INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 554/Del/2016
(Assessment Year: 2012-13)

ACIT (TDS), Gurgaon	Vs.	Artemis Medicares Services Ltd, 414/1, 4th Floor, DDA Commercial Complex, District Centre, Janakpuri, New Delhi
(Appellant)		(Respondent)

PAN: AAFCA0130M

CO No. 176/Del/2016
(In ITA No. 554/Del/2016)
(Assessment Year: 2012-13)

Artemis Medicares Services Ltd, 414/1, 4th Floor, DDA Commercial Complex, District Centre, Janakpuri, New Delhi	Vs.	ACIT (TDS), Gurgaon
(Appellant)		(Respondent)

PAN: AAFCA0130M

Assessee by :	Ms. Shaily Gupta, CA Shri. Archit Kabra, CA
Revenue by:	Shri Kanv Bali, Sr. DR
Date of Hearing	06/11/2023
Date of pronouncement	16/01/2024

O R D E R

PER M. BALAGANESH, A. M.:

1. This appeal in ITA No. 554/Del/2016 is filed by the revenue and the cross objection No. 176/Del/2016 for A.Y. 2012-13 arises out of the order by ld CIT(A)-

1, Gurgaon in appeal No. 74/14-15 dated 27.11.2015 (hereinafter referred to as ld CIT(A) in short) against the order of assessment passed u/s 201(1) and 201(1A) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 25.04.2014 by the AO, DCIT, TDS, Circle, Gurgaon (hereinafter referred to as ld. AO).

2. At the outset, there is a delay of 15 days in filing of Cross Objections by the assessee before us. Considering the reasons adduced in the condonation petition, we are inclined to condone the delay and admit the Cross Objection of the assessee.

3. Identical issues are involved in all these appeals and hence they are taken up together and disposed of by this common order for the sake of convenience.

4. The revenue has raised the following grounds of appeal :-

"1. Relying upon the decision of Hon'ble ITAT, New Delhi in assessee's own case for the F.Y.2009-10, and hence accordingly, deleting the demand raised on account of short deduction & interest thereon amounting of Rs.7,07,08,085/- for the F.Y.2011-12.

2. Shifting the onus of verification of tax details of deductees upon the AO (TDS) as the AO (TDS) does not have access to verify such details of the deductees on the ITD system.

3. Treating the payment made by the assessee as covered u/s 194J of the IT Act in respect of all categories of Doctors (1 to 5th Cat.) as mentioned in the order u/s 201(1) & 201(1A) of the IT Act, 1961 instead of Section 192 being TDS on Salary, as held by the AO.

4. The Ld. CIT(A)-1, Gurgaon erred in law and facts by deleting the demand amounting Rs.40,26,123/-.

5. The Ld.CIT(A)-1, Gurgaon erred in law and facts by ignoring the and not considering the findings of the then AO that the total provisions debited in the same year, the deductor has claimed that TDS was made on part of the provisions; whereas not made on part of the similar other provisions. The tax auditor has also found and reported amounts of Rs.2,53,57,043/- liable for TDS and held deductor in default for not making TDS on such amounts.

6. The appellant craves leave to add, alter or amend an of the grounds of appeal at the time of hearing."

5. The assessee has raised the following grounds of appeal in CO No. 176/Del/2016:-

> *"1. That the learned Commissioner of Income Tax (Appeals) erred in confirming the levy of interest 201(1A) of the Income Tax Act amounting to Rs.6,52,072/- (on TDS) in respect of provision for expenses of Rs.2,53,57,043/- made by the appellant company in its books as at the close of the year on 31.03.2012 and which were reversed in the subsequent Financial Year, despite holding in Para 4.4 of his order that the assessee cannot be held to be an assessee in default u/s 201(1) of the Income Tax Act, 1961."*

6. The Ground Nos. 1 to 3 raised by the revenue are challenging the action of the ld. CIT(A) holding that the payments made to doctors would be covered by TDS provisions in terms of section 194J of the Act as against section 192 of the Act done by the ld. AO .

7. We have heard the rival submissions and perused the materials available on record. The assessee company is engaged in the business of establishing, maintaining and running of Hospital and Multi-Speciality healthcare facilities. A TDS Survey u/s 133A of the Act was carried out in the business premises of the assessee company on 10.8.2011 wherein it was transpired by the Survey Team that the assessee had been making payment of consultancy charges to Doctors. These payments were subjected to deduction of tax at source by the assessee in terms of section 194J of the Act. Whereas the Survey Team and the ld. AO held that these payments would have to be treated as salary and accordingly tax to be deducted at source would be in terms of section 192 of the Act. Accordingly, the proceedings u/s 201(1) / 201(1A) of the Act were initiated on the assessee and differential rate of TDS was sought to be collected from the assessee by treating it as 'assessee in default' u/s 201(1) and consequential interest u/s 201(1A) of the Act. The ld. AO in page 31 of his assessment order clearly stated that the facts in Asst Years 2010-11, 2011-12 and 2012-13 were found to be identical and similar treatment was given by him for the earlier years. Consistent with the practice, he treated the assessee as 'assessee in default' and levied tax and interest on the assessee for the year under consideration also. The ld. CIT(A) observed that the

same issue had already been decided in favour of the assessee by this Tribunal in ITA No. 4718/Del/2013 for Asst Year 2009-10 dated 15.5.2015 and accordingly held that the payments to doctors would be covered only u/s 194J of the Act and not u/s 192 of the Act. We find that the relief has been granted by the ld. CIT(A) by following the Tribunal order passed in assessee's own case for the Asst Year 2009-10 referred supra. We also find identical view has been taken for Asst Year 2011-12 by this Tribunal in ITA No. 6527/Del/2015 dated 18.9.2017. Hence we do not find any infirmity in the order passed by the ld. CIT(A) in this regard. Accordingly, the Ground Nos. 1 to 3 raised by the revenue are dismissed.

8. The Ground Nos. 4 & 5 raised by the revenue and the Ground raised by the assessee in its Cross Objections are identical and they relate to applicability of TDS provisions in respect of provision for expenses made at the end of the year.

9. The assessee company in the revised computation of income filed before the ld. AO along with the revised return filed on 22.8.2013, which is well within the time limit prescribed u/s 139(5) of the Act, had disallowed voluntarily a sum of Rs 2,53,57,043/- on the year end provision of expenses u/s 40(a)(ia) of the Act. The said expenses were disallowed u/s 40(a)(ia) of the Act in the revised return on the ground that the said expenditures were not subjected to deduction of tax at source. The case of the assessee is that these are provision made for certain business expenses on actual basis where the services are rendered by the respective parties but the bills were raised by them in the next financial year. Accordingly, the assessee had booked those expenses on provision basis in accordance with mercantile system of accounting regularly followed by the assessee and had reversed the very same expenditure on 1st April of the next financial year. It was submitted that on receipt of actual bills from the concerned vendors, the due tax is deducted at source and payments made to them. It was submitted that as on 31st March, the payees are not identifiable and hence the assessee could not be expected to deduct tax at source while making provision for expenses on the same. The ld. AO however did not heed to these contentions and held that the assessee itself had voluntarily disallowed the same

u/s 40(a)(ia) of the Act in the return of income and accordingly need to be treated as 'assessee in default' u/s 201(1) and consequential interest u/s 201(1A) of the Act. A remand report was sought by the ld. CIT(A) from the ld. AO. The ld. AO submitted his remand report vide letter dated 28.9.2015 which is enclosed in Pages 365 to 366 of the Paper Book. On perusal of the said remand report, the ld. CIT(A) noticed that the ld. AO had categorically given a finding that in respect of provision made for various expenses, that the assessee had not credited the corresponding liability to the account of the concerned individuals who had rendered the services. The ld. AO also examined the few sample copies of invoices filed by the assessee in the remand proceedings and agreed to the contentions of the assessee. The ld. CIT(A) granted relief to the assessee by holding that the assessee cannot be treated as 'assessee in default' u/s 201(1) of the Act. However, the ld. CIT(A) held that the assessee would be eligible for interest u/s 201(1A) of the Act. Against this, the revenue is in appeal before us and assessee has filed cross objection before us only for contesting the levy of interest u/s 201(1A) of the Act.

10. We have heard the rival submissions and perused the materials available on record. The aforesaid facts and observations made by the ld. CIT(A) and by the ld. AO in the remand report are not in dispute before us. Once there is a categorical finding that the assessee had not credited the corresponding liability for expenses to the account of the concerned vendors who had rendered the services, the payees become non-identifiable and hence there is no question of applicability of TDS provisions on the same. Merely because the assessee had voluntarily disallowed the expenses u/s 40(a)(ia) of the Act in the return, the same would not automatically enable the ld. AO to treat it as 'assessee in default' u/s 201(1) of the Act and consequentially levy interest u/s 201(1A) of the Act. In our considered opinion, the provisions of section 40(a)(ia) and section 201(1) / 201(1A) of the Act are mutually exclusive. In any case, there is no estoppel against the statute. We find that the issue in dispute is squarely addressed by the Co-ordinate Bench of Delhi Tribunal in the case of HT Mobile Solutions Limited vs

JCIT (OSD) in ITA Nos. 2475 & 2476/Del/2022 for Asst Years 2013-14 & 2014-15 respectively dated 22.5.2023 wherein it was held as under:-

> *"4. We have heard the rival submissions and perused the material available on record. The case of the Revenue is that the assessee had made year-end provisions for expenses amounting to Rs.86, 12,471/- on which tax was not deducted at source. The assessee was treated as 'assessee in default' in the sum of Rs.8,61,247/- u/s 201(1) of the Act and interest of Rs.8,00.548/- u/s 201(1A) of the Act. The Id. AO observed that the provision had been made on ad hoc basis in respect of various expenditures by the assessee. On the contrary, the assessee's case is that payees of these expenses are not identifiable and, hence, tax could not be deducted at source. The assessee also submitted that invoices for these expenses were received by the assessee company in the next financial year with the date falling in next financial year. Hence, these year-end provisions made by the assessee were reversed by the assessee in the next financial year and expenses were booked on receipt of invoices and at which point in time, tax had been duly deducted at source and remitted to the account of the Central Government. In respect of this year-end provision, the assessee had suo moto disallowed the expenses in the computation of its income. In these facts and circumstances, it was pleaded that the assessee could not be treated as 'assessee in default' u/s 201(1) of the Act and consequentially no interest could be levied u/s 201(1A) of the Act.*
>
> *5. We find that the demand has been raised on the assessee treating it as an 'assessee in default' for the following expenses:-*

Nature of Expenses	*Section under which tax deductible*	*Amount of Provision made*	*Amount of tax deductible*
Advertisement and sales promotion exp.	*194J*	*45,94,057*	*4,59,406*
Legal and professional fee	*194J*	*3,59,400 (5.00.000 - 1,40,600)*	*35,940*
Interest on loan	*194 A*	*36,59,014*	*3,65,901*
Total		*86,12,471*	*8,61,247*

> *6. The assessee had stated that it had been regularly following the practice of making provisions for expenses for which parties are not identifiable or amounts payable were not identifiable or bills have not been received or the same have not been processed for payment/credit to the accounts of the payees, based on Accounting Standards-29 "Provisions, Contingent Liabilities & Contingent Assets" issued by the Institute of Chartered Accountants of India (ICAI) while finalizing books of account. It is a fact on record that such provisions were made in view of accrual method of accounting followed by the assessee and the same were reversed in the books of account on the first day of the immediately succeeding year. It is not in dispute that as and when the invoices are received by the assessee in the succeeding year with date of invoice falling in the succeeding year, the same are processed for payment wherein due deduction of tax at source have been made and remitted to the account of the Central Government within the prescribed time. We find that this is a consistent practice*

followed by the assessee on year-to-year basis. The fact of reversal of these expenses in the succeeding year are enclosed in pages 23 to 29 of the paper book. This is not disputed by the revenue before us. The fact of the assessee deducting the tax at source in the succeeding year and remitting the same to the account of the Central Government on 02.05.2013, 30.05.2013, 05.07.2013 and 06.09.2013 are enclosed are enclosed in pages 33-37 of the paper book. We find that the issue in dispute is no longer res integra in view of the decision of the Hon'ble jurisdictional High Court in the case of UCO Bank vs. Union of India reported in 369 ITR 335 wherein it was held as under:-

> *"18. In terms of Section 194A of the Act, the petitioner would, in the normal course, be obliged to deduct tax at source in respect of any credit or payment of interest on deposits made with it. However, in the present case, the question that needs to be addressed is whether Section 194A of the Act contemplates deduction of tax in a situation where the assessee is not ascertainable and the person in whose name the interest is credited is also, admittedly, not a person liable to pay tax under the Act.*
>
> *19. The Registrar General of this Court is, clearly, not the recipient of the income represented by interest that accrues on the deposits made in his/her name. The Registrar General is also not an assessee in respect of the deposits made with the petitioner bank pursuant to the orders of this Court. The deposits kept with the petitioner bank under the orders of this Court are, essentially, funds which are custodia legis, that is, funds in the custody of this Court. The interest on that account - although credited in the name of the Registrar General - are also funds that remain under the custody of this Court. The credit of interest to such account is, thus, not a credit to an account of a person who is liable to be assessed to tax. In this view, the petitioner would have no obligation to deduct tax, because at the time of credit there is no person assessable in respect of that income which may be represented by the interest accrued/paid in respect of the deposits. The words "credit of such income to the account of the payee" occurring in Section 194A of the Act have to be ascribed a meaning in conformity with the scheme of the Act and that would necessarily imply that deduction of tax bears nexus with the income of an assessee.*
>
> *20. In absence of an assessee, the machinery ofprovisions for deduction of tax to his credit are ineffective. The expression "payee" under Section 194A of the Act would mean the recipient of the income whose account is maintained by the person paying interest. In the present case, although the FD is made in the name of the Registrar General, the account represents funds which are in custody of this Court and the Registrar General is neither the recipient of the amount credited to that account nor the interest accruing thereon. Therefore, the Registrar General cannot be considered as a "payee" for the purposes of Section 194A of the Act. The credit by the petitioner bank in the name of the Registrar General would, thus, not attract the provisions of Section 194A of the Act. Although, Section 190(1) of the Act clarifies that deduction of tax can be made prior to the assessment year of regular assessment, nonetheless the same would not imply that deduction of tax is mandatory even where it is known that the payee is not the assessee and there is no other assessee.*

21. It is relevant to note that there is no assessee to whom interest income from the deposits in question can be ascribed; no person can file a return claiming the interest payable by the petitioner as income. The necessary implication of this situation is recovery of tax without the corresponding income being assessed in the hands of any assessee. The ultimate recipient of the funds from the FD would also not be able to avail of the credit of TDS. It is apparent that in absence of an ascertainable assessee the machinery of recovering tax by deduction of tax at source breaks down because it does not aid the charge of tax under Section 4 of the Act but takes a form of a separate levy, independent of other provisions of the Act. This is, clearly, impermissible.

22. The impugned circular proceeds on an assumption that the litigant depositing the money is the account holder with the petitioner bank and/or is the recipient of the income represented by the interest accruing thereon. This assumption is fundamentally erroneous as the litigant who is asked to deposit the money in Court ceases to have any control or proprietary right over those funds. The amount deposited vests with the Court and the depositor ceases to exercise any dominion over those funds. It is also not necessary that the litigant who deposits the money would be the ultimate recipient of those funds. As indicated earlier, the person who is ultimately granted the funds would be determined by orders that may be passed subsequently. And at that stage, undisputedly, tax would be required to be deducted at source to the credit of the recipient. However, the litigant who deposits the funds cannot be stated to be the recipient of income for the reasons stated above.

23. Deducting tax in the name of the litigant who deposits the funds with this Court would also create another anomaly because the amount deducted would necessarily lie to his credit with the income tax authorities. In other words, the tax deducted at source would reflect as a tax paid by that litigant/depositor. He, thus, would be entitled to claim credit in his return of income. The implications of this are that whereas this Court had removed the funds from the custody of a litigant/depositor by judicial orders, a part of the accretion thereon is received by him by way of Tax deducted at source. This is clearly impermissible because it would run contrary to the intent of judicial orders.

24. In the given circumstances, the writ petitions are allowed and the impugned notice dated 25.04.2012, the impugned circular bearing no. 8/2011 and the impugned order dated 10.03.2014 are set aside

(emphasis supplied by us)"

7. We find that in the absence of an ascertainable amount and identifiable payee, the machinery provisions of recovering tax deducted at source falls flat because in either way, it does not aid the charge of tax u/s 4 of the Act, but, takes a form of separate levy independent of other provisions of the Act. Similar view was also taken in yet another decision of the Hon'ble Jurisdictional High Court in the case of DCIT vs. Ericson Communications Ltd. reported in 378ITR 395 (Dei), wherein it was held as under:-

"22. In our view, mere passing of the book entries, which are reversed, would not give rise to an obligation to deduct TAS by the Assessee, as clearly, there is no debt that can be said to be acknowledged by the Assessee. Imposition of an obligation to deduct TAS in these circumstances would amount to enforcing payments from one person towards a tax liability of another, even where the person does not acknowledge that any sum is payable. This, in our view, is contrary to the scheme of provisions relating to collection of TAS under the Act.

23. It is also not disputed that TLME had not claimed royalty payable from the Assessee and, concededly, no royalty for the period has been paid either. In the circumstances, we are unable to accept that any income had accrued or arisen or deemed to have accrued or arisen, which is chargeable to tax in the hands of TLME. It is not disputed that the agreement dated 1st January, 1997 was not acted upon at the material time. In the absence of any income chargeable to tax arising on account of royalty in the hands of TLME at the material time, the question of withholding TAS would not arise.

24. In our view, reliance placed by the Revenue on the decision of Transmission Corpn. of AP Ltd. (supra) is wholly misplaced. In that case, the Supreme Court had clarified that where payments of any amount(s) on account of trade payables (i.e. payments in the nature of Revenue) were made, the payer was obliged to deduct tax at the relevant rates on the entire amount paid and it was not open for the payer to deduct TAS at a lower amount on the ground that the income embedded in the payments made would be lower than the amounts paid. The Supreme Court had explained that it was not open for the payer to suo moto take a decision as to the quantum of income embedded in the payments and withhold tax accordingly. And, the question of the quantum of income embedded in the receipts would be determined, subsequently in the assessment proceedings with respect to the payee. The Supreme Court had also noted that in the case where the Assessee had contended that a lower TDS should be deducted, it would be open for the payer to make an application to the AO under the provisions of Section 195(2) of the Act, to determine an appropriate proportion of payment chargeable to tax. This decision of the Supreme Court is not an authority for the proposition that TAS has to be deducted and paid where there is neither any payment nor any acknowledgement of debt which reflects any accrual of income chargeable to tax or in cases where no income accrues or arises which is chargeable to tax under the Act.

25. It is not disputed that TLME also did not claim the aforesaid amount of royalty in question and no such amount had in fact been paid. Thus, where the parties by their understanding and conduct are ad-idem that no liability to pay any amount arises, it would not be open for the Revenue to insist on collection of any tax. In the case of CIT v. Shoorji Vallabhdas & Co. [1962] 46ITR 144 the Supreme Court had considered the case where the Assessee firm was a managing agent of inter alia two shipping companies and as per its agreements with the concerned shipping companies, was entitled to managing commission @10% of the freight charged and entries for the same had also been passed in the books of account. The Assessee floated two private companies and

desired that the said private companies be substituted as managing agents in its place. In this background one of the shipping companies managed by the Assessee received a letter from two of its shareholders, who objected to the quantum of management agency commission being charged by the Assessee. In this context, the Assessee was invited to make an offer to reduce the commission charged. The Assessee agreed for reduction in the agency commission in order to put the concerned managed companies on a firm financial footing and at the Extraordinary General Body Meeting of the managed companies held subsequently, the private companies floated by the assessee were accepted as the managing agents in place of the Assessee. The Income Tax Officer as well as the Appellate Assistant Commissioner had concluded that larger commission had accrued during the relevant period and was thus assessable to tax. The Tribunal accepted the Assessee's contention and held that the income on account of larger commission had neither accrued nor was paid to the Assessee and, thus, was not chargeable to tax. The Bombay High Court agreed with the Tribunal, however, certified the case as fit under Section 66A(2) of the Income Tax Act, 1961, to be considered by the Supreme Court.

The Supreme Court referred to the earlier decision of the Bombay High Court in CIT v. Chamanlal Mangaldas & Co. [1956] 29ITR 987 (Bom.), which was approved by the Supreme Court in CIT v. Chamanlal Mangaldas & Co. [1960] 39 ITR 8 (SC) and held as under: -

> *".....Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in bookkeeping, an entry is made about a "hypothetical income", which does not materialise. Where income has, in fact, been received and is subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable. Where, however, the income can be said not to have resulted at all, there is obviously neither accrual nor receipt of income, even though an entry to that effect might, in certain circumstances, have been made in the books of account. This is exactly what has happened in this court. Here too, the agreements within the previous year replaced the earlier agreements, and altered the rate in such a way as to make the income different from what had been entered in the books of account. A mere book-keeping entry cannot be income, unless income has actually resulted, and in the present case, by the change of the terms the income which accrued and was received consisted of the lesser amounts and not the larger. This was not a gift by the assessee firm to the managed companies. The reduction was a part of the agreement entered into by the assessee firm to secure a long-term managing agency arrangement for the two companies which it had floated."*

26. In view of the aforesaid, we are of the view that the Assessee was not obliged to deduct tax at source. Accordingly, the question of law is

answered in favour of the Assessee and against the Revenue and the appeal is dismissed.

27. In the circumstances, parties are left to bear their own costs.

(emphasis supplied by us)"

8. In view of the aforesaid observations and respectfully following the jurisdictional precedents relied upon hereinabove, we hold that the assessee cannot be treated as an 'assessee in default' for mere book entries passed within the meaning of section 201(1) of the Act and consequentially interest u/s 201(1A) is also directed to be deleted."

11. Respectfully following the aforesaid judicial precedents, we hold that the assessee cannot be treated as 'assessee in default' u/s 201(1) of the Act and no interest is chargeable u/s 201(1A) of the Act on the same. Accordingly, the Ground Nos. 4 & 5 raised by the revenue are dismissed and Cross objection of the assessee is allowed.

12. In the result, the appeal of the revenue is dismissed and cross objection of the assessee is allowed.

Order pronounced in the open court on 16/01/2024.

-Sd/-	-Sd/-
(ANUBHAV SHARMA)	**(M. BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated:16/01/2024
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi