

IS ELECTRICITY A GOOD OR SERVICE

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ABSTRACT

In this manuscript the Author want to explain the debatable issue in India, Whether electricity is considered as goods or services in the common parlance. Furthermore the author also shown with the comparative study of the two legislations i.e., Indian Legislations and U.S. Legislations. There are several case laws and clauses in which the energy is to be treated as services. Hereinafter the author explains the same topic in the other context of General Agreement of Trade and services and various regulations of the World Trade Organization and its recommendations. The paper also consist various legislations of India in which it is explained. In this paper the Author also discussed the types of energy i.e., renewable energy and non-renewable energy. The concept of electricity is the “manufacture goods”. In this manuscript the author also examining that in how many ways the electricity can further be described and various legislations how the energy is to be treated. It also describes the taxability of electricity in India.

Keywords: Consumer Protection Act, Energy Laws, Taxation Laws, Insolvency and Bankruptcy Code, US Legislations on Energy Law, etc.

INTRODUCTION

Energy, means electrical energy-

- i) Generated, transmitted or supplied for any purpose; or
- ii) Used for any purpose except the transmission of a message.¹
- iii) “Energy” means any form of energy derived from fossil fuels, nuclear substances or materials, hydro-electricity and includes electrical energy or electricity generated from renewable sources of energy or bio-mass connected to the grid.²

Energy Resources³

Like other natural resources, energy resources are also renewable as well as non-renewable.

A) Renewable Energy Resources:⁴

Renewable energy resources are mostly biomass-based and are available in unlimited amount in nature since these can be renewed (i.e. regenerated in natural process) over relatively short period of time. Renewable energy sources are inexhaustible, i.e. they can be replaced after we use them and can produce energy again and again. These include, firewood (or fuelwood) obtained from forest, petro plants, plant biomass (as agricultural wastes like bagasse), animal dung, solar energy, wind energy, water energy (hydro-electrical, ocean wave and tidal energy), and geothermal energy etc. These can reproduce themselves in nature and can be harvested continuously through a sustained proper planning and management.

B) Non-renewable (Exhaustible) Energy Resources:⁵

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¹ [Indian Electricity Act (9 of 1910), S. 2(g)] Act (9 of 1910) repealed and replaced by Act (36 of 2003).

² Energy Conservation Act (52 of 2001), S. 2(h).

³ Energy Resources and India's Security 2009 Report by Teri, The Energy and Resource Institute.

⁴ Pg no.-2, ibid.

⁵ Pg no.-3, ibid.

Non-renewable energy resources are available in limited amount and develop over a longer period of time. As a result of unlimited use, they are likely to be exhausted one day. These include various fossil fuels including petroleum products, coal and natural gas and nuclear energy. Nuclear energy is mainly obtained from the nuclear fission of the uranium and thorium. The global resources of fossil fuel and uranium and thorium are limited and will be eventually be depleted. Moreover, use of fossil fuels for energy has negative environmental consequences, such as air pollution, global warming, acid rains and oil spills. Thus, it has been become essential to minimize the use of fossil fuels and to replace them with renewable resources.

Is electricity a good or services?

The definition of "Goods"⁶ includes all material, commodities and articles in a solid, liquid or gaseous and all forms of energy.

Electric Energy is moveable property and covers the term 'goods'.⁷ In the recent times the electricity is also traded in the market as well as in the capital market and to become goods an article must be something which can ordinarily come to the market to be bought and sold.⁸

INDIAN LEGISLATIVE INTERPRETATION

Under the Consumer Protection Act, 1986 the term "Service" means service of any description which is made available to potential users and include⁹ [but not limited to] the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both¹⁰ [housing construction,] entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;¹¹

Under the Income Tax Act, 1961, the term 'service' means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial nature such as accounting, banking, communication, conveying of news or information, advertising, entertainment, amusement, education, financing, insurance, chit funds, real estate, construction, transport, storage, processing, supply of electrical or other energy, boarding and lodging.]¹²

Under the Foreign Exchange and Management Act, 1999 The term "service" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;¹³

The Service means service of any description which is made available to potential users and includes the provision of services in connection with business of an industrial or commercial matters includes supply of electrical or other energy and electrical energy treated as the supply.¹⁴

In the case of Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO and Others¹⁵; made following pertinent observations:

⁶ Export-Import Bank of India (28 of 1981), S. 2(e).

⁷ Hardia Municipality v. H. Electric Supply Co., AIR 1964 MP 101, 108.

⁸ Union of India v. Delhi Cloth and General Mills, AIR 1963 SC 791, 795. South Bihar Sugar Mills Ltd. V. Union of India, AIR 1968 SC 922, 928.

⁹ Ins. by Act 62 of 2002, S. 2 (w.e.f. 15-3-2003). Prior to substitution it read:

"(nn) 'restrictive trade practice' means any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as a condition precedent for buying, hiring or availing of other goods or services;"

¹⁰ Ins. By Act 50 of 1993, S. 2 (w.e.f. 18-6-1993).

¹¹ Consumer Protection Act (68 of 1986), S. 2(1) (o).

¹² Income-Tax Act (43 of 1961) S. 28(va), Expln. (ii).

¹³ Foreign Exchange Management Act (42 of 1999), S. 2(zb).

¹⁴ Trademarks Act, (47 of 1999), S. 2(1)(3); Competition Act, 2002 (12 of 2003), S. 2(u).

“149. It may be that electricity has been considered to be “goods” but the same has to be considered having regard to the definition of “goods” contained in clause (12) of the Article 366 of the Constitution of India. When this Court held electricity to be “goods” for the purpose of application of sales tax laws and other tax laws, in our opinion, the same would have nothing to do with the construction of Entry 53 of List II of the Seventh Schedule of the Constitution of India.”

Rental of Immovable Property and Support Services of Business and Commerce have also been identified and taxed. While providing these services, in certain cases, the service provider also collects certain amount of charges towards electricity distributed to the tenants. The electricity may be either supplied through the State Government Electricity Grid or through own generation by means of a generator. It is the view of the department that service tax is applicable on charges collected on distribution of electricity as it will fall under the category reimbursable expenses.

The term electricity is not defined in the service tax law. The Random House Dictionary of English Language defines the term electricity as a fundamental physical agency caused by the presence and motion of electrons, protons and other charged particles, manifesting itself as attraction, repulsion magnetic, luminous and heating effects and the like.

The Supreme Court had an occasion to decide whether Electricity is goods:

In the case of Commissioner of Sales Tax, Madhya Pradesh, Indore v. Madhya Pradesh Electricity Board, Jabalpur¹⁶, the question whether electricity was goods for the purposes of imposition of sales tax under the Madhya Pradesh General Sales Tax Act, 1959. It was noted that the definition of the term goods meant all kinds of movable property¹⁷ and included all materials, articles and commodities. It was held that electric energy is “goods” within the meaning of the two Acts. It can be transmitted, transferred, delivered, stored, and possessed in the same way as any other movable property. If there can be sale and purchase of electric energy, then it is intended to be covered by the definition of “goods” in the two acts, and so Madhya Pradesh Electricity Board was a “dealer” defined in the two acts.

The reasoning which prevailed with the High Court was that a well-defined distinction existed between the sale or purchase of goods and consumption or sale of electricity otherwise there was no necessity of having Entry No. 53 but under Entry 53 taxes can be levied not only on sale of electricity but also on its consumption which could not probably have been done under Entry 54. It is difficult to derive much assistance from the aforesaid entries. What has essentially to be seen is whether electric energy is goods within the meaning of the relevant provisions of the two Acts. The definition in terms is very wide according to which goods means all kinds of movable property. Then certain items are specifically excluded or included and electric energy or electricity is not one of them. The term movable property when considered with reference to goods as defined for the purposes of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It is needless to repeat that it is capable of abstraction, consumption and use which, if done dishonestly, would attract punishment.¹⁸ It can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other movable property. In the case of Durham Electrical etc. Co. v. Inland Revenue¹⁹, in which electric energy was assumed to be goods. If there can be sale and purchase of electric energy like any other movable object, we see no difficulty in holding that electric energy was intended to be covered by the definition of goods in the two Acts. If that had not been the case there was no necessity of specifically exempting sale of electric energy from the payment of sales tax by making a provision for it in the Schedules to the two Acts. It cannot be denied that the Electricity Board carried on principally the business of selling, supplying or distributing electric energy. It would therefore clearly fall within the meaning of the expression dealer in the two Acts.

¹⁵ (2007) 5 SCC 447

¹⁶ (1969) 1 SCC 200

¹⁷ General Clauses Act (10 of 1897), S.3(36).

¹⁸ Under Section 39 of the Indian Electricity Act, 1910.

¹⁹ 1909 2 KB 604

The above view was by the Constitution Bench of the Supreme Court in *State of A.P. etc. v. National Thermal Power Corpn. Ltd. and Ors.*²⁰ Holding that electricity though an intangible object is goods covered by Entry 54 of List II of Schedule VII to the Constitution of India.

Let us take the case of installation of a generator set in the premises of the service provider and electricity that is being generated from the said generator is also being supplied to the service receiver. Generator is used to manufacture rather generate electricity which is excisable goods and if there is any tax or duty that is applicable it should be only excise duty at the rate prescribed by The Central Excise Tariff Act.

There are numerous instances as above where the service tax department has travelled beyond its powers and levied and continues to levy service tax on goods. Alas, the State remains a mere spectator.²¹

Justice Agrawal referred to the Supreme Court judgment in the case titled *Chameli Singh and Others v State of UP*²² and *Another*, where it discussed the components of right to life and specifically observed that the right to life includes the right to live with human dignity and further observed that right to live guaranteed in any civilised society implies the right to shelter and while discussing right to shelter, it has been held that right to shelter includes electricity which is undisputedly and essential service to the shelter for human being.

UNITED STATES LEGISLATIVE INTERPRETATION

It has also been a matter of debate as to inclusion of computer software within the definition of "goods" as defined in section 2²³ of the Uniform Commercial Code, 1952. It is argued that since "custom designed" computer software is a product of a labor intensive process and it must be considered as a service rather than a good. However, sale of most of the software programs resemble sales of any other consumer product available for consumption, and it is usually sold through separate pre-existing packages.²⁴ On the other hand contracts for providing data processing services have been held to be contracts for services rather than contracts for "goods".²⁵

Legislative history need not provide all of the answers, however, because we can also try to construe § 503(b)(9) in accordance with other principles underlying the Bankruptcy Code. For example, one key tenet of the Bankruptcy Code is the policy of construing administrative expense claims narrowly.^[22] This might lead us to conclude that for § 503(b)(9) purposes, electricity, which exhibits characteristics of both a good and a service, ought to be considered a service.

Although § 503(b)(9) may be seen as an additional effort by Congress to give creditors more of an advantage over debtors, should this advantage be pressed to the point where debtors are no longer able to reorganize? In short, the policies of narrowly construing administrative expense claims and striking a balance between debtors and creditors would seem to point us in the direction of construing things like electricity as services when there is some doubt as to whether the item being sold is actually a good or a service.

²⁰ Appeal (civil) 3112 of 1990

²¹ https://taxindiaonline.com/RC2/inside2.php3?filename=bnews_detail.php3&newsid=9434 last visited on 30/11/2018

²² Appeal (civil) 12122 of 1995

²³ U.C.C. Law §.2-103 (k) : "Goods" means all things that are movable at the time of identification to a contract for sale. The term includes future goods, specially manufactured goods, the unborn young of animals, growing crops, and other identified things attached to realty as described in Section 2-107. The term does not include information, the money in which the price is to be paid, investment securities under Article 8, the subject matter of foreign exchange transactions, or choses in action."

²⁴ Bonna Lynn Horowitz, *Computer Software as a Good under the Uniform Commercial Code: Taking a Bite Out of the Intangibility Myth [notes]*, 69 B. U. L. Rev. 129, 153 (1985).

http://heinonline.org/HOL/Page?handle=hein.journals/bulr65&div=9&collection=journals&set_as_cursor=11&men_tab=srchresulst&terms=definition%20of%20goods|software&type=matchall (last visited Feb. 19, 2014) (stating that majority of sales of software programs are "off the shelf" transactions which are analogous to any other commercially consumed "good". The mere fact that it was designed because of the intellectual abilities of an individual does not change the basic characteristic of the commodity as a "good".)

²⁵ Id. (arguing that data processing transactions are based on the skill and ability of the person handling these programs rather than the computer software itself. Thus, these contracts cannot be regarded as sale of "goods").

Puget Sound Energy, Inc. v. Pacific Gas & Electric Co.²⁶ As one court noted in one of the earlier cases on the subject, "Electricity is a commodity which, like other goods, can be manufactured, transported and sold." Baldwin-Lima-Hamilton Corp. v. Superior Court.²⁷

Other courts, however, have reached the opposite conclusion. For example, in New York, Kentucky, Maryland, Massachusetts and Michigan, courts have found that electricity is not a good, but instead is a service.²⁸ Some of these courts have adopted almost a metaphysical approach to analyzing the issue which ignores the fact that electricity is a moveable, physical product, despite its invisibility to the human eye:

The provision of electricity is a service, not the sale of a product. . . . Electricity is the flow of electrically charged particles along a conductor. The utility does not 'manufacture' electrically charged particles, 'but rather, sets in motion the necessary elements that allow the flow of electricity.' [Citation omitted.] The consumer pays for electricity by kilowatt hour, that is, the length of time electricity flows through the system. There is no individual product. Instead, the consumer pays for use of the electricity.

Certain sources define services as "the supplying or supplier of utilities or commodities, as water, electricity, or gas, required or demanded by the public,"²⁹ which would lead one to believe that these three items should be considered services, but this conflicts with U.S. courts' findings that water and gas are definitively a good under § 503(b)(9).³⁰

Bowen v. Niagra Mohawk Power Corp.³¹ This reasoning is dubious as it appears to be more a discussion of the transmission of electricity, rather than the electricity itself. The New York court also appears to be exhibiting fundamental misunderstanding regarding the generation of electricity. The discussion appears to focus on whether the utility is a distributor or a generator, rather than whether electricity is a movable thing. Nonetheless, several courts have followed this reasoning. Other courts have grounded their reasoning in public policy, expressing concern about the implications of subjecting heavily regulated utilities to the UCC's warranty remedies.³² And while many of the cases finding electricity to be a service arise from tort actions (e.g., damages caused by stray electricity, power surges, or contact with power lines), at least one state—New York—considers electricity a service, even in commercial contract litigation.³³

Courts have developed and applied a method, the "predominant purpose test," which is applicable to hybrid contracts calling for the delivery of both goods and services.³⁴ Although most courts follow the predominant purpose test in applying the UCC, only one bankruptcy court has adopted that test for § 503(b)(9).³⁵ This approach had been explicitly rejected for § 503(b)(9) purposes in an earlier decision, however, when the court concluded that the only relevant determination for § 503(b)(9) purposes was

²⁶ 271 B.R. 626, 640 (N.D. Cal. 2002)

²⁷ 208 Cal. App. 2d 803, 819 (1962).

²⁸ See Bowen v. Niagara Mohawk Power Corp., 183 A.D.2d 293 (N.Y. App. Div. 1992); G&K Dairy v. Princeton Electric Plant Bd., 781 F. Supp. 485 (W.D. Ky. 1991); Singer Co. v. Baltimore Gas and Electric Co., 558 A.2d 419, 470-72 (Md. Ct. Spec. App. 1989); New Balance Ath. Shoe v. Boston Edison Co., 1996 Mass. Super. LEXIS 496 (Mass. Super. 1996); Williams v. Detroit Edison Co., 234 N.W.2d 702, 705-06 (Mich. Ct. App. 1975); Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 705 N.E.2d 656 (N.Y. Ct. App. 1998).

²⁹ <http://dictionary.reference.com/browse/service> and others

³⁰ See in, Re NE Opco, Inc., 501 B.R. 233 (Bankr. D. Del. 2013)

³¹ 183 A.D.2d 293, 297 (N.Y. App. Div. 1992)

³² See New Balance Ath. Shoe v. Boston Edison Co., 1996 Mass. Super. LEXIS 496 (Mass. Super. 1996).

³³ See Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 705 N.E.2d 656 (N.Y. Ct. App. 1998). The Norcon Power Partners decision was the last in a string of decisions that started with a federal court decision in Encogen Four Partners, L.P. v. Niagara Mohawk Power Corp., 914 F. Supp. 57 (S.D.N.Y. 1996), where the court held that, under New York law, electricity was not a "good" under the UCC, and that New York common law did not recognize the right to demand adequate assurances. On appeal, the Second Circuit did not disturb the determination that electricity was not a good, but certified a question to the New York Court of Appeals about whether the doctrine of adequate assurances should apply to contracts that are not governed by the UCC. See Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 110 F.3d 6 (2d Cir. 1997). The New York Court of Appeals answered that question in the affirmative. Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 705 N.E.2d 656 (N.Y. Ct. App. 1998).

³⁴ See In re Circuit City Stores, Inc., 416 BR 531 - Bankr. Court, ED Virginia 2009

³⁵ In re Circuit City Stores, Inc., 416 B.R. 531 (Bankr. E.D. Va. 2009).

the value of the goods delivered, regardless of whether the contract also called for the provision of services.³⁶

Is There Guidance in Other Contexts?

Intuition would seem to make the issue of whether electricity qualifies as a good or service simple, for purposes of Uniform Commercial Code applicability. After all, that electricity usage is measured in certain units (kilowatts) by a device (electric meter) that lends a great deal of common sense support for the idea that electricity must be a good. Moreover, because electricity can be touched and moved, the conclusion that electricity is a good seems even more certain. Despite electricity's apparently obvious classification as a good, courts struggle in classifying electricity as a good, a struggle that has led to a division amongst courts in handling this issue. This uncertainty has led to confusion over whether certain tools under the UCC—a demand for adequate assurances or UCC-specific statute of limitations, for instance—are applicable in a dispute involving a contract for electricity.

U.S. bankruptcy courts are not alone in their struggle to characterize electricity as a good or service. International trade rules and regulations differ between goods and services, resulting in different treatment and considerations in international transactions involving goods versus services. Neither the General Agreement on Tariffs and Trade (GATT),³⁷ which explicitly covers goods, nor the General Agreement on Trade in Services (GATS),³⁸ which explicitly covers services, clearly define electricity, nor do they explicitly decide on its inclusion or exclusion. The GATS comes nearest, as it includes a sector titled “Services Incidental to Energy Distribution,” which is included in the sector, “Other Business Services.”³⁹

There are current negotiations related to the inclusion of an energy sector under GATS, and the United States has explicitly requested its inclusion by the World Trade Organization as a service,⁴⁰ but no energy sector exists at this time.⁴¹ In 2010, the Background Note by the Secretariat of the Council for Trade in Services (under which the GATS resides), stated, “While power generation would appear to entail the production of a good⁴² a number of services are directly related to the construction, maintenance and operation of generation plants.” This comment, and its footnote, suggest that many parties within the WTO consider electricity to be a good, although it is discussed in great detail as also being a service.

To courts concluding that electricity is a good, electricity fits squarely within the definition of goods. These courts conclude that “electricity is identified at the moment it is metered; and something is a good if movable at the time of identification.”⁴³ Proponents of this argument also point to the tangibility of electricity: “one only need touch a live electric connection; e.g., place one's finger in an electric socket, to feel and sense [electricity].”⁴⁴ In short, because proponent courts see electricity as falling within the definition of goods under the UCC, it is easily classifiable as such. Some courts, however, disagree with the supposed simplistic construction.

Those courts concluding that electricity is a service, do so utilizing an appeal to metaphysical reasoning, public policy, or a dissection of the distribution chain. To courts adopting the metaphysical argument for concluding that electricity is a service, they argue that “electricity is the flow of

³⁶ In re Plastech Engineered Products, Inc., 397 B.R. 828 (Bankr. E.D. Mich. 2008).

³⁷ The General Agreement on Tariffs and Trade (GATT) was a globally recognized agreement created in 1947. The GATT set the standard for international trade agreements for 47 years and eventually resulted in the creation of the WTO in 1995. The WTO served as an overhaul to the GATT and the workings of the GATT agreement is now the responsibility of the Council for Trade in Goods (Goods Council) within the WTO.

³⁸ The General Agreement on Trade in Services was created in 1995 and was created to globally extend multilateral trading capabilities in the service sector. The GATS agreement is now the responsibility of the Council for Trade in Services (Services Council) within the WTO.

³⁹ WTO Services Sectoral Classification List, MTN.GNS/W/120, July 10, 1991.

⁴⁰ GATS Communication from the United States – Council for Trade in Services Special Session, December 18, 2000.

⁴¹ http://www.wto.org/english/tratop_e/serv_e/energy_e/energy_e.htm

⁴² If electricity is considered to be a good — a presumption that seems to be shared by most members — generation of electricity is not covered by the GATS. If we consider that electricity is a service, generation would fall under the GATS.

⁴³ Gilbert L. Hamberg, Federal Courts Conflict Whether Electricity is a Goods Under Section 503(b)(9) of the Bankruptcy Code, energybiz, <http://www.energybiz.com/article/14/01/federal-courts-conflict-whether-electricity-goods-under-section-503b9-bankruptcy-code> (Jan. 24, 2014) (citing In re Grede Foundaries, 440 B.R. 791 (W.D. Wis. 2010); In re Erving Indus., Inc., 432 B.R. 354 (Bankr. D. Mass. 2010).

⁴⁴ Hamberg, *Ibid.*

electrically charged particles along a conductor" and that "the utility [company] does not 'manufacture' electrically charged particles, 'but rather, sets in motion the necessary elements that allow the flow of electricity."⁴⁵ According to this argument, the consumer pays for the length of time electricity flows through the system, not the creation or utilization of individual product.⁴⁶ Authors in the field criticize this view as focusing "on whether the utility is a distributor or a generator, rather than whether electricity is a movable thing."

CONCLUSION

Does Anyone Know What Electricity Is?

No one ever says, "If you don't pay your electricity bill they will turn off your good." Rather, the common vernacular is that "they will shut off your service." However, as one learns more about the physical/scientific characteristics of electricity and its generation and supply, the ability to define it becomes more complex.

The scientific community, and certain bankruptcy court opinions, can provide a detailed analysis of the properties of electricity and electrical currents. However, similar to how light can be considered both a wave and a particle, electricity is considered either a good or a service in different circumstances.

Thus, Indian consumers will end up shelling out nearly Rs 30,000 crore extra every year towards payment for power consumption unless electricity is brought under the Goods and Services Tax (GST) regime. The reason? Power producers cannot claim credit for tax and cess paid on coal and coal transportation due to exclusion of electricity from the new indirect tax regime. The applicable GST rate on coal is 5%. Furthermore, the dry fuel attracts clean cess of Rs 400 per tonne. In addition, 5% GST is also payable on transportation of coal by trains. India's power sector consumes more than 600 million tonnes of coal every year.

⁴⁵ Bowen v. Niagra Mohwak Power Corp., 183 A.D.2d 293, 297 (N.Y. App. Div. 1992)

⁴⁶ Ibid