

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G" NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER**

**आ.अ.सं./I.T.A Nos.9143 & 9144/Del/2019
निर्धारणवर्ष/Assessment Years:2017-18 & 2019-20**

Satya Kiran Healthcare Private Ltd., Near PWD House, Atlas Road, Sonipat, Haryana. PAN No.AABCS7978K	बनाम Vs.	ITO, Ward-TDS, Rohtak, Haryana.
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

Assessee by	None
Revenue by	Shri Anuj Garg, Sr. DR

सुनवाईकीतारीख/ Date of hearing:	01.11.2023
उद्घोषणाकीतारीख/ Pronouncement on	30.01.2024

आदेश /O R D E R

PER C.N. PRASAD, J.M.

These two appeals are filed by the Assessee against the order of the Ld.CIT(Appeals), Rohtak dated 23.10.2019 for the assessment years 2017-18 & 2019-20 arising out of the orders passed u/s 201(1) and 201(1A) of the Act for short deduction of TDS.

2. In spite of issue of several notices, none appeared on behalf of the assessee, nor any adjournment was sought. Therefore, we

proceed to decide the appeals on hearing the Ld. DR. The only issue in these appeals is whether TDS is to be deducted u/s 194J or u/s 194C of the Act on the payments made towards maintenance of X-Ray machine and CVC machine.

3. Perusal of the order passed u/s 201(1) and 201(1A) for these assessment years reveals that assessee made certain payments towards ambulance rent, maintenance of X-ray machine and CVC machine. The assessee deducted TDS on X-ray machine and CVC machine @ 1% u/s 194C of the Act. However, the Assessing Officer (for short referred as the “AO”) was of the view that the assessee should have deducted TDS u/s 194J at 10% on payments made for maintenance of X-Ray and CVC machines as fees paid for professional and technical services. The AO passed order u/s 201(1) and 201(1A) treating the payments made towards maintenance of x-ray machine and CVC machine as charges for professional services and deducted TDS @10% u/s 194J of the Act.

4. Assessee preferred appeal before the Ld.CIT(Appeals) and the Ld.CIT(A) sustained the order of the AO observing as under: -

“4. I have carefully considered the facts of the case, assessee’s submissions, order u/s 201(1) & 201(1 A) of the Act and find that:

4.1 Survey u/s 133A of the Act was done by ITO (TDS) and it was found that the assessee failed to comply with the provision of section 194J of the Act when making payment for professional fees of Rs.5,52,000/- on account of Ambulance rent Rs.7,35,398/- on account of maintenance of X-Ray machine and CVC machine and Rs.38,500/- as audit fees on which TDS was deducted late. In this case demand was raised u/s 201(1) & 201(1A) of the Act as it was held by the AO after survey, that there was short deduction of TDS and interest of Rs.93,712/-

4.2 During the appellate proceedings the assessee has given detailed submission as discussed in para 3 above that the services provided by the deductees fall in the category of contractual payment and not technical or professional service and TDS @ 2% as per section 194C has been deducted. In support of his contention he has relied on the decision of Hon'ble ITAT Mumbai in ITO(OSD)(TOS)-13 Vs Dr Balabhai Nanavati Hospital, wherein it was held that "in view of the above facts and circumstances, we are of the view that the expenditure on account of AMC of medical equipment etc. is not in the nature of fee for professional and technical services as construed u/s 194J of the Act and hence not liable to deduct TDS u/s 194J of the Act. The assessee has deducted TDS u/s 194C of the Act in regard to payments on AMC of medical equipment and machines etc. Accordingly, we find no infirmity in the order of CIT(A) on this issue and hence the same is confirmed." He has also relied on the decision of Hon'ble ITAT Ahmedabad and Hon'ble Madras High Court on this issue. The CBDT circular no.7 dated 08.08.1995 also supports his contention. As an alternate plea, the assessee has submitted that the payees have taken into account such some for computing the return of their income and had paid taxes accordingly. A certificate from an accountant in Form No. 26A, to this effect has been given. The assessee has also contended that as per the first proviso to section 201(1) of the Act, the onus was on the AO who had alleged failure on part of the deductor. Thus,

additional evidence in the regard was furnished. The assessee has relied on the circular of CBDT dated 29.01.1997 which says that "no demand visualized u/s 201(1) should be enforced if the deductor has satisfied the officer of TDS that taxes due have been paid by deductee-assessee. However, this does not till the date of payment of taxes by the deductee assessee or liability for penalty u/s 271C of the Act. The assessee has relied on the decision of Hon'ble Supreme Court in Hindustan Coca Cola Beverage Pvt. Ltd. Vs. CIT (2007) to 93 ITR 0226, on this issue. Further the assessee has contended that interest u/s 201(1A) of the Act may not be charged without giving effect to the proviso to section 201(1A). As regards no deduction of TDS on audit fees, it is held that the same was deducted and paid late by seven months.

4.3 A perusal of CBDT circular no. 7 dated 08/08/1995 shows that the following criteria is to be considered when examining the Issue of TDS u/s 194C or 194J of the Act-

Question 28: Whether the services of a regular electrician on contract basis will fall in the ambit of technical services to attract the provisions of section 194J of the Act? In case the services of the electrician are provided by a contractor, whether the provisions of section 194C or 194J would be applicable?

Answer: The payments made to an electrician or to a contractor who provides the service of an electrician will be in the nature of payment made in pursuance of a contract for carrying out any work. Accordingly, provisions of section 194C will apply in such cases.

Question 29: Whether a maintenance contract including supply of spares would be covered u/s 194C or 194J of the Act?

Answer: Routine, normal maintenance contracts which includes supply of spares will be covered under section 194C. However, where technical services are rendered, the provision of section 194J will apply in regard to tax deduction at source.

4.4 In the instant case as per the order of ITO(TDS) dated 27/02/2019 after IDS inspection it was held that payment of Rs.7,35,398/- was made on account of maintenance of X-Ray/MRI machines. As regards assessee's submission and alternate plea that the assessee would not be in default if the deductee has furnished the return and shown the amount in the income and a certificate as per the Act has been furnished in this regard, it is seen that the payees have included the contract charges received from the assessee of Rs.3 lacs each in their ITRs but there is no satisfaction of me AO that correct tax has been paid by the payees as required in the case of Hon'ble Supreme Court in Hindustan Coca Cola Beverage Pvt. Ltd. vs CIT (2007) in 93 1TR 0226, on this issue; further, it is seen that in the instant case the certificate in form no 26A as per rule 31ACB has not been uploaded on the DIT (Systems) Portal and it is also seen that Sh. S.P. Gupta & Sons (HUF) and Mahesh Gupta & Sons (HUF) are assessee's sister concerns and payments have been made for general/administrative work executed by these concerns and no evidence is given regarding the exact nature of work, terms of contract, their technical competence for which payment has been made and shown as contractual in nature. The payments made to Mahesh Gupta HUF and S.P. Gupta, HUF (for specialized maintenance contracts) would require technical expertise. Thus it is held that TDS should have been made u/s 194J of the Act and the assessee is in default in this regard. A perusal of the ledger accounts submitted by the assessee show that Rs.6,870/- were paid for repair & maintenance/AMC of X-Ray machine for which TDS @ 2% is deductible as it is a contract for maintenance. The payment of Rs 55,000/- to Fuji Film is also in the nature of AMC/ contract for maintenance for which TDS @2% is deductible. Payment of Rs.20,206/- made to Allengers Medical Systems was also AMC/ contract for maintenance for which TDS @ 2% is deductible. As discussed above and as submitted by the assessee, for these payments the assessee is in default for non deduction of tax @ 2% u/s 194C of the Act as they were contractual in nature. As regards audit fees

the assessee has deducted TDS after a delay of 11 months and not at the time of making provision of the same, so interest u/s 201 (1A) is leviable.”

5. On careful perusal of the observations of the Ld.CIT(A), we noticed that the contention of the assessee that the payments made for maintenance of X-ray machine and CVC machine attracts TDS u/s 194C and not u/s 194J as professional charges was rejected and was treated as fee for professional and technical services as per section 194J of the Act attracting TDS @10% as against 1% made by the assessee u/s 194C of the Act. We observe that the contentions and the case laws relied on by the assessee was not considered by the Ld.CIT(A) in proper perspective.

6. We also noticed that in the course of appellate proceedings in the paper book the assessee submitted that the assessee furnished return of income filed by the payee to show that the income has been accounted for in their returns and paid the tax dues on income declared by them and assessee is in the process of furnishing of certificate to this effect from an Accountant in Form No. 26A, however, the Ld.CIT(A) has not considered the submissions of the assessee. In the grounds of appeal the assessee also contended that the AO failed to consider the amount already deposited by the

assessee even before passing the order u/s 201(1) and 201(1A) of the Act.

7. We observe that as per the mandate of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage Pvt. Ltd. Vs. CIT 293 ITR 226 if the payee has taken into consideration the amounts received by payer in their return of income and paid taxes on such amounts the assessee cannot be treated as an assessee in default u/s 201(1) of the Act. The Ld.CIT(A) appears to have not considered all these submissions of the assessee and the evidences placed before him. In the absence of any evidence furnished before us to show that the payees have already considered these amounts in their returns, in the interest of justice, we restore this matter to the file of AO for fresh adjudication in accordance with law. The assessee is at liberty to file all the evidences to support their contentions before the AO. All the issues in the appeal are left open for fresh adjudication in accordance with law after providing adequate opportunity of being heard to the assessee.

8. Grounds in the appeal for the AY 2019-20 are identical to grounds in appeal for AY 2017-18 and, therefore, the appeal for AY 2019-20 is also restored to the file of the AO for fresh adjudication.

9. In the result, appeals of the assessee are allowed for statistical purpose.

Order pronounced in the open court on 30/01/2024

Sd/-
(G.S. PANNU)
VICE PRESIDENT

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 30/01/2024

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT
(DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi

