions of Section 194-I of Income Tax Act will not be enforced qua the charges payable for temporary stay of guests to members of Petitioner No. 1 who are running their hotels with proper authorization."

13. On 15th April 1999 Writ Petition (Civil) No. 1924 of 1999 by ASPHL was listed. While directing notice to issue in this writ petition a similar interim order was passed.

14. In the meanwhile, similar writ petitions were filed in the High Court of Madras challenging the applicability of Section 194-I of the Act to payments being made by the companies for hotel stay of their employees or others authorized by them. The aforesaid writ petitions were disposed of an order dated 23rd February 2001 with directions to CBDT to give a hearing to the Petitioners in the said writ petitions and other hotels and lay down proper guidelines for the assessing authority with regard to the scope of Section 194-I of the Act and the manner in which it is to be implemented.

15. Pursuant to the said order of the Madras High Court, a hearing was given to those Petitioners and the CBDT issued a Circular No. 5 of 2002 dated 30th July 2002 clarifying that the payment made to the hotel for hotel accommodation, whether in the nature of lease or license, was covered within the meaning of ''rent'', so long such an accommodation was taken on regular basis. It was further clarified that wherein the agreement was in the nature of ''rate contract'', it could not be said to be accommodation taken on regular basis.

16. The Petitioners contended that while issuing the above circular the CBDT overlooked the definition of ''rent'' and that it had erroneously classified ''rent'' as payment made for accommodation on regular basis and that this was inconsistent with Section 194-I of the Act. The Petitioners sought to amend their respective writ petitions challenging Circular No. 5 of 2002 dated 30th July 2002 issued by the CBDT. The amendments were allowed by this Court by its order dated 22nd March 2005.

Submissions of Counsel

17. Mr. Lalit Bhasin, learned counsel appearing for the Petitioners made the following submissions:

(i) The definition of ''rent'' in the Explanation to Section 194-I of the Act specifically states that it must be a payment under any ''lease or sub-lease or tenancy'' or ''any other similar agreement'' with the hoteliers. However, in issuing the impugned circulars the Department has overlooked the above definition and has erroneously classified ''rent'' into rate charged and accommodation taken on regular basis.

(ii) The occupant of a room in a hotel, whether a foreigner or an Indian, is not a tenant as explained by the Supreme Court in Associated Hotels v. R.N. Kapoor , (1960) 1 SCR 368. He is at best a licensee.

(iii) The words ''any payment'' appearing in the Explanation to Section 194-I of the Act must be read consistent with the word ''rent'' in the main body of Section 194-I of the Act. Further, the words ''any other agreement or arrangement'' in the definition of ''rent'' has to be ejusdem generis and therefore read together with the preceding words ''any lease, sub-lease or tenancy'' in the definition. A reference was made to the definition of ''other'' as defined in Stroud''s Judicial Dictionary of Words and Phrases (Fourth Edition) which states that the word ''other'' "always implies something additional" and that "where general words follow particular ones, the rule is to construe them as applicable to persons ejusdem generis".

(iv) The room tariff is a composite charge which comprises all the facilities and amenities provided to the guest. It would include the charges for water, electricity, air conditioning, telephone facilities, it has to provide, beside boarding and lodging, highly trained experienced and efficient staff, 24 hours service for reception, information and housekeeping of the highest possible standards and other facilities like restaurant, beauty salon, barber shop, health club, business centre service etc. It can at best be a licence fee. Reliance was placed on the decision in State of Punjab v. M/s. Associated Hotels of India Limited , AIR 1972 SC 1131, Northern India Caters (India) Ltd. v. Lt. Governor of Delhi , (1979) 1 SCR 557, Hotel and Restaurants Association v. Star India (P) Limited , 2006 (12) SCALE 543 and The Federation of Hotels & Restaurants Association of India v. Union of India , AIR 2007 Del 137.

(v) An analogy is sought to be drawn with the definition of ''landing charges'' collected at airports which was interpreted in Japan Airlines Company Limited v. Commissioner of Income Tax , (2015) 377 ITR 372 (SC) as including charges for landing and take-off services as well as parking of aircrafts collected by the Airport Authority of India. It was held not to merely mean charges for ''use of land'' but for services and facilities offered in connection with the aircraft operation at the airport. Likewise, the stay of a guest in a hotel room did not involve use of land or building alone within the meaning of Section 194-I of the Act.

(vi) Circular No. 5 of 2002 is vague as it did not define the expression ''regular basis''. The mere fact that a hotel might receive bookings for guests either from the individuals themselves or from travel agents and tour operators or corporate bodies, did not change nature of use of the hotel room. Likewise whether the room is used for one or several days would not make any difference to the nature of the use and the amount charged for such use. In other words, the expression ''regular basis'' did not change the essence of the transaction. The payment by travel agents or tour operators on a consolidated basis on behalf of all the individual guests who occupy the room in a hotel is really for the sake of convenience.

18. It must be noted that certain other grounds have been urged in the petitions which were not urged in the course of arguments. This includes a challenge to Section 194-I of the Act being violative of Article 14 read with Article 19 (1) (g) of the Constitution inasmuch as it seeks to treat made by individual foreign guests of a hotel, who may be making payments through a tour operator, different from Indian individual gests who may be making such payment directly. Apart from making an irrational and unreasonable classification, it is urged that it imposes an unreasonable restriction of the right to carry on business under Article 19 (1) (g) of the Constitution, It has further been urged in the grounds in the writ petitions that Section 194-I equates room charges with rent when plainly room charges were not restricted to use of the space in the room but was a composite charge for a host of amenities and facilities provided, and inasmuch as it treats unequals equally it violates Article 14 of the Constitution. Further the income earned by the Petitioners through their hotels has been assessed under the head ''profits and gains from business and profession'' and not under the head ''income from house property'' and therefore Section 194-I cannot apply to room charges collected from guests at the hotels.

19. The above submissions were countered by the learned counsel for the Revenue, i.e., Ms. Vibhooti Malhotra, Mr. Raghvendra Singh and Mr. Zoheb Hossain who submitted as under:

(i) It is not understood why the hotels would have any objection to the circulars as they could not be said to be prejudiced by them. In any event there was no challenge to the circulars insofar as it mandated deduction of TDS from the room charges where the giving of a room on hire was on regular basis.

(ii) Further the challenge to the circular dated 8th August 1995 was made only after four years in 1999 and therefore the petitions should be held to be barred by laches.

(iii) The definition of ''rent'' in Explanation to Section 194-I of the Act has the widest scope given the context in which it occurs. The ambit of the word ''rent'' was not meant to be confined to any particular type of ''agreement or arrangement'' i.e., lease, sub-lease or tenancy. Reliance was placed on the decision of the Andhra Pradesh High Court in Krishna Oberoi v. Union of India , (2002) 257 ITR 105 (AP)

which in turn referred to the decisions in State of Punjab v. British India Corporation Limited , AIR 1963 SC 1459 and Smt. Rajbir Kaur v. S. Chokasiri & Co. , AIR 1988 SC 1845.

(iii) Relying on the decision in Indus Towers Limited v. Commissioner of Income Tax , (2014) 364 ITR 114 (Del) it was urged that the Explanation to Section 194-I which defined ''rent'' was ''determinative''. It meant ''any payment'' by whatever name called. Referring to the decision in Bharat Sanchar Nigam Limited v. Union of India , (2006) 3 SCC 1 it was submitted that the dominant intention test was no longer determinative of whether the charges collected can be said to be ''rent''. A reference was also made to some of the invoices, copies of which are enclosed with Writ Petition (Civil) No. 1924 of 1999, to show that a major portion thereof pertained to the room tariff.

(iv) Reliance was also placed on the decisions in Commissioner of Income Tax, Bangalore v. Venkateswara Hatcheries (P) Limited , (1999) 3 SCC 632 and UCO Bank, Calcutta v. Commissioner of Income Tax, West Bengal , (1999) 4 SCC 599. It was contended that concepts which may be relevant for a particular statute may not be ipso facto be relevant in interpreting the word ''rent'' in Section 194-I of the Act. The decision in Union of India v. Motilal Padampat Sugar Mills , 1969 (1) SCC 320 was referred to urge that the word ''any other'' preceding the words ''agreement or arrangement'' had to interpreted in the widest possible manner

Laches

20. On the issue of laches this Court would like to observe that the Department may be justified in pointing out that there was a delay of four years in the Petitioners approaching this Court to challenge the Circular No. 715 of 1995, the fact also remains that the Hotel Restaurant Association (Western India) had also challenged Section 194-I of the Act in the Bombay High Court by filing Writ Petition (Civil) No. 1917 of 1995. Likewise EIHL, a member of FHRAI had also challenged it by filing Writ Petition No. 105 of 1995 in the High Court of Bombay. These writ petitions were disposed of as withdrawn by orders dated 21st March 2009 in Writ Petition (Civil) No. 1917 of 1995 and 24th March 2009 in Writ Petition (Civil)_ No. 105 of 1995.

21. Further, till such time, the tour operators were not asked by the Department by its letter dated 2nd February 1999 requiring them to deduct the TDS on the payments made to the hotels for the bookings made by the individuals/clients, there was no reason for the members of the FHRAI to have any grievance. In fact pursuant to the stay granted in the aforementioned writ petitions in the Bombay High Court, the Department itself did not think it necessary to issue any clarification or direction.

22. The third reason is that no objection as such was raised by the Department to the writ petitions being amended in 2004, which amendment was allowed in 2005. The amended prayers included a challenge to Circular no. 5 of 2002 in particular. Consequently, this Court negatives the plea of the Department that these writ

petitions are barred by laches.

Interpreting the word ''rent''

23. The central issue as far as the present writ petitions are concerned is regarding the interpretation of the word ''rent'' occurring in Section 194-I of the Act. With the petitions having been amended in 2005, the challenge is to even the amended Section 194-I as it presently stands.

24. At the outset it requires to be noticed that Explanation to Section 194-I of the Act, as it stands, gives an exhaustive definition of the word ''rent''. It begins by stating that ''rent'' means ''any payment, by whatever name called''. The payment need not be only under a ''lease/sub-lease/tenancy''. It could be under ''any other arrangement or agreement'' and such arrangement could permit the use ''either separately or together'' any land, building, land appurtenant to a building, machinery, plant, equipment, furniture, fittings ''whether or not any or all the above are owned by the payee.''

25. The words ''any other'' preceding the word ''arrangement or agreement'' is dispositive of the express legislative intent of giving the latter words the widest scope. As far as the main body of Section 194-I of the Act is concerned, it declares that any person who makes payment, not being an individual or Hindu undivided Family (''HUF''), by way of rent has to deduct TDS. Significantly therefore, when such payment is made by an individual or a HUF, no TDS is expected to be deducted from such payment. The deduction of TDS from the payment, either at the time of credit of such payment to the account of payee or at the time of payment in cash itself is 2% for the use of the machinery or plant or equipment and 10% for the use of "any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings."

26. The Explanation to Section 194-I is consistent with and not beyond its scope of Section 194-I of the Act. It envisages ''rent'' as any payment for the use of land or building or machinery or plant or equipment or furniture or fittings. Merely because the room charges might also comprise charges for the facilities provided would not take it out of the ambit of ''rent'' in terms of Section 194-I of the Act.

Discussion of case law

27. The Court next proceeds to discuss the decisions cited by Mr. Bhasin in support of his submissions.

28.1 In Associated Hotels of India Limited v. R.N. Kapoor (supra) the question as to what constitutes ''rent'' arose under the Delhi and Ajmer-Merwara Rent Control Act, 1947 (''DAMRCA''). There the Respondent had occupied two rooms in the Imperial Hotel, New Delhi run by the Appellant therein, described as Ladies'' and Gents'' Cloak rooms. The Respondent carried on his business there as a hair dresser. The document executed between the parties was one between a licensor and licensee.

The Respondent was to pay an annual rent of Rs. 9,600 in four quarterly instalments. Later by a mutual agreement, this was reduced to Rs. 8,400. On an application made by the Respondent for standardization of rent under Section 7 (1) of DAMRCA, the Rent Controller of Delhi fixed the rent at Rs. 94 per month.

28.2 On appeal by the Appellant, the order of the District Judge reversing the order of the Rent Controller was set aside by the High Court. It was held that the agreement created a lease or not a license and that Section 2 (b) of DAMRCA did not exempt the two rooms from the operation of the DAMRCA. The order of the Rent Controller was, therefore, restored. In the appeal by Imperial Hotel, two questions that arose for determination were (i) whether the agreement created a lease or a license and, (ii) whether the said rooms can be said to be rooms within the meaning of Section 2(b) of DAMRCA. This was because Section 2 (b) of DAMRCA defined the premises to mean "any building or part of a building which is, or is intended to be, let separately for use as a residence or for commercial use or for any other purpose" but does not include a room in a dharamshala, hotel or lodging house. It was in this context the Court was called upon to answer the question "what is the meaning of the expression ''a room in a, hotel.''?

28.3 The Court re-formulated that question by observing, as under:

"If a strictly literal construction is adopted, then a room in a hotel or dharamshala or lodging house means merely that the room is within, and part of, the building which is used as a hotel, dharamshala or lodging house. There may be a case where the entire building is not used as a hotel, dharamshala or lodging house, but only a part of it so used. In that event, the hotel, lodging house or dharamshala will be that part of the building only which is used as such, and any room therein will be a room in a hotel, dharamshala or lodging house. Rooms outside that part but in the same building will not be rooms in a hotel, dharamshala or lodging house. Take, however, a case where the room in question is within that part of the building which is used as a hotel, dharamshala or lodging house, but the room is let out for a purpose totally unconnected with that of the hotel, lodging house or dharamshala as the case may be. Will the room still be a room in a hotel, lodging house or dharamshala? That I take it, is the question which we have to answer."

28.4 The majority in Associated Hotels of India Limited v. R.N. Kapoor (supra) then examined the purpose of use of the space in the hotel which was given on rent. It was stated that the "expression ''room'' in the composite expression ''room in a hotel'' must take colour from the context or the collocation of words in which it has been used; in other words, its meaning should be determined noscitur a sociis". It was then stated that a room in a hotel must fulfil two conditions, namely (i) it must be part a hotel in the physical sense and (2) its user must be connected with the general purpose of the hotel of which it is a part. The mere fact that the people not resident in the hotel might also be served by the hair dresser would not alter the position that it was still an amenity for the residents in the hotel. Accordingly, it was

held that two rooms which were given on hire did not fall within the meaning of ''premises'' in Section 2 (b) of DAMRCA and therefore, the Respondent was not entitled to ask for the standardization of the rent.

29. The Court does not agree with Mr. Bhasin that on the strength of the above decision in Associated Hotels of India Limited v. R.N. Kapoor (supra), the word ''rent'' in the present case must be restricted to payment received under a lease, sub-lease or tenancy. That would be contrary to the legislative intent that is apparent from the wide sweep of the words ''any payment'' and ''any other agreement or arrangement.'' Unlike Section 2 (b) of DAMRCA there is no exclusion from Section 194-I of the Act of any arrangement or agreement under which payment might be received It certainly does not exclude the payment received by a hotel for use by a customer of a room therein. The decision in Associated Hotels of India Limited v. R.N. Kapoor (supra), therefore, does not help the case of the Petitioners.

30.1 Turning to the next decision in State of Punjab v. M/s. Associated Hotels of India Limited (supra), it is seen that the question that arose in that case was whether the hotels were liable to pay sales tax in respect of meals served to the guests coming there for stay in hotels. It was stated that the bill raised on the customers was incapable of being split up into separate charges: for each of the amenities furnished and availed of by the customers.

30.2 The High Court held that the transaction was primarily one for lodging that the board supplied by the hotel amounting to an amenity considered essential in all properly conducted hotels and could not be said to constitute a sale every time a meal was served to such a resident visitor. It was this decision of the High Court that was challenged before the Supreme Court.

30.3 The Supreme Court held that "in considering whether a transaction falls within the purview of sale tax, it becomes necessary at the threshold to determine the nature of the contract involved in such a transaction for the purpose of ascertaining whether it constitutes a contract of sale or a contract of work or service. If it is of the latter kind it obviously would not attract the tax." It was clarified that "mere passing of property in an article or commodity during the course of the performance of the transaction in question does not render it a transaction of sale." It was further clarified that in every case the Court would have to find out what was the primary object of the transaction and the intention of the parties while entering into it.

30.4 Thereafter in para 13 the Court agreed that in the case of hotels the mere transfer of property was not conclusive and did not render the event of such supply and consumption a sale "since there is no intention to sell and purchase. The transaction essentially is one of service by the hotelier in the performance of which meals are served as part of, and incidental to that service, such amenities being regarded as essential in all well conducted modern hotels." It was therefore held that the Revenue was not entitled to split up the transaction into two parts, one of

service and the other of sale of food stuffs and to split up also the bill charged by the hotelier as consisting of charges for lodging and charges for food stuffs served to guests with a view to bring the latter under the Act."

31. Turning to the next decision in Northern India Caters India Limited v. Lt. Governor of Delhi (supra), the question there arose under the context of Bengal Finance (Sales Tax) Act, 1941. The decision followed the decision in State of Punjab v. Associated Hotels of India Limited (supra) and it was held that since it was a composite charge levied by the hotelier on those residing therein, the Revenue was not entitled to split up the transaction into two parts.

The legal position after the 46th Amendment

32.1 It requires to be noticed at this stage that the above legal position was overturned by the 46th amendment to the Constitution by which Article 366 (29A) was introduced. The effect of this change was explained by the Supreme Court in Bharat Sanchar Nigam Limited v. Union of India (supra). In terms of Article 366 (29A) of the Constitution, tax on the sale or purchase of goods includes "tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, deliver or supply of goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

32.2 After referring to the decision in Associated Cement Companies Limited v. Commissioner of Customs , (2001) 4 SCC 593, the Supreme Court in Bharat Sanchar Nigam Limited v. Union of India (supra) conclusively held:

"49..... After the Forty-sixth Amendment, the sale element of those contracts which are covered by the six sub-clauses of clause (29A) of Article 366 are separable and may be subjected to sales tax by the States under Entry 54 of List II and there is no question of the dominant nature test applying. Therefore when in 2005, C.K. Jidheesh v. Union of India , (2005) 13 SCC 37 held that the aforesaid observations in Associated Cement Companies Limited (supra) were merely obiter and that Rainbow Colour Lab v. State of M.P. , (2000) 2 SCC 385 was still good law, it was not correct. It is necessary to note that Associated Cement did not say that in all cases of composite transactions the Forty-sixth Amendment would apply."

32.3 The Supreme Court in Bharat Sanchar Nigam Limited v. Union of India (supra) further observed:

"50. What are the "goods" in a sales transaction, therefore, remains primarily a matter of contract and intention. The seller and such purchaser would have to be ad idem as to the subject matter of sale or purchase. The Court would have to arrive at

the conclusion as to what the parties had intended when they entered into a particular transaction of sale, as being the subject matter of sale or purchase. In arriving at a conclusion the Court would have to approach the matter from the point of view of a reasonable person of average intelligence."

33. Thus it is apparent that after the 46th Amendment the ''dominant nature'' test is no longer the sole determinant of whether a transaction can be said to be ''sale'' within the meaning of Article 366 (29-A) of the Constitution. This is a useful principle to be kept in view while interpreting the word ''rent'' in Section 194-I of the Act as well, since that word need not, in the context in which it occurs, need not be circumscribed by what is the dominant feature of the underlying transaction, be it a lease, a tenancy, a sub-lease or any other ''agreement or arrangement''

Contextual interpretation

34. Contextual interpretation has been favoured by the Courts when the question arose as regards the meaning to be attributed to particular words. For e.g., in Union of India v. Motilal Padampat Sugar Mills Co. (P) Limited (supra), in the context of Section 41 (1) (c) of the Indian Railways Act 1890, it was held that word ''rates'' occurring thereunder could not be given the narrow meaning so as to exclude charges made or levied by the railway for all other services. In Commissioner of Income Tax, Bangalore v. Venkateswara Hatcheries (P) Limited (supra) the Court was considering the word ''produce'' and ''article'' occurring in Section 32-A (2)(b)(ii) and Section 80-J (4) (iii) of the Act. The question was whether the chicken being produced by the Assessee can be construed to be an article or thing. In this context it was observed as under:

"Neither the word ''produce'' nor the word ''Article'' has been defined in the Act. When the word is not so defined in the Act it may be permissible to refer to dictionary to find out the meaning of that word as it is understood in the common parlance. But where the dictionary gives divergent or more than one meaning of a word, in that case it is not safe to construe the said word according to the suggested dictionary meaning of that word. In such a situation the word has to be construed in the context of the provisions of the Act and regard must also be had to the legislative history of the provisions of the Act and the scheme of the Act. It is settled principle of interpretation that the meaning of the words, occurring in the provisions of the Act must take their colour from the context in which they are so used."

35. In State of Punjab v. British India Corporation (supra), the question before the Supreme Court was whether the payment received from the employees of the Respondent company on leave and license, was liable to be taxed under the Punjab Urban Immovable Property Tax Act 1940. The specific question was whether such payment was ''rent'' within the meaning of the Rule 18(4) (ii) of the Punjab Urban Immovable Property Tax Rules, 1941. IN answering the question in the negative, the

Supreme Court held:

"In the absence of anything to indicate the contrary, it would be reasonable to think that the rule-making authority would not depart from the meaning in which it had reason to believe that the legislature had used the word, and that it used the word in cl. (ii) of Rule 18 (4) in the same narrower sense of payment by tenant to landlord for demised property. Our conclusion therefore is that the word "rent" in cl. (ii) of Rule 18 (4) means payment to a landlord by a tenant for the demised property and does not include payments made by licensees."

36. In Rajbir Kaur v. S. Chokesiri and Co. (supra) it was held that the question whether a transaction is a lease or licence had to be determined keep in view the "operative intention of the parties" rather than whether there was exclusive possession handed over thereunder. The reason given was:

"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.

Decisions on Section 194-I of the Act

37. The Court now turns to the decision of the Andhra Pradesh High Court in Krishna Oberoi v. Union of India (supra) which was called upon to answer the very question that arises in these petitions. The Court there was asked to give a declaration that "the charges paid/payable to the petitioner-company by its customers on account of room charges are not in the nature of rent within the meaning of Section 194-I of the Act." The Court noted Circular dated 8th August 1995 which clarifies that Section 194-I would apply to payments made for accommodation taken on ''regular basis''. The Court negatived the challenge to the provision based on the hardship caused to hoteliers by observing:

"20. Therefore, even accepting that the obligation to effect TDS creates hardship, financial inconvenience to the 1st Petitioner, even then, that circumstance itself cannot be a valid or legal ground to take out the payments received by the payee from the patrons for use of the hotel rooms in pursuance of agreements between them from the purview of "rent" as defined in the Explanation to Section 194-I. If TDS results in hardship, financial burden on the recipient, the Parliament itself has made provision in Section 197 for obtaining certificate for deduction at lower rate or no deduction of Income Tax. Section 197 of the Income Tax Act relating to certificate for deduction of Income Tax at lower rate or for no deduction of Income Tax in appropriate cases has been amended to include income by way of "rent" within the

scope of the said section. Therefore, it is open for the 1st petitioner to make necessary application under Section 197 if there is any justification or hardship for it to do so. In conclusion, we hold that the charges paid to the 1st petitioner-company by its customers like the respondents 4 and 5, for use and occupation of the hotel rooms should be regarded as "rent" within the meaning of Section 194-I."

38. Accepting the plea of the Department that a wider meaning had to be given to the word ''rent'' occurring in Section 194-I, the Andhra Pradesh High Court observed:

"the word "rent" in its wider sense may mean payment made by a licensee also for the use of land or buildings and not necessarily a payment made by a tenant or a lessee. If such a wider meaning can be given to the word "rent", even in the absence of definition of the word "rent" in a statute, we do not find any weighty or sound reasons to limit the meaning of the word "rent" occurring in Explanation to Section 194-I only to the payment made by a tenant or a lessee for the use of land or buildings demised to him. We say this because, the term "rent" is defined in the Explanation in a wider sense. As per the definition; "rent" includes and means not only a payment made under any lease or sub-lease or tenancy, but also means and includes payment made under any other agreement or arrangement for the use of building or land. If that is so, even accepting the contention of Sri Kodandram, that die relationship between the 1st petitioner and its corporate customers is a kind of licence-arrangement and not a leasing-arrangement as correct, the payment made by such licensees could validly be treated as "rent" within the meaning of that term for the purpose of Section 194-I. There is no controversy that the payments have to be made by the corporate customers of the 1st petitioner under agreements entered into between them and for the use of the building owned by the 1st petitioner. Therefore, the consideration paid to the 1st petitioner by its customers under the agreements for the use and occupation of the hotel rooms squarely falls within the term "rent" as defined under the Explanation."

39.1 In Indus Towers Ltd. v. Commissioner of Income Tax (supra), the Court concurred with the above decision in Krishna Oberoi (supra). The Court formulated the question that arose as under:

"20. 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."

39.2 Delving into the interpretation of Section 194-I of the Act, this Court observed:

"26. 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 (p) Ltd. v. CIT , (1964) 51 ITR 353). 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."

Summation of the legal position re: ''rent'' under Section 194-I

40. In view of the legal position explained in the above decisions, with which the Court concurs, it holds as under:

(i) The word ''rent'' in Section 194-I of the Act has to be interpreted widely and not confined to payments received towards a ''lease, sub-lease or tenancy'' or transactions of such like nature.

(ii) given the context of the said provision which is intended to cover a wide range of transactions as is evident from the words "any other agreement or arrangement" it is evident that the principles of ejusdem generis or noscitur a sociis cannot be invoked to narrow the scope of those words. The words "any payment" occurring in definition of ''rent'' in the Explanation to Section 194-I is also indicative of the

legislative intent to accord the widest possible meaning to the payment received as a result of any of the underlying transactions envisaged in that provision.

(iii) After the 46th amendment to the Constitution which inserted Article 366 (29A) the ''dominant purpose'' test cannot form the sole basis for determining whether the payment received as consideration for the transfer of the right to use or enjoy a property is ''rent''. The context in which the word has been used, the particular statute in which it occurs and the legislative intent has to be taken into consideration in examining a narrower or a wider meaning has to be given to the word.

(iv) Even where the room charges collected by a hotel from its customer is not confined to the use of the space but to a host of facilities and amenities such payment would still fall within the ambit of ''rent'' under Section 194-I of the Act.

Constitutional validity

41. Turning to the specific challenge to the constitutional validity of Section 194-I of the Act, it must be noted at the outset that the present petitions do not pertain to any particular assessment orders. The question whether any part of the consideration charged for the room by the hotel, includes payment for services that fall outside the ambit of the term ''rent'' as defined in the Explanation to Section 194-I of the Act would depend of the facts of a particular case and the specific terms of the ''agreement or arrangement'' between the parties.

42. However, the Petitioners seek to question the constitutional validity of the provision on an abstract basis on the ground that it is per se arbitrary and irrational. The Court is unable to agree with the submission that the word ''rent'' as used in Section 194-I is incapable of a wider meaning than payment under a transaction of lease, sub-lease or tenancy. Also, no artificial distinction, as suggested by the Petitioners, is being sought to be drawn between individual guests of a hotel, on the basis whether they are Indians or foreigners. Where the payment on behalf of the foreigner is made by a tour operator, such payment would fall within the ambit of Section 194-I and that is a reasonable classification based on an intelligible differentia as to the entity making payment. Section 194-I obliges the person making the payment, who is neither an individual nor an HUF, to deduct TDS at the prescribed rates, deposit it under Rule 30 of Income Tax Rules, 1962 (''Rules'') and issue TDS certificate to the hotel concerned under Rule 31 of the Rules. In terms of Section 199 such deduction is treated as payment of tax on behalf of the hotel and credit is given in the assessment to the hotel for the TDS deducted on the production of certificate furnished under Section 203. Consequently, the hotel does not suffer any prejudice or inconvenience. Further, the hotel can under Section 197 of the Act apply to have the TDS deducted at a lower rate. The Petitioners have been unable to point out what in the above scheme of the Act renders Section 194-I either arbitrary or unreasonable so as to attract Articles 14 or 19 (1) (g) of the Constitution.

The challenge to the constitutional validity of the said provision must fail.

43. The Revenue is right in its contention that applicability of Section 194-I does not depend upon whether the income of the hotel from room charges is assessed under "profits and gains of business or profession" or "income from house property". Section 194-I is applicable at the time of payment of rent or at the time of crediting such amount to the payee, if the other conditions laid down under the said provision are fulfilled. It is for the Assessee to decide whether it seeks to retain the hotel as an investment or as a business asset. The income therefrom could be taxed as business income if it is exploited as a business asset. Rental income can also be taxed under the head "Income from other sources". This, however, does not affect the constitutional validity of the provision or the liability of the person (other than an individual or HUF) making payment to deduct TDS at the time of making such payment.

The validity of the Circulars

44. Turning to the circulars in question, they cannot be said to have expanded the scope of Section 194-I of the Act. As explained in UCO Bank, Calcutta v. Commissioner of Income Tax, West Bengal (supra), where the circulars are not adverse to an Assessee, they cannot be considered as travelling beyond the powers of the CBDT under Section 119 of the Act.

45. In fact it is not understood how any portion of either Circular Nos. 105 of 1995 dated 8th August 1995 or Circular No. 5 of 2002 dated 30th July 2002 can be said to be prejudicial to hoteliers. There is no vagueness as to what constitutes hotel accommodation taken on ''regular basis''. In order to remove any ambiguity that may attach to that term, the subsequent Circular dated 30th July 2002 was issued. Para 2 of the said Circular clarifies the position as under:

"2. The Board have considered the matter. First, it needs to be emphasised that the provisions of Section 194-I do not normally cover any payment for rent made by an individual or HUF except in cases where the total sales, gross receipts or turnover from business and profession carried on by the individual or HUF exceed the monetary limits specified under clause (a) or clause (b) of Section 44AB. Where an employee or an individual representing a company (like a consultant, auditor, etc.) makes a payment for hotel accommodation directly to the hotel as and when he stays there, the question of tax deduction at source would not normally arise (except where he is covered under Section 44AB as mentioned above) since it is the employee or such individual would makes the payment and the company merely reimburses the expenditure.

Furthermore, for purposes of Section 194-I, the meaning of ''rent'' has also been considered. "''Rent'' means any payment, by whatever name called, under any lease..... or any other agreement or arrangement for the use of any land....." (emphasis supplied). The meaning of ''rent'' in Section 194-I is wide in its ambit and

scope. For this reason, payment made to hotels for hotel accommodation, whether in the nature of lease or licence agreements are covered, so long as such accommodation has been taken on ''regular basis''. Where earmarked rooms are let out for a specified rate and specified period, they would be construed to be accommodation made available on ''regular basis''. Similar would be the case, where a room or set of rooms are not earmarked, but the hotel has a legal obligation to provide such types of rooms during the currency of the agreement."

46. What a ''rate contract'' is has also been clarified in the same Circular in para 3 as under:

''3. However, often, there are instances, where corporate employers, tour operators and travel agents enter into agreements with hotels with a view to merely fix the room tariffs of hotel rooms for their executives/guests/customers. Such agreements, usually entered into for lower tariff rates, are in the nature of rate-contract agreements. A rate-contract, therefore, may be said to be a contract for providing specified types of hotel rooms of pre-determined rates during an agreed period. Where an agreement is merely in the nature of a rate contract, it cannot be said to be accommodation ''taken on regular basis'', as there is no obligation on the part of the hotel to provide a room or specified set of rooms. The occupancy in such cases would be occasional or casual. In other words, a rate-contract is different for this reason from other agreements, where rooms are taken on regular basis. Consequently, the provisions of Section 194-I while applying to hotel accommodation taken on regular basis would not apply to rate-contract agreements."

47. The Court accordingly holds that the Circulars, far from expanding the scope of Section 194-I serve to lend further clarity to the scope and ambit of the said provision and therefore, cannot be held to be ultra vires the Act. No instance has been pointed out to the Court to demonstrate how the said circulars have caused any hardship or confusion.

Conclusion

48. The question whether any part of the payment received by the hoteliers, who are members of FHRAI, from persons other than individuals and HUFs, can be construed as ''rent'' within the meaning of Section 194-I of the Act is answered in the affirmative. The contention of the Petitioners that no part of the payment received by them as room charges falls within the ambit of ''rent'' under Section 194-I of the Act is hereby rejected.

49. The Court nevertheless clarifies that it will depend on the facts of every case, and the onus would be on the concerned hotel to show, whether the payment made by the customers to the hotel includes any payment that can be said to be outside the ambit of ''rent'' as defined under Section 194-I of the Act. fall outside the ambit of Explanation to Section 194-I of the Act.

50. The petitions are accordingly dismissed but, in the facts and circumstances of the cases, with no orders as to costs. The interim orders are vacated.