**INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH “D”: NEW DELHI**

**BEFORE**
**SHRI G.D. AGRAWAL, HON’BLE PRESIDENT**
**AND**
**SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA No.:- 3234/Del/2014
Assessment Year: 2010-11
AND
ITA No. 4398/Del/2013
Assessment Year: 2009-10

| Vipul Medcorp TPA Pvt. Ltd.<br>515, Udyog Vihar, Phase-V,<br>Gurgaon<br>PAN AABCV8688F | Vs. | ACIT<br>Circle-51(1)<br>New Delhi. |
|---|---|---|
| **(Appellant)** | | **(Respondent)** |

ITA No. 3240/Del/2014
Assessment Year: 2010-11

| DCIT<br>Circle-51(1)<br>New Delhi | Vs. | Vipul Medcorp TPA(P) Ltd.<br>515, Udyog Vihar Phase-V<br>Gurgaon<br>PAN AABCV8688F |
|---|---|---|
| **(Appellant)** | | **(Respondent)** |

ITA No. 4756/Del/2015
Assessment Year: 2009-10

| Vipul Medcorp TPA Pvt. Ltd.<br>515, Udyog Vihar, Phase-V,<br>Gurgaon<br>PAN AABCV8688F | Vs. | JCIT<br>TDS Range-51<br>New Delhi. |
|---|---|---|
| **(Appellant)** | | **(Respondent)** |

| Appellant by: | Shri Rajesh Arora, CA |
|---|---|
| Respondent by : | Shri Amit Jain, Sr. DR |

| Date of Hearing | 11/06/2018 |
|---|---|
| Date of pronouncement | 04/09/2018 |

## O R D E R

**PER AMIT SHUKLA, J.M.**

The appeal for the assessment year 2009-10 has been filed by the assessee against impugned order dated 23.5.2103; and appeal for the assessment year 2010-11 has been filed by the assessee as well as by the revenue against impugned order dated 20.3.2014, passed by Ld. CIT(Appeals) -30 New Delhi, both in relation to order under section 201(1)/201(1A); and lastly, the appeal for the assessment year 2009-10 has been filed by the assessee against penalty proceedings u/s 271C against impugned order dated 11.5.2015. Since the issues involved in all the appeals are common arising out of identical set of facts, therefore, same were heard together and have been disposed of by way of this consolidated order.

2. We will first take up the appeal of the assessee for the assessment year 2009-10, wherein the assessee has raised following grounds:

1. *The Ld/- CIT (A) has erred in law and facts of the case, in confirming the levy of interest amounting to Rs. 1,24,61,884/- u/s 201(1A) on the tax calculated on all the payments made by the assessee company to the hospital without deducting TDS u/s 194J for which the assessee was exempted having furnished the auditor's certificates from the deductee hospital. The interest was charged on the estimated basis on the monthly payment for the period starting from 7th day of the subsequent month till filing of*

*the return by the deductee which is based upon the conjectures and presumption and is bad in law.*

2. *The Ld/- CIT(A) has erred in law and facts of the case in sustaining the addition of tax of Rs. 15,54,696/- and Interest thereon amounting to Rs 4,77,122/- charged u/s 201(1)/(1A) of the Income Tax Act, 1961 on the amount of Rs. 1,50,94,139/- for which the auditors certificates could not be provided, ignoring the submission of the assessee company, which is highly arbitrary, unjustified, against the principles of natural justice, bad in law and uncalled for."*

3. The facts in brief are that the assessee company is engaged in the business of providing third party administration services (in short, TPA) for the medical insurance policies issued by the Insurance Companies and is governed by the 'Insurance Regulatory & Development Authority of India' (IRDA). The assessee makes the payment to various approved hospitals on behalf of the Insurance Companies and then the payments are reimbursed to the assessee by such Insurance Companies after processing the bill of the hospital. The assessee company provides both cashless and actual reimbursement of the insurance company to various policy holders. During the year under consideration the assessee had made payment amounting to Rs. 108,28,80,515/- to various hospitals. The AO noted that on 24th November, 2009, CBDT had issued a circular No. 8/2009, whereby it was clarified the controversy that TPAs making the payments on behalf of the insurance company to the hospitals over settlement of medical insurance claim etc. under various schemes are liable to deduct tax at source u/s 194J on such payments to the hospitals. A survey was carried out u/s 133 A at the premises of the assessee and statement of Senior Manager (Accounts) was recorded,

wherein he admitted that no tax has been deducted under any provision of the Act for the payment given to various hospitals. Consequently proceedings u/s 201(1) was initiated and notice was issued on 14.12.2010 requiring the assessee to furnish relevant details. In response, the assessee submitted that the CBDT circular has been challenged before the Hon'ble Delhi High Court in the writ petition, wherein Hon'ble High Court vide order dated 11.1.2010 has held that no recovery shall be pursuant to the circular No. 8/2009. Ld. AO held that in view of clear cut CBDT Circular, there was a failure on part of the assessee for not deducting tax and therefore, assessee is deemed to be "assessee in default" in respect of such tax and also liable for charging of interest u/s 201(1A). He further noted that CBDT has clarified that the demand u/s 201(1) shall not be enforced if the deductor satisfies to the AO that the relevant tax has been paid by the deductee, i.e., the hospital and the certificate from the auditor of the deductee has been obtained stating that the tax and interest due from deductee has been paid for the assessment year concerned, then it would be sufficient compliance. However, it will alter the liability to charge interest u/s 201(1A) of the Income Tax Act, up till the payment of tax by the deductee of the assessee. After inviting assessee's submission on various issues in this regard and after submission of various certificates by the assessee from the hospitals, AO held that liability of TDS as 'assessee in default' u/s 201(1) read with section 201(1A) should be calculated at Rs. 1,88,90,792/-, for which he has given a separate working in annexure to the assessment order. For the sake of ready reference, the amount of payment made by the assessee to the hospital and number of certificates obtained by the assessee and the interest charged u/s 201(1A) by the AO can be summarized in the following manner:

| Particulars | Amount of Payment (Rs. | No. of certificates | Interest charged under section 201(1A) of the Act by the Ld. AO (Rs. |
|---|---|---|---|
| Total payments made to hospitals by the assessee during the year under reference | 108,28,80,515 | 1,614 | |
| Less: | | | |
| Payments for which auditor's certificates were produced before the Ld. AO. | (103,96,29,903) | (1,189) | 1,34,03,277 |
| Payments for which auditor's certificates were not required as the same were below Rs. 20,000/- | (24,78,193) | (214) | |
| Balance payments for which auditor's certificates could not be produced before the Ld. AO | 4,07,72,419 | 211 | 12,87,956 |
| Less: | | | |
| Payments for which auditor's certificates were produced before the Ld. CIT(A) under Rule 46A of the Income Tax Rules 1962 ("the Rules") | (2,56,78,280) | 121 | |
| Net payments for which auditor's certificates could not be produced by the assessee | 1,50,94,139 | 90 | |

4. The AO has thus treated the assessee to be in default for the payment of Rs. 4,07,72,419/- for which assessee could not submit the auditor certificate on which AO has charged tax @ 10.3% of Rs. 41,99,559/- u/s 201; and interest u/s 201(1A) of Rs. 12,87,956/-. For the balance payment amounting to Rs. 104.21 crores, the AO has charged interest of Rs. 1,34,03,277/- u/s 201(1A).

5. Before the First Appellate Authority the assessee further submitted another 121 auditors certificate of the hospitals for the payment aggregating to Rs. 2,56,78,280/- as an additional evidence under rule 46A . Such additional evidences have been admitted by the Ld. CIT (A) after holding that assessee was prevented by sufficient cause to produce the same before the AO. Before the Ld. CTI(A) the assessee made mainly four arguments which has duly noted and incorporated in the impugned order and thereafter Ld. CIT(A) has given part relief which can be summarized in the following manner :-

| Particulars | Addition sustained by Ld. CIT(A) |
|---|---|
| Interest charged under first proviso to section 201(1A) of the Act on payments of Rs. 106,53,08,183 for which auditor's certificates are placed on record calculated for the period from the date of payment to the hospital till last date of return filing of hospitals, i.e. 30.09.2009.<br>(Rs. 103.96 Cr. For certificates submitted before Ld. AO and Rs. 2.56 Cr. For certificates submitted under Rule 46A before Ld. CIT (A). | 1,24,61,884/- |
| Tax @ 10.3% under section 201(1) of the Act on payments of Rs. 1,50,94,139/- to hospitals for which the auditor's certificates (Total 90 certificates) were not placed on record. | 15,54,696/- |
| Interest under section 201(1A) of the Act calculated on the above payments of Rs. 1,50,94,139 from the date of payment till the date of order under section 201(1) of the Act. | 4,77,122/- |

6. Before us, Ld. Counsel submitted that, earlier there was no clarification as to when the TPA was required to deduct tax at source of payment made by the hospital and due to lack of this clarification only, CBDT had issued a circular on 24.11.2011, but the clarification has given in the subsequent year much after the expiry of the financial year, by which the TPAs have charged with obligation to deduct TDS over payment made to the various hospitals during the year under reference. Further, the assessee had deducted and deposited the TDS from the date of circular in question, but for the payments pertaining to prior to the date of the circular which assessee could not have forecasted any liability to deduct tax. Despite that assessee started collecting certificates from the auditors of deductee hospitals, since there was huge payment, the assessee could not submit 90 certificates for the payment aggregating Rs. 1,50,94,139/- out of total payment of Rs. 108.28 crores. The assessee had also furnished the list of hospitals, names and addresses with PAN and amount of payment made to the hospitals, the details of which is appearing in the order of the Ld. CITA() at page No. 16. Thus, he submitted that there was a reasonable and sufficient cause for non deduction of TDS and consequently the interest u/s 201(1A) should not have been charged from the assessee company. In support he strongly relied upon the following two judgments:-

(i) Tony Electronics Ltd. Vs. ACIT 62, TTI 351 (1998) : 63 ITD 41(1997) (Del Trib);

(ii) Gujarat Narmada Valley Fertilizers Co. Ltd. Vs. ITO, 66 TTI (Ahd) 121 (2000): 71 ITD 66 (Ahd)(1999);

7. Ld. Counsel further submitted that the interest charged u/s 201(1A) by the AO on the amount on which certificates from the auditors of the deductee hospitals were produced, no interest could have been charged, because such a chargeability of interest was only

inserted by the Finance Act 2012 w.e.f. 1.7.2012 by way of 2nd *proviso* to section 201(1A). Thus, he submitted that interest of Rs. 1,24,61,884/- charged under the 1st *proviso* to section 201 (1A) in the garb of CBDT circular is not justified, because CBDT cannot empower the AO to charge interest unless it is provided in the Act. He also relied upon the judgment of Hon'ble Delhi High Court in the case of **CIT vs. Karan Bihari Thaper, 335 ITR 541(2011),** wherein it has been held that amendment in the section which was made applicable w.e.f. prospective date cannot be given a retrospective effect by way of CBDT circular. He also relied upon the catena of the decision on this point.

8. Regarding TDS liability of Rs. 15,54,696/- and interest of Rs. 4,27,122/- on the payment for which assessee could not produce certificates, Ld. Counsel submitted that, first of all there is a calculation error, because tax has been calculated at 10.3% which ought to have been calculated @ 10%, because cess of 0.3% is not applicable on the payments u/s 194J. Further circular clarifying the deduction of tax by TPA was brought subsequent to the year under consideration and by that time the assessee has discharged all its obligations to the hospitals by collecting certificates from the same and out of 1614 certificates, the assessee could not collect only 90 certificates for which assessee had separately given details of Pan and where the parties are assessed. Under these facts and circumstances assessee should not be treated as assessee in default so as to charge liability u/s 201 (1) and 201 (1A) and the certificates which could not be produced.

9. Ld. Counsel before us has also raised additional ground No. 3 challenging that the levy of tax u/s 194J on composite bills received from the hospitals is not correct. On the additional ground, Ld.

Counsel submitted that the provision of section 194J has been made applicable to the payments made by the assessee company to the hospitals which should only be restricted to the extent of professional fees contained in the hospitals bill and not for consumables and bed charges, etc. The assessee has made payments aggregating to Rs. 108.29 crores and the break-up of each and every payment to different hospitals has been given in paper book volume I. Based on these details assessee has given a break up of average percentage of different components in the payments made to the hospital which is as under :-

| | Break Up | | | | | | |
|---|---|---|---|---|---|---|---|
| | Investigation | Medicines | Others | Professional Charges | Room Tariff | Consum-ables | Grand Total |
| Percen tage | 16% | 20% | 6% | 26% | 17% | 15% | 100% |

10. Thus, he submitted that tax u/s 194J ought to have been restricted only to 26% which is the professional charges and the other components do not fall within the scope of fees for professional services u/s 194J. Consequently, the interest levied u/s 201(1A) also deserves to be restricted only to 26%. In support of this contention, he relied upon the following judgments:-

(i) Arogya Sri Health Care vs. ITO, 51 SOT 79 (2012) (HYD)(URO)

(ii) Medi Assist vs. DCIT (TDS) in I.T.A Nos. 503 & 510/Bang/201

(iii) TTK Healthcare TPA Pvt. Ltd. Vs. DCIT, ITA Nos. 424 to 429/Bang/2011

11. On the other hand, Ld. DR strongly relying upon the order of the AO and Ld. CIT(A), submitted that it is not in dispute that assessee had not deducted TDS on the payments made to the hospitals which otherwise was covered u/s 194J. CBDT circular has mainly clarified this position. In any case the Ld. CIT(A) has already given a substantial relief, wherein the assessee has filed the certificates and it is only in those cases where assessee could not obtain the auditor's certificate of the hospitals, he has confirmed the demand and the interest u/s 201(1A) which is completely in accordance with law. Thus, order of the Ld. CIT (A) should be confirmed.

12. We have heard the rival submissions, perused the relevant finding given in the impugned order as well as the material referred to before us. It is an undisputed fact that assessee has made payment aggregating to Rs. 108,28,80,515/- to various hospitals for which assessee had not deducted TDS. The controversy, whether the provisions of section 194J are applicable on the transactions by the TPAs with the hospitals have been clarified by the CBDT vide its Circular No. 8/2009 (supra). The relevant clarification by the CBDT reads as under:-

> *"3. The services rendered by hospitals to various patients are primarily medical services and, therefore, provisions of 194J are applicable on payments made by TPAs to hospitals etc. Further for invoking provisions of 194J, there is no stipulation that the professional services have to be necessarily rendered to the person who makes payment to hospital. Therefore TPAs who are making payment on behalf of insurance companies to hospitals for settlement of medical/insurance claims etc under various schemes including Cashless schemes are liable to deduct tax at source under section 194J on all such payments to hospitals etc.*

*3.1. In view of above, all such past transactions between TPAs and hospitals fall within provisions of Section 194J and consequence of failure to deduct tax or after deducting tax failure to pay on all such transactions would make the deductor (TPAs) deemed to be an assessee in default in respect of such tax and also liable for charging of interest under Section 201 (IA) and penalty under Section 271 C.*

*4. Considering the facts and circumstances of the class of cases of TP As and insurance companies, the Board has decided that no proceedings U/S 201 may be initiated after the expiry of six years from the end of financial year in which such payment have been made without deducting tax at source etc by the TPAs. The Board is also of the view that tax demand arising out of Section 201 (1) in situations arising above, may not be enforced if the deductor(TP A) satisfies the officer in charge of TDS that the relevant taxes have been paid by the deductee assessee (hospitals etc.). A certificate from the auditor of the deductee assessee stating that the tax and interest due from deductee assessee has been paid for the assessment year concerned would be sufficient compliance for the above purpose. However, this will not alter the liability to charge interest under Section 201 (1A) of the Income Tax Act till payment of taxes by the deductee assessee or liability for penalty under Section 271C of the Income Tax Act as the case may be."*

13. Thus, this circular set the controversy at rest that the TPAs were required to deduct tax at source u/s 194J; and it has also been provided that the tax demand arising out of section 201(1) may not be enforced, if the deductor (TPAs) satisfies the officer in charge of TDS that the relevant taxes have been paid by the deductee of the hospital and a certificate from the auditor of the deductee has been obtained

stating that the tax and interest due from deductee has been paid for the assessment year concern and that would be sufficient compliance for the above purpose. As discussed above, the assessee, after the CBDT Circular came into force made very herculean effort for obtaining 1614 certificates, out of which the assessee before the AO as well as before the Ld. CIT (A) had produced almost 1584 certificates for which Ld. CIT (A) has given the benefit. Now the dispute is with regard to 90 certificates which assessee could not procure, the tax liability u/s 201 and 201(1A) has been determined. Apart from that, assessee has also challenged the levy of interest by the AO u/s 201(1A) on the payments, on which assessee has produced the certificates.

14. We shall firstly deal with the issue of levy of interest amounting to Rs. 1,24,61,884/- levied u/s 201(1A). The interest has been calculated from the date on which the tax was deductable to the date of furnishing of return of income by the deductee hospitals. This has been charged in view of *proviso* to section to section 201(1A) which has been brought in the statute by the Finance Act 2012 w.e.f. 1.7.2012. Ld. CIT (A) though has held that liability u/s 201(1) cannot be fastened on which assessee has produced the certificate, however compensatory interest u/s 201(1A) at the prescribed rate from the date of default up to the date of filing of return by the deductee entity, He further observed that, since assessee has given the entire details like PAN, then AO should verify such information from the DGIT (System) server after obtaining such an information. However, before us, Ld. Counsel contended that no interest should at all be chargeable for the period prior to amendment brought by the Finance Act 2012 w.e.f. 1.7.2012 by way of *proviso* to section 201(1) and 201(1A). Earlier the interest u/s 201(1A) was to be charged where assessee is treated to be 'assessee in default' u/s 201(1). Here in this case, the assessee

had submitted the certificates of the hospitals and hence assessee cannot be treated to be in default u/s 201(1) and consequently interest u/s 201(1A) cannot be charged for the year under reference. The exception which has been provided by the *proviso* to section 201(1A) has been made effective by the Finance Act 2012 and not in the year under reference. The said exception cannot be enforced against the assessee by way of circular and that too with retrospective effect. The circular only clarified that, where the deductee has filed its return and assessee furnishes a certificate to corroborate the same, the interest if any has to be in accordance with the provisions of section 201(1A) of the Act. Such a circular cannot impose any liability of interest, and had it been so, then the amendment in the sections 201(1) and 201 (1A) through Finance Act, 2012 would have been made applicable retrospectively.

16. We find considerable strength in the aforesaid arguments of the Ld. Counsel, because in so far as the interest charged u/s 201(1A) of Rs. 1,24,61,884/- of the payments where assessee had produced the certificates, the said interest could not have been levied in the garb of CBDT circular, because prior to *proviso* to section 201(1A), the interest was chargeable when assessee had not deducted tax or after deducting tax had failed to pay, then he was liable to pay the interest. In other words assessee was liable for interest when assessee is treated as 'assessee in default'. The Circular which came on 24.11.2009, was much after the year ending 31st March, 2009; and before that it was not clear that assessee had to deduct the TDS on such kind of payment which was in the nature of reimbursement. The said Circular clarifying the situation came in the subsequent financial year wherein TPAs were required to deduct TDS u/s 194J and because of such a circular assessee has been deemed to be assessee in default. The said circular also carved out exception and gave relief

to the assessees' on the condition that, if the certificate from an auditor has been obtained from the deductee that it has paid the taxes in the income tax return filed by him, then assessee was not liable to be treated as 'assessee in default' and once that is so, then the assessee could not be liable for chargeability of interest u/s 201(1A). The exception to levy interest and the period of calculation has come way of an amendment brought in the statute by the Finance Act 2012 w.e.f. 1.7.2012, wherein the following *proviso* has been added:-

> *"Provided that in case any person, including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first proviso to sub-section (1), the interest under clause (i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident."*

By this amendment, now it has been provided that, where the assessee is not deemed to be 'assessee in default' and if, *firstly*, such a person has furnished his return of income u/s 139; *secondly*, has taken into account such sum for computing income and return of income; and *lastly*, has paid the taxes due on income declared by him in such return of income and the person furnishes the certificate to this effect from an accountant, then in that case the interest has been provided to be payable from the date on which tax was deductable to the date of furnishing of return of income by such person. This *proviso* imposing such kind of levy of interest brought in the statute w.e.f. 1.7.2012 cannot be held to be applicable retrospectively for the year under consideration. It is trite law that CBDT circular *per se* can neither supersede the provision of the Act nor can it enhance the scope of section. This proposition has been reiterated by the Hon'ble

Jurisdictional High Court in the case of CIT vs. Karan Bihar Thapar, 335 ITR 541, wherein the Hon'ble Court held that an amendment in the section which was to be made applicable from a prospective date, should not be given a retrospective effect by way of CBDT Circular. Otherwise an amendment which determines the tax burden is substantive in nature and cannot be given a retrospective effect. Apart from that, Hon'ble Supreme Court on various occasions has held that circular cannot override or detract from the provisions of the Act but it can only seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specified circumstances. Reference can be made to Hon'ble Supreme Court in the case of **Catholic Syrian Bank Ltd. Vs. CIT 3SCC 784 (2012)**. Thus, we hold that no interest u/s 201(1A) can be charged on the payments where assessee is not treated to be 'assessee in default' u/s 201(1) and since, such an exception for calculation of interest has been brought into the Act w.e.f. 1.7.2012, therefore, it cannot be applied for the assessment year 2009-10. Accordingly, ground No. 1 as raised by the assessee is treated as allowed.

17. Coming to the addition of the tax of Rs. 15,54,696/- and interest thereon amounting to Rs. 4,77,122/-, we hold that assessee was liable to deduct tax at source u/s 194J in view of the clarification brought by the CBDT, because the CBDT had merely clarified the controversy by stating that TPAs are acquired to deduct tax at source while making the payment to the various hospitals u/s 194J. The assessee was thus clearly in default in not deducting TDS on such payments and consequently was liable for interest u/s 201(1A). To this extent the order of the Ld. CIT (A) is affirmed.

18. However, we agree with the contention of the Ld. Counsel that the entire payment of reimbursement cannot be reckoned to be purely

‘professional charges’. The assessee makes payment to various approved hospitals on behalf of Insurance Companies for which payments are reimbursed to the TPA by the Insurance Company after processing the bills of the hospital. These bills contained payment for medical investigation, medicines, room tariff, bed charges, consumables, etc. and also the professional charges. In so far as charges relating to medicines, room tariff, bed charges, consumables and others, it cannot be held to be for ‘professional services’ as provided u/s 194J, which defines the professional services as under :-

> *1.93.2 (a) “ Professional services” means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section;*

Thus, professional services relating to medical services alone should be liable for deduction of TDS u/s 194J. The medical services here would include operation fees, Doctor’s consultancy fee or any kind of medical investigation fee. The payments towards bed charges, medicines used on the patients, transportation charges, implants, consumables, etc. will not fall into professional medical services. This view has been upheld by the coordinate Benches of Tribunal in the case of Arogya Sri Health Care vs. ITO (supra); Medi Assist vs. DCIT (supra), TTK Healthcare TPA Pvt. Ltd. Vs DCIT (supra). Before us Ld. Counsel had filed break up of each payment made by the assessee to different hospitals which have been given in the paper book Volume I, to point out that more than 50% of the payments relate to reimbursement on account of medicines, room tariff, consumables, etc. Accordingly, we direct the AO that, he should examine these

payments and only payment relating to 'professional medical services' like, professional charges and medical investigation fees should alone be held to be liable for TDS u/s 194J and not other reimbursements. Only with regard to these payments which are held to be professional charges, the liability u/s 201(1) should be charged and consequently the interest u/s 201(1A) will also be levied, because *qua* these payments the assessee would be treated as 'assessee in default' and in terms of earlier provisions in section 201(1A) such interest was leviable if the assessee is treated as 'assessee in default'. With this direction, ground No. 2 is treated as partly allowed.

19. In the result appeal of the assessee is partly allowed.

20. Now coming to the cross appeals filed for the assessment year 2010-11, the facts and issues involved are identical. Here in this case the AO has raised the demand of tax u/s 201 and interest u/s 201(1A) in the following manner:-

| Particulars | | Amount Paid | Interest charged by the Ld. AO |
|---|---|---|---|
| Total Payment made to hospitals (ColumnA) | | 181,05,67,595/- | |
| Less : Value of : | | | |
| Payments to hospitals for which CA certificates submitted by the assessee company | 92,55,96,668/- | | 62,30,416/- |
| Total payments on which full TDSD deducted and deposited as prescribed u/s 194J | 33,84,97,959/- | | 7,31,533/- |

| | | | |
|---|---|---|---|
| Certificates submitted for lower deduction u/s 197 | 38,89,07,646/- | | 10,45,936/- |
| Payments below Rs. 20,000 on which 194J not applicable | 14,75,132 | | NIL |
| Payments to govt. hospitals exempt u/s 196 | 51,91,442/- | 165,96,68,847/- | NIL |
| Balance Amount for which the assessee was still in process of collecting the CA certificates | | 15,08,98,748/- | 4,13,555/-<br>2,34,300/- |
| Less: payments on which TDS is deposited | | 14,11,36.260/- | |
| Balance amount on which demand raised | | 97,62,488/- | |
| Tax u/s 201(1) and interest u/s 201(1A) | | 9,76,249/- | 86,55,739/- |

21. Thus, AO has treated the assessee to be 'assessee in default' for the payment of Rs. 97,62,488/- for which assessee could not submit the auditor's certificate in the course of the assessment proceedings on which AO has charged interest @ 10% of Rs. 9,76,249/-. Ld. CIT (A) has sustained the following addition:-

| Particulars | Addition sustained by Ld. CIT(A) (i.e. after appeal effect) (Rs.) |
|---|---|
| Tax @ 10% under section 201(1) of the Act on payments of Rs. 97,62,488 to hospitals for which the auditor's certificates were not placed on record | 9,76,249/- |
| Interest charged under first proviso to section 201(1A) of the Act on payments of Rs. 92,55,96,668/- for which auditor's certificates are placed on record calculated for the period from the date of payment to the hospital till last date of return filing of hospitals, i.e. 30.09.2010 | 62,30,416/- |
| Interest under section 201(1A) of the Act calculated on the payments of Rs. 93,46,50,857/- made prior to the month of | 30,86,659/- |

| | |
|---|---|
| issue of circular. | |
| Interest under section 201(1A) of the Act calculated on the payment of Rs. 33,84,97,959/- on which TDS has been deducted | 7,31,533/- |

22. Here also the assessee company has made total payment amounting to Rs. 181,05,67,595/- to various hospitals for which assessee could not produce the auditor certificate on the payments amounting to Rs. 15,08,98,748/- in compliance with the circular which was introduced on 24.11.2009 i.e., during the year under reference. It has been stated by the Ld. Counsel that assessee company has deducted and paid TDS on the payments made during the year under reference from the month of issue of circular, i.e., November, 2010 amounting to Rs. 14,11,36,260/-. Consequently, the tax liability u/s 201(1) was worked out as Rs. 9,76,249/- and further more the interest of Rs. 6,48,865/- u/s 201(1A) was charged on which auditor's certificate has not been produced. In so far as the issue raised in ground No. 1 is concerned, that the Ld. CIT (A) was not justified in sustaining the addition of Rs. 9,76,249/- u/s 201(1) on the payments where the assessee could not file the auditor's certificate, we have already held that assessee was liable to deduct tax u/s 194J and since assessee could not file the auditor's certificate, therefore, to this extent assessee has to be treated as 'assessee in default'. However, in the earlier year, we have held that entire payments cannot be held to be in nature of professional services, therefore, in view of the directions given above, AO shall examine the details of the payments and only to the extent of payments for professional medical services alone would be held liable for deducting TDS and hence assessee shall be treated as 'assessee in default' u/s 201(1A) and consequently the interest u/s 201(1A) would be computed accordingly.

23. In so far as interest charged under first *proviso* to section 201(1A), we have already given a finding that in the case of payments where auditor's certificates have been produced then assessee can not held to be 'assessee in default' and consequently, no interest u/s 201(1A) can be charged. Similarly, the interest u/s 201(1A) calculated on the payment of Rs. 33,84,97,959/- on which assessee deducted TDS, interest is leviable, because, we have already held that assessee was liable to deduct TDS on such payment u/s 194J and circular is mere clarificatory in nature. However, the interest shall be computed after examining the details of the payment that only to the extent of interest calculated on the payments relating to professional medical services alone would be chargeable, because, only to that extent assessee would be held as 'assessee in default'. With these directions the appeal of the assessee is partly allowed.

24. In the revenue's appeal following grounds have been raised:-

*(1) " On the facts and in the circumstances of the case as well as in law, the Ld. CIT(A) has erred in directing the AO not to charge interest u/s 201(1A) of the Act prior to the CBDT Circular No. 8 dated 24.11.2009, whereas there is no mention in the Circular (supra) not to charge any interest prior to the issuance of the Circular i.e. 24.11.2009.*

*(2) On the facts and in the circumstances of the case as well as in law, the Ld. CIT(A) has erred in agreeing to the contention of the assessee that the interest should have been charged only till the date of payment of tax and not till the date on which the deductee(s) filed their Return of Income."*

25. In view of the finding given above, the appeal of the revenue is dismissed, as we have already held that prior to the amendment by the Finance Act 2012, no interest shall be charged u/s 201(1A)

where the assessee is not treated as 'assessee in default'. Thus revenue's appeal is dismissed.

26. Now coming to the levy of penalty u/s 271C the AO has levied the penalty u/s 271C for non deduction of tax u/s 194J on the payments of Rs. 1,50,94,139/- and thereby levying the penalty of Rs. 15,54,696/- in the A.Y. 2009-10. The contention of the Ld. AO is that the assessee could not produce the bills on the payments where auditor's certificate has not been provided by the assessee and CBDT circular No. 8/2009 makes it very clear that it was the responsibility of the deductor to deduct and deposit the correct amount otherwise assessee shall be liable to penalty u/s 271C. Ld. CIT (A) has confirmed the penalty rejecting the assessee's contention that there was a bonafide belief that the payments through the hospital should not deducted u/s 194J as CBDT circular has given only after expiry of eight months from the end of the relevant financial year. Before us Ld. Counsel submitted that prior to the CBDT circular, it was not clear, whether the TDS was required to deducted u/s 194J on the payments made to the hospital for which assessee used to get reimbursement from the Insurance Companies. The CBDT circular was challenged before the Hon'ble Delhi High Court and it was only vide order dated 30th September 2010 the said circular has been upheld. However, the Hon'ble High Court has clearly held that the aforesaid circular to the extent that it directs that the failure to deduct tax or after deducting tax failure to pay on all transactions would make the deductor (TPA) to the hospital u/s 194J is upheld, but in so far as levy of penalty u/s 271C is concerned, that portion of the Circular was struck down/ set aside. Thus, the portion of the circular that penalty necessarily will be attributed has been negated by the Hon'ble Delhi High Court and hence there cannot be a case of automatic levy of penalty u/s 271C.

Since the circular has come much after the expiry of the financial year ending on 31st March 2009, therefore, assessee was clearly under a bonafide belief that no TDS is liable to be deducted. Accordingly, we hold that it is not a fit case for levy of penalty u/s 271C and hence same is directed to be deleted.

27. In the result appeal of the assessee is allowed.

28. To sum up:

i) Assessee's appeal for the A.Y.s 2009-10 & 2010-11 is partly allowed;

ii) Revenue's appeal for the A.Y. 2010-11 is dismissed; and

iii) Assessee's appeal for the A.Y. 2009-10 relating to penalty u/s 271C is allowed.

Order pronounced in the Open Court on 4th September, 2018.

sd/- sd/-

**(G.D. AGRAWAL)** **(AMIT SHUKLA)**

**PRESIDENT** **JUDICIAL MEMBER**

Dated: 4/9/2018

***Veena***

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi