

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'F', MUMBAI**

**BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER
AND
SHRI SANDEEP GOSAIN, JUDICIAL MEMBER**

**ITA No.7402 & 7403(Mum) 2013
(Assessment years : 2007-08 & 2008-09)**

The Assistant Commissioner of Income-tax(TDS)
3(2), Mumbai

Appellant

Vs

M/s United Healthcare India Pvt.Ltd.,
3B, Gundecha Onclave, Kherani Roiad,
Saki Naka, Andheri (E),
Mumbai-400 072
PAN No.AAACS9480R

Respondent

**Appellant by : Shri Neil Philip,
Revenue by : Shri Ashish Sodhani**

Date of hearing : 24-05-2016

Date of pronouncement : 10-08-2016

ORDER

PER SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

Both these appeals have been filed by the revenue against the order of the Id.CIT(A)-13, Mumbai dated 11-10-2013 in Appeal No.CIT(A)-13/IT/Rationalization order no.602/11-12 for the assessment years : 2007-08 and 2008-09, on the following grounds;

“Based on the facts and circumstances of the case, the Appellant respectfully submits that the learned Assessing Officer erred in passing an order under section 271C of the IT Act, 1961 (ITA) for assessment year 2007-08 on the following grounds.

1. The Assessing Officer failed to appreciate that the Appellant was under a "genuine and bonafide" belief on

the non-applicability of section '194J of the ITA to payments made by the appellant to the hospitals under the cashless hospitalization scheme.

2 The Assessing Officer failed to appreciate that the Appellant was under a genuine and bonafide belief on the non-applicability of .section 194J of the IT A to payments made to the hospitals because of the various Judicial precedents confirming that the hospitals do not render any professional services

3. The Assessing Officer failed to appreciate that the Appellant was under a "genuine and bonatide" belief on the non-applicability of section 194J of the ITA to payments made to the hospitals because of the various judicial precedents confirming that mere intermediaries were not subjected to withholding obligations under the provisions of the ITA

4. The Assessing Officer failed to' appreciate that in the 'event of a reasonable cause being shown by the tax payer for failure to withhold tax under section 194J of the IT Act, the penal provisions of section 271 C of the IT A cannot be imposed against the appellant

5. The Assessing Officer failed to appreciate that the Central Board of Direct Taxes had issued a clarification by virtue of the Circular due to the ambiguity existing pertaining to the applicability of section 194J to the payments made to hospital In light of the afore mentioned ambiguity, the Assessing Officer erred in concluding that the penal provisions of Sec.271C of the !TA could be imposed against the Appellant.

6. The Assessing Officer failed to appreciate that the Hon'ble High Court after being prima facie convinced that there was ambiguous point of law pertaining to the applicability of section 194J of the IT Act to payments made to the hospitals had admitted the petition filed and therefore the penal provisions of Section 271 C of the ITA could not be imposed against the Appellant.

7. The Assessing Officer failed to appreciate that there was no judicial precedent directly on the applicability of payments made to the hospital by third party administrators its determination was at a "nascent" stage and therefore the penal provisions of section 271C of the IT Act could not be imposed against the Appellant.

8 The Assessing Officer failed to appreciate that the practice of not deducting tax at source under Section 194J for the payments made by the Third Party Administrators directly to the hospital under the cashless hospitalization

scheme was an established industry practice and therefore the penal provisions of section 271C of the ITA could not be imposed against the Appellant.

9. The Assessing Officer erred in imposing penalty under section 271C of the IT Act as the appellant had not acted "deliberately" in defiance of law and was not guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligations.

The appellant submits that each grounds of appeal are without prejudice to one another. Further, the appellant craves leave to add, alter, vary, omit, substitute or amend of the above ground of appeal at any time before or at the time of the appeal so as to enable the CIT(A) to decide this appeal according to law.

3. Since the grounds involved in both these appeals are identical, first we take up appeal no.7402(Mum.)/2013 for the assessment year 2007-08.

4. The brief facts of the case are that the assessee is stated to be engaged in the business of providing health management services. It is a third party administrator providing health insurance services. In this case, a survey u/s 133A of the IT Act was conducted at the premises of the assessee on 17-09-2009. From the details collected during the course of survey and subsequently during the course of hearing, it was found that the assessee has not deducted tax at source for the FY: 2006-07, as the assessee company had paid an amount of Rs.42,04,76,538/- to various hospitals on which no TDS has been deducted. Further, on this payment to various hospitals, the assessee company was liable to deduct tax as per the provisions of sec.194J of the IT Act, 1961.

5. The ITO(OSD)(TDS)-3(2) passed an order u/s 201(1) of the IT Act, 1961 on 05-11-2009 thereby, raising a demand of Rs.4,76,39,992/- being the short deduction on account of payments made to hospitals.

The order passed u/s 201(1) of the IT Act was subsequently, rectified u/s 154 on 30-03-2010 and the total short deduction u/s 201 was held to be Rs.21.39,048/-.

The assessee filed appeal with the CIT(A) and the CIT(A) after hearing both the parties has held that the payment made to hospitals nursing homes is liable for deduction of tax at source as per the provisions of sec.194J of the IT Act, 1961

Thereafter, the penalty proceedings u/s 271C of the IT Act on account of default of the assessee as per the provisions of Sec. 201(1), 201(1A) of the Act, were initiated. The AO after considering the contentions raised by the assessee and after considering the case of Dedicated health care services TPA(Ind.)Pvt. Ltd Vs ACIT(2010) held that sec.194J is applicable on the payments made by TPA's to the hospitals and also the wordings of section are very clear and not ambiguous. The Assessing Officer held that the assessee has interpreted the law in his own way which is not consistent with the words used in the sec.194J of the IT Act, and since the assessee was unable to show bonafide belief or reasonable cause for non-deduction of tax. Therefore, a sum of Rs.21,39,048/- was imposed as penalty u/s 271C of I.T. Act.

6. Aggrieved by the order of imposing penalty, the assessee preferred an appeal before the CIT(A) and the CIT(A) after considering the case of both the parties has allowed the appeal and deleted the penalty imposed by the Assessing Officer u/s 271C of the IT Act, 1961.

7. Aggrieved by the order of CIT(A), the revenue is appeal before us on grounds mentioned herein above.

8. Ground no.2 & 3 are general in nature and needs no adjudication.

9. Ground no.1. In this ground, the revenue has challenged the order of the CIT(A) by pleading that the CIT(A) had erred in deleting the penalty imposed u/s 271C of the IT Act, levied by Addl.CIT(TDS), as the quantum addition has been confirmed by the learned CIT(A) and without properly appreciating the factual and legal matrix of the case, as clearly bought out by the Addl.CIT(TDS) in his order.

10. We have heard the counsel for both the parties and we have also perused the material placed on record as well as the orders passed by the revenue authorities.

11. The moot question before us, for our consideration is as to whether the CIT(A) has erred in deleting the penalty imposed u/s 271C of the IT Act levied by Addl.CIT(TDS)? In this connection, after hearing both the parties and perusal of the orders passed by the revenue authorities and after going through the judicial pronouncements, we found that the issue with regard to applicability of sec.194J of the IT Act has already been decided by the Hon'ble Bombay High Court in the case of Dedicated Health

Services TPA (India) Pvt.Ltd and Others Vs ACIT & Others 324 ITR 3465(Bom.) which decided the matter as under;

“Held, (i) that , whether the provision of medical services takes place within the institutional framework of a hospital services were rendered as part o an umbrella of services provided by the hospital which engages qualified medical professionals who practice the medical profession. These were services rendered in the course of the carrying on of the medical profession. Hence, TPAs, when they made payments to hospitals were liable to deduct tax at source under the provisions of section 194J....”..

By virtue of the law interpreted by the Hon'ble Bombay High Court, it is manifestly clear that the TPA's, while making the payments to hospitals are liable to deduct tax at source, under the provisions of sec.194J of the IT Act, 1961. Therefore, as per the aforementioned law settled by the Hon'ble Bombay High Court the assessee was also liable to deduct tax at source, while making payments to hospitals under the provisions of sec. 194J of the IT Act. But the CIT(A) while passing the impugned order has deleted the penalty. The operative portion of the CIT(A)'s order is reproduced blow;

“ 5.5 a reading of this portion of the order makes it clear that wherever a tax payer is able to show the reasonable cause for his failure to deduct tax, penalty u/s 271C is not leviable automatically. Now coming to present case, the subject matter of this appeal, appellant has argued that there were contradictory decisions available on the issue whether in a case like theirs, TPA, TDS was to be made u/s

194J or not and hence the appellants were under bonafide belief that they are not required to deduct tax. The appellant has then also pleaded that though Assessing Officer has relied upon this very decision of Hon'ble' Bombay High Court for levying penalty only for the reason that the case was decided against them, but he has not considered the decision given regarding applicability of CBDT Circular which was set aside for the purpose levying penalty u/s 271C. I have also considered this aspect and after going through these facts available on record. I am of the considered view that penalty u/s 271C was not leviable in this case for the reason that appellant did not deduct tax following favourable decision available to them at that time according to which no tax was deductible by them being TPA u/s 194J. This being a reasonable cause itself in view of provision of section 273B, the penalty levied u/s 271C when the appellant has reasonable cause for not deducting the tax is not tenable. Accordingly, the penalty imposed u/s 271C of the Act levied at Rs.21,39,048/- for SAY: 2007-08 being not sustainable is deleted herewith".

12. From the conjoint reading of the impugned order passed by the CIT(A) as well as the written submissions by the assessee as well as the arguments advanced by both the parties, we are of the considered view, that while deleting the penalty the CIT(A) has mentioned that the penalty u/s 271C was not leviable in the case of assessee for the reasons that the assessee did not deduct tax following "**favourable decisions**" available to them at "**that time**". According to which no tax was deductible by them

for being TPA u/s 195J. Therefore, the CIT(A) while passing the impugned order has held that “this being a reasonable cause itself, in view of provisions of sec.273B” the penalty levied u/s 271C of the Act, upon the assessee was deleted.

13. The ld. CIT(A) has no where mentioned what were those favourable decisions at that time available to the assessee according to which the assessee was not liable to deduct tax being TPA u/s 194J of the Act and this particular stand taken by CIT(A) is the basis for reaching to the conclusion. However, the orders passed by the ld. CIT(A) lacks mentioning or discussion of ‘any such favourable decisions’, while reaching to a conclusion regarding deletion of penalty. Therefore, in our considered view, the ld. CIT(A) has reached to a conclusion without mentioning its basis. Hence, the order of ld. CIT(A) is nonspeaking to that extent.

Considering the facts of the present case, in our considered view the present appeal is to be remanded back to the file of the CIT(A) with a direction to pass speaking order, while mentioning the basis or the details of ‘favourable decisions’ which were available at ‘that time’ before the assessee, according to which no tax was deductible. Needless to mention that the ld. CIT(A) would give a fresh opportunity of hearing to both parties before passing a fresh order in accordance with law.

ITA No.7403(Mum)/2013 for assessment year 2008-09

14. As the grounds in this appeal are identical, we have already decided the issues in ITA No.7402(Mum)/2013 for assessment year 2007-08. Hence, our decision in ITA No.7402/Mum/2013 is applicable to assessment year 2008-09 also.

15. In the result, with aforesaid directions both the appeals filed by the revenue are allowed for statistical purposes.

Order pronounced in the open Court on the 10/08/2016.

Sd/-

(JASON P BOAZ)
ACCOUNTANT MEMBER

Mumbai:

D a t e d : 10.08.2016

Ashwini/Ps

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-
- 4 CIT
- 5 DR, ITAT, Mumbai
- 6 Guard file

Sd/-

(SANDEEP GOSAIN)
JUDICIAL MEMBER

BY ORDER,

Assistant Registrar
ITAT, MUMBAI