IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A", NEW DELHI
BEFORE SHRI R.P. TOLANI, JUDICIAL MEMBER
AND
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
I.T.A. No. 475/Del/2011
A.Y. : 2006-07

Dr. Aman Khera, C/o Rahul Kapoor and Associates, Chartered Accountants, E-186, Greater Kailash-I, New Delhi – 110 048 (PAN : ALBPK9477H) **(Appellant)**	vs.	Dy. Commissioner of Income tax, Circle 25(1), Vikas Bhavan, New Delhi **(Respondent)**
Assessee by	:	Sh. M.P. Rustogi, Adv. & Mrs. Lalitha Krishnamurthy, CA
Department by	:	Ms. Y. Kakkar, Sr. D.R.

ORDER

PER SHAMIM YAHYA: AM

This appeal by the assessee is directed against the order of the Ld. Commissioner of Income Tax (Appeals) dated 24.11.2010 pertaining to assessment year 2006-07.

2. The grounds of appeal read as under:-

"1. That the lower authorities had erred on facts and under the law in assessing the entire amount of consultancy fees of ₹ 1,21,83,494/-, received from UG Hospitals Pvt. Ltd., for the term of five years, even

pertaining to the unexpired period of the contract, in the year under appeal and consequently the addition of ₹ 115,74,319/- in the income of the appellant is arbitrary, unjust and at any rate very excessive.

2. That the lower authorities had erred on facts and under the law in assessing the entire consultancy fees amounting to ₹ 1,21,83,494/-, received from UG Hospitals Pvt. Ltd. for the term of five years, instead of yearly accrual, which is against the law and principle of commercial accountancy.

3. That without prejudice to Grounds No.1 and 2 above, the disallowance of expenses of ₹ 42,65,000/- @ 35% allowed by the Assessing Officer and enhanced by Ld. Commissioner of Income Tax (Appeals) is without any basis, arbitrary, unjust and bad in law.

4. Without prejudice to above grounds that in case the entire amount of consultancy fees is assessable during the year then the revenue authorities ought to have also allowed the expenses is incurred in relation thereto in the subsequent years.

5. That the assessee denies his liability to pay interest charged under section 234B and 234C of the Income Tax Act, 1961.

6. The above grounds of appeal are independent and without prejudice to one another.

Your appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal at the time of hearing."

3. Facts, in brief, are that the assessee, a doctor/ surgeon, has filed return showing income of ₹ 5,46,616/-. The assessee has shown professional receipts of ₹ 6,09,175/-, out of receipts of ₹ 1,21,84,494/- form UG Hospitals Private Limited (UGH) in the relevant year on the fact that the entire receipts of ₹ 1,21,83,494/- belongs to 5 years as per agreement. The receipts pertaining to this year (for three months) out of receipts of ₹ 1,21,83,494/- from UGH has been offered as revenue receipts for taxation and remaining as advance. The Assessing Officer, observing as under in the impugned order, assessed this claimed advance as income:-

"Receipt from M/S U.G. Hospital Pvt Ltd: It was seen during the assessment proceeding that the assessee has received total

amount of Rs 1,21,83,494 from M/S U.G. Hospital. From the TDS certificate issued by M/S U.G. Hospital it is seen that a total sum of Rs. 6,83,494 has also been deducted which has been made on payment of the above sum of Rs. 1,21,83,494 as professional to the assessee by M/S U.G. Hospital for the period 1-1-06 to 31-03-06. During the hearing proceeding the assessee claimed that the above sum received were as advance on account of his appointment as Hospital Consultant for 5 years by M/S U.G. Hospital. The assessee reply has been examined & found devoid of any merit in it for the following reasons:

Similar payments have been received by assessee's father- Dr. K.L. Khera , Brother - Sh. Raman Khera as well as Sister- Miss Jyoti Khera. The amount received are claimed to have been received for one and only reason for all of them i.e. their being appointed as Hospital Consultant simultaneously & having been also paid simultaneously in crores -in advance for 5 years. It is simply unbelievable that a hospital will need- all of a sudden - so many Hospital Consultants from a single family -all closely related to each other by blood - & pay all of them in advance for 5 years - hefty sum amounting in crores -for the service as claimed! More puzzling is the fact that the father Dr K. L. Khera who is senior-

most among all the recipients has been paid only Rs 58,26,888 as advance for the same period i.e 5 years where as the assessee & his sister Miss Jyoti Khera being much junior in experience compared to their father have both received Rs 1,21,83,494 each. The basis of advance payment received therefore is beyond comprehension & therefore the reasons as advanced by the assessee for receipt of the payment are simply not acceptable & therefore rejected. From the period mentioned on the TDS certificate i.e. 1-1-06 to 31-03-06 also it is clear that the assessee claim of advance receipt for 5 years is not correct. Also it is beyond comprehension why a business entity like M/S U.G Hospital - would advance such a huge sum to only - members of a particular family - for such a long period without any formal written agreement or contract. The assessee and the Hospital both were requested to furnish copy of agreement if any signed at any point of time, but no such agreement has been furnished & accordingly it is presumed that there is no written agreement or contract between the payer & the payees of so called -advance for hospital consultancy. The non- appearance of the assessee as well as his father in response to summons issued u/s 131 of the IT. Act, 1961 as discussed above without any valid reasons or

grounds do also clearly prove that the assessee or his father do not want to disclose the full facts & therefore what has been stated in writing with regard to receipt of Rs. 121,83,494 by the assessee cannot be accepted under any circumstance.

However in order to provide one more opportunity a letter dt. 7-12-08 was sent to the assessee as to why the entire receipt of Rs 12183494 by him - professional fee as claimed - during the year- & further claimed as advance- should not be taxed for the reasons as mentioned in the above letter in the year of receipt that is in the A.Y. under consideration 06-07. In response to the above cited letter, the assessee filed a written submission dt 11-12-2008 which is placed on records. The reply of the assessee has been perused & examined. There is no further evidence or disclosure of facts in the written submission furnished by the assessee .In, the submission it has been requested not to take the entire receipt for taxation during the year under consideration as proposed by the undersigned in the letter dt. 7th Dec 08.

However, the request of the assessee cannot be acceded to considering the overall facts & circumstances of the case and as no further acceptable evidence in support of what has been

claimed have been furnished .There is no regular books of accounts maintained by the assessee under any system cash- or- mercantile as mentioned and discussed above. The assessee should have maintained regular books of account keeping in view huge receipt of payment & nature of claim as being advanced by him! There is not a single line devoted by the assessee in his letter dt 11th Dec, 2008 as to why the assessee & Dr K. L. Khera - his father - both failed to appear in person when opportunity after opportunity, were offered to them! The reply of U/G hospital in this regard is also not acceptable for the reasons as mentioned above & totality of facts & circumstances of the case in absence of any formal written agreement or contract as discussed in details above. I, therefore considering the overall facts & circumstance of the case and the fact that no regular books of accounts has been maintained by the assessee under any system -mercantile or cash - am convinced that the entire receipt deserve to be taxed in the year of receipt only rejecting the theory of "advance" in absence of any written agreement or contract or non maintenance of regular books of accounts under any system under the circumstances mentioned above from undisclosed sources only. I accordingly treat the entire receipt of

Rs. 1,21,83,494 as receipt from disclosed sources i.e. U.G. Hospital for undisclosed reasons under the circumstances mentioned above. However to tax the entire receipt without allowing any expenses which might have been incurred by the assessee would not be in the interest of natural justice! out of the above receipt, therefore, an amount of Rs 42,65,000 being roughly 35% of the total receipt i.e. Rs. 1,21,83,494 is allowed as possible expenditures which might have been incurred on earning the above income on estimate & only balance of Rs 79,18,494 is taken as income of the assessee not disclosed & added accordingly to the total income of the assessee ... ".

4. Upon assessee's appeal Ld. Commissioner of Income Tax (Appeals) elaborately discussed the assessee's submissions. Ld. Commissioner of Income Tax (Appeals) observed that it is undisputed that fact that M/s UGH has paid substantial sums as mentioned above to four persons of the assessee group. On the basis of material available on the record, Ld. Commissioner of Income Tax (Appeals) opined that he was convinced and of the considered view that there is no direct live link between payment made by the UGH and services rendered by the assessee and thus hold that the receipts under reference being irrevocable; has become due for taxation in the

relevant year because the UGH, after paying the sum, has no power to enforce the rendering of services by the assessee and other members of this group and the assessee alongwith the other members of this group are not under any obligation to refund the receipt in part or in full at any point of time under any circumstances. Even the assessee failed to produce the relevant bills, vouchers of any third party pertaining to the relevant year and or to the subsequent years as evident from the order sheet dated 10.11.2010, which may establish beyond that the expenses have been claimed for rendering services to the UGH. Thus, there is no evidence establishing that the services have been undoubtedly rendered. Ld. Commissioner of Income Tax (Appeals) observed that on the basis of facts on the record, following queries were kept in mind with following answers while deciding this appeal:-

> *"i. How the capability of all three persons, namely, Dr. Aman Khera, Dr. Raman Khera and Ms. Jyoti Khera, as for as rendering of services to UGH is concerned, will be same for which the similar payment has been done? The answer is that the capability of two people cannot be same. The consultant normally gets the charges depending on their potentiality as per terms and agreement and mainly after rendering the services,*

but here it is just reverse. Ms. Jyoti Khera is not a doctor also and not having any management degree in hospital management. Then how her expertise was utilized by the UGH is not understandable.

ii. If the above named persons of the appellant group are so management expert then why have they failed to run the hospital of KCT since quite long time? Answer: the payments are not for their expertise but for other wise.

iii. If the above named persons of the appellant group are so management expert then why other hospital groups have not taken over them when they are free to join/take any job as per the agreement with UGH? Answer: the payments are not for their expertise but for other wise and that is why the appellant did not get any other assignment in subsequent years till 2009.

iv. Amongst how many consultants, the above named persons of the appellant group were selected by UGH? NO answer was given by the appellant.

v. How and why have all these four persons of the appellant group taken over by the UGH at one point of time? The answer is

that the agreement is not person specific but here it is group specific.

iii. Why the agreement and payments made to the appellant group are irrevocable?

Answer: Because it is not related with the specific services.

iv. Why articles relating to the recovery of consultancy charges, in absence of services rendered by the appellant, were not brought into the agreement? Answer: Because it is not related with the specific services.

v. Why agreement was entered after the lapse of four and half year? Answer: Because the payment is not related with the specific services.

vi. How the UGH can enforce the services of the appellant, in case he denies/refuses to render services? In such situation, what step can be taken by the UGH? Answer: There is no such provision as the payment is not related with the specific services. The appellant is not under any obligation to refund/repay the fees.

vii. How the payment is related to the services? Answer: Not established by the appellant.

viii. Has any similar agreement entered into by the UGH with any consultant where the payment in advance has been done to a third party in a group without entering into any agreement? Answer: No such agreement was brought to my notice though the appellant was specifically called for many times.

ix. Why UGH has not made monthly payment to Dr R. L. Khera Charitable Trust, whose hospital has been taken over as per agreement? Answer: The UGH, instead of making payment to KCT, made payment to the appellant group.

x. Is it not payments to the members of the appellant's group in lieu of hospital belonging to KCT taken over by the UGH and given colour of consultancy charges? Answer: Circumstantial evidences say yes.

xi. How the AD 'has allowed/appellant met expenses in this year and or subsequent year when the major part of the receipt as such was invested either in the house or FDR? Answer: Not established with the cash flow in this year.

xii. Why there is no third party evidence, which may establish the direct live nexus between the receipts and the claimed corresponding expenses of the appellant? Answer: Expenses are not verifiable as these have not been incurred.

xiii. Whether the disclosure of the receipt from the UGH in the period of 5 years by the appellant has minimized the tax incident? Answer: Yes. This arrangement has directly benefited the appellant and UGH both."

4.1 In view of the factual and circumstantial evidence gathered by the AO and as discussed in his order. Ld. Commissioner of Income Tax (Appeals) held that it is held in principle that the receipts of Rs. 1,21,83,494/- is chargeable to tax in the relevant year. Ld. Commissioner of Income Tax (Appeals) further held that the allowance of ₹ 42,65,000/- as expenses @ 35% of the receipt of ₹ 1,21,83,494/- from the UGH is not in accordance with the law because expenses more than what have been incurred/ claimed in the relevant year cannot be allowed. The Assessing Officer has already allowed the claimed expenses while determining the business income of ₹ 2,55,808/-. Hence, the allowance of 35% of the receipt of ₹ 1,21,83494/- as expenses over and above the claimed expenses by the Assessing Officer in the impugned order is not justified at all. Ld.

Commissioner of Income Tax (Appeals) further held that it is double allowance of the expenses against the proportionate receipt of ₹ 6,09,175/- offered out of receipt from the UGH. Ld. Commissioner of Income Tax (Appeals) further observed that it was brought to the notice of the Ld. Authorised Representative that why not the allowance of ₹ 42,65,000/- be withdrawn as it is against the accounting principle and provisions of the law. It was argued before the Ld. Commissioner of Income Tax (Appeals) that since the receipt from the UGH is not taxable in entirety in this year therefore, the question of disallowance the expenses of ₹ 42,65,000/- does not arise. Ld. Commissioner of Income Tax (Appeals) further held that in view of the finding that the entire receipt of ₹ 1,21,83,494/- is chargeable to tax in the relevant year, therefore, the allowance of expenses over and above the claimed expenses is held unjustified. Ld. Commissioner of Income Tax (Appeals) concluded that on the basis of above facts, he was enhancing the income of the assessee by ₹ 42,65,000/-. Ld. Commissioner of Income Tax (Appeals) further held that the assessee has offered proportionate receipt of ₹ 6,09,175/- out of receipt from the UGH has been taxed by the Assessing Officer as business income. Therefore, Ld. Commissioner of Income Tax (Appeals) held that he was of the view that the amount of ₹ 6,09,175/- has been doubly taxed by

the Assessing Officer in the sum of ₹ 79,18,494/- again. Hence, he deleted it and gave relief of ₹ 6,09,175/-. Ld. Commissioner of Income Tax (Appeals) concluded that in view of the above findings, the Assessing Officer is directed to complete the assessment at ₹ 1,21,20,934/- (₹ 84,65,109/- plus ₹ 42,65,000/- less ₹ 6,09,175/-).

5. Against the above order the assessee is in appeal before us.

6. We have heard the rival contentions in light of the material produced and precedent relied upon.

7. Ld. counsel of the assessee has made the following submissions in this regard:-

> *"(i) The charging provisions are Section 4 and 5 of the Income Tax Act, 1961 (the Act), whereas the provision of Section 145 of the Act which deals with the method of accounting is only a procedural section. Section 4 states that tax is chargeable on the total income at the rate prescribed.*
>
> *(ii) Section 5 deals with the scope of total income and states that in the case of resident, the total income includes all income from whatever source derived which:*

(a) is received or is deemed to be received in India;

(b) accrues or arises or is deemed to accrue or arise to him in India;

(c) accrues or arises to him outside India.

(iii) In the case of Shoorji Vallabhdas in 46 ITR 144, the Hon'ble Supreme Court observed that the income-tax takes into account two points of time on which the liability to tax is attracted:

(a) accrual of income; and

(b) receipts of income.

The Hon'ble Supreme Court says that in both the cases, the substance of the matter is income.

(iv) In the case of Parimisethi Seetharamamma vs. CIT in 57 ITR 532, the Hon'ble Supreme Court stated that all incomes are receipts but all receipts are not income. It is only those receipts which bear the characteristic of income that can be taxed under the Act.

(v) In the case of E.D. Sasoon & Co. Ltd. vs. CIT in 26 ITR 27, at page 50, the Hon'ble Supreme Court explained what is income.

The Hon'ble Supreme Court stated that income means what comes in as the periodical produce of one's work.

At pages 51-52, the Hon'ble Supreme Court observed as under:

" .... If income has accrued to the assessee it is certainly earned by him in the sense that he has contributed to its production or the parenthood of the income can be traced to him. But in order that the income can be said to have accrued to or earned by the assessee it is not only necessary that the assessee must have contributed to its accruing or arising by rendering services or otherwise but he must have created a debt in his favour. A debt must have come into existence and he must have acquired a right to receive the payment. Unless and until his contribution or parenthood is effective in bringing into existence a debt or a right to receive the payment or in other words a debitum in prasenti, solvendum in futuro it cannot be said that any income has accrued to him .... ".

(vi) The Institute of Chartered Accountants of India, which is also one of the important institution dealing with accountancy in the commercial world, has prescribed Accounting Standards (AS-9) for the recognition of revenue. AS-9 in paragraph 7 deals with the system of recognition of revenue in the rendering of services. In

paragraph 7.1 it states that revenue from service transactions is usually recognized as the service is performed, either by the proportionate completion method or by the completed service contract method. It further specifies that in proportionate completion method, the revenue is recognized proportionately by reference to the performance of each Act and when services are provided by an indeterminate number of acts over a specific period of time, revenue is recognized on a straight line basis over the specific period. In other words, AS-9 also prescribes that in case of service contracts which is spread over to various years, the revenue is recognized on proportionate basis.

(vii) In the case of CIT vs. Dinesh Kumar Goel in 331 ITR 10 (Del), the said assessee was running an institute of coaching students and had received the total fee of the 'entire course having the duration of two years. The fee was non-refundable. The said assessee claimed that the fee should be spread over to the years for which the coaching was to be made, whereas the Revenue was of the view that because the money was non-refundable and as per the agreement the students have to pay the entire fee in advance at the time of admission, therefore it is assessable in the year of receipt. The Jurisdictional Delhi High Court negatived the

contention of the Revenue and held, after following the judgment of E.D. Sasoon & Co. (supra) that because the services had to be rendered in two years, therefore the entire fee had to be spread over in two years and had to be assessed proportionately.

(viii) In the case of Career Launchers (India) Ltd. vs. ACIT in 131 ITD 414 at pages 431-433/434, the Coordinate Delhi Bench of the ITAT has also held that even if the amount is non-refundable, it has to be assessed on proportionate basis on the basis of duration of services rendered. The Delhi Bench of the ITAT followed another Coordinate Bench's decision in the case of K.K. Khullar vs. DCIT in 116 ITD 301 (Del) wherein the Delhi Bench of the ITAT held that even in the case of cash system of accounting, the income has to be assessed on the basis of services rendered because the income can be said to have accrued on the rendering of the services and not otherwise.

(ix) The Chennai Special Bench of the Tribunal in the case of ACIT vs. Mahendra Holidays & Resorts (India) Ltd. in 131 TTJ 1 has also held that where the services are required to be rendered in various years, the receipts have to be spread over the years for which the services are required to be rendered. The Special

Bench of the ITAT further observed that recognizing entire receipt in the year of receipt can lead to a distorted picture.

(x) In the case of Beta Cellcom Ltd. vs. ITO in ITA No. 133/Del/2009 for Assessment Year 2002-03 vide order dated 30th June 2011 in 2011-TIOL-706-ITAT-DEL, the Coordinate Delhi Bench of the ITAT, after following the judgment of Delhi High Court in CIT vs. Dinesh Kumar Goel (supra) and Special Bench decision in the case of Mahindra Holidays & Resorts (supra), held that where the services are required to be rendered in various years, the receipts have t8 be spread over the years for which the services are required to be rendered (copy attached).

(xi) In the case of CIT vs. D.C. Gandhi & Associates in 210 ITR 929, the Gujarat High Court has held that even in the cash system of accounting, the income is accrued only on the rendering of services and not otherwise. The case of D.C. Gandhi was of an advocate who had received the amount in advance from the client. As and when any services were rendered by Gandhi to the client, the necessary amount out of the advance so received was appropriated towards the fee and credited to the profit & loss account.

(xii) In the case of Jitendra Sharma vs. DCIT in ITA No. 1765/De1/2002 vide order dated 3rd February 2006, the Coordinate Delhi Bench held that even in the cash system of accounting it is only that portion of the amount, out of advances, that accrued to the assessee as income for which the services have been rendered and not the whole amount (copy attached).

In the instant case also, the payment has been made by UG Hospitals to the assessee for rendering of services for five years. Though the amount was non-refundable, but the same is irrelevant for the purpose of chargeabi1ity of income. Under the law, in both systems of accounting, whether it is mercantile or cash, the income can be said to have accrued only on the rendering of services and if as per the contract the assessee has to render the services for various years, then the income can be said to have accrued in proportion to the services rendered by the assessee.

Case laws relied by Revenue are distinguishable both on facts & law:

(a) 230 ITR 51 (Bom), CIT vs. Shah Construction - Distinguishable

In this case there was no issue before the Bombay High Court about the spread over of income. The issue before the Bombay High Court was whether in a case where the relevant amount in the hands of the payer has been disallowed, cannot be assessed in the hands of the payee on this ground. The Hon'b1e High Court held that disallowance of a particular amount in the hands of payer cannot be a ground for its non-assessability in the hands of payee because in the hands of payee the amount already accrued as per the agreement.

(b) 311 ITR 332 (Del), Magnum Power Generation Ltd. vs. Addl. CIT - Distinguishable on facts and law.

In this case, the issue was the accrual of interest on inter-corporate deposits. The said assessee had made inter-corporate deposit with another company. Such inter-corporate deposits were renewed from time to time. A large part of the amount was not returned by the company and the cheques issued were dishonoured for want of funds. The said assessee initiated proceedings under the Negotiable

Instruments Act, 1881 and filed a winding up petition under the Companies Act, 1956 for recovery of principal as well as interest thereof. On directions issued by the Company Court, the company made payment of the entire principal amount and the interest for the entire period which was received by the said assessee in December 2005. The case before the High Court was for the earlier years prior to the receipt of the amount from the company as per court orders. In those very years, the assessee claimed that the interest amount due for these periods was not liable to be taxed even though the assessee was maintaining a mercantile system of accounting as the debt was a sticky debt. The Hon'ble High Court found that in the absence of any evidence, the debt cannot be considered as a sticky debt and all the three authorities below had found that the debt was not a sticky debt. On such facts, the High Court held that the interest accrued to the assessee in those years.

(c) 285 ITR 501 (AP), P.L. Ganpathi Rao vs. CIT.

The said assessee had leased out a film for five years. As per the agreement executed between the assessee and the

lessee, the amount of Rs 4 lakhs accrued to the assessee on the date of the execution of the agreement. On such basis, the Andhra Pradesh High Court stated that as per the agreement, the amount accrued to the assessee on the date of the execution of the agreement, hence assessable in that year.

In the instant case, no such clause existed in the agreement.

(d) The cases of Moti Lal Chhidami Lal in 191 ITR 1 (SC) and the Dalmia Cement Ltd. vs. CIT in 191 ITR 331 (Del) are not applicable to the facts of the present case. In both the cases, the courts were examining the principle of overriding charges and diversion of income, which is not the issue in the instant case.

(e) In Airport Authority of India vs. CIT in ITA No. 432/2008 dated 16th December 2011 reported in 20 12-TIOL-09-HC-DEL-IT-LB, the issue before the Hon'ble Delhi High Court was whether merely on the issue of proforma invoice, the income can be said to have accrued more particularly when the assessee has not received the amount. The Delhi High Court, after following the judgment of Godhra Electricity Co. Ltd. vs. CIT in 225 ITR 746 (sq, held that merely on the basis of issuance of a proforma invoice,

the income does not accrue in the real sense unless the other party accepts it.

It has no relevance in the facts of instant case.

(f) In R.M. Arunachalam vs. CIT in 227 ITR 222 (SC), the issue before the Hon'ble Supreme Court was whether while computing the capital gain on sale of inherited property, the estate duty is deductible as cost of acquisition or cost of improvement. The Hon'ble Supreme Court answered the issue in negative and held that the estate duty is not a deductible item while computing the capital gain on sale of property.

It has no relevance in the facts of instant case.

(g) In JCIT vs. Khanna & Annandhanam in ITA No. 3444/Del/2001 dated 18th January 2008 in 2008- TIOL-377-ITAT-DEL, the issue was totally different. In that case, the issue was whether the amount received for the sterilization of future professional earnings is taxable or not.

In the instant case, no such issue is there.

(h) As per DR the amount is not refundable; hence it accrued during the year of receipt on cash basis.

The amount refundable or not refundable is not the criteria to tax the amount in Income Tax Act. In the Income Tax Act as per the provision of Sections 4 and 5, it is only the income which is chargeable to tax as held by Supreme Court in the case of Shoorji Vallabhdas (supra). Moreover, in the case of Career Launchers (India) Ltd. (supra) and Dinesh Kumar Goel (supra) the amounts received were also not refundable.

Conclusion:

The contention of DR that the payer UG Hospitals has deducted the TDS on the entire amount during the year under consideration hence it should be assessed in the year of its receipt, is not correct and are based on misconception of law. The manner of deduction of TDS is not a criterion of the assessability of the receipt in the hands of payee. As for the provision of Section 194C or 194J of the Act, the TDS is deductible either at the time of making payment or at the time of credit of the amount in the books of account, whichever IS earlier. However, in the case of Transmission Corporation of AP in 239 ITR 587, the Hon'ble Supreme Court held that the deduction of TDS is only a tentative assessment and not a final assessment. The final

assessment has to be made by the AO in accordance with the provisions of law in the hands of payee.

It is not out of place to mention here that from the arguments of DR it appears that there is a little bit confusion in the mind of Department about types of services rendered by the assessee because according to them, assessee is not doing any job as a professional doctor, i.e. patient check-up or surgery etc. but they failed to understand that now-a-days the big hospitals are being run on commercial lines just like a business organization wherein Hospital Management also plays a key role. The UG group of hospitals used to run 14 hospitals at the time of contract. After the completion of contract with UG Group, now the assessee has joined Pushpanjali Crosslay Hospital, Sahibabad which is runmng only one hospital, as a Senior Consultant Business Development almost on the same fee as that of UG Hospital (copy of appointment letter and visiting card to prove this fact is attached).

The takeover of management operation by UG Group is an independent transaction and has no co-relation with the assessee. The UG Group has engaged the assessee on account of his own qualification and experience.

The non refundability of amount is not a criteria to assess the amount in the year of receipt but the criteria is the accrual of income out of the receipts and the same is accrued with reference to the services rendered on proportionate basis in both systems of accountancy whether it is mercantile or cash as discussed in the case laws (above) though the books of account was also maintained by the assessee wherein the assessee has duly shown the proportionate receipts with reference to the period of services rendered during the year under appeal.

The remaining receipts were also shown and assessed in subsequent years proportionately"

8. Ld. Departmental Representative on the other hand relied upon the orders of the Assessing Officer and Ld. Commissioner of Income Tax (Appeals). She further pointed out that from the financial year 2007, assessee is following cash system of accounting. She further referred to clause 2.7 of the agreement which indicated that the fixed consultancy fees paid to the assessee Sh. Aman Khera is non-refundable even on prior determination of agreement. She pointed out that the assessee has claimed full TDS credit of ₹ 6,09,175/- on professional receipts of ₹ 12183494/- in the computation of income. Hence, as per section 199 of the Act the whole income is taxable. Ld.

Departmental Representative further relied upon the catena of cases laws including the following :-

(a) 230 ITR 51 (Bom), CIT vs. Shah Construction

(b) 311 ITR 332 (Del), Magnum Power Generation Ltd. vs. Addl. CIT .

(c) 285 ITR 501 (AP), P.L. Ganpathi Rao vs. CIT.

(d) The cases of Moti Lal Chhidami Lal in 191 ITR 1 (SC) and the Dalmia Cement Ltd. vs. CIT in 191 ITR 331 (Del).

(e) In Airport Authority of India vs. CIT in ITA No. 432/2008 dated 16th December 2011 reported in 2012-TIOL-09-HC-DEL-IT-LB.

(f) In R.M. Arunachalam vs. CIT in 227 ITR 222 (SC),

(g) In JCIT vs. Khanna & Annandhanam in ITA No. 3444/Del/2001 dated 18th January 2008 in 2008- TIOL-377-ITAT-DEL.

8.1 Ld. Departmental Representative further in written submission gave a number of citations without explaining how the same are relevant in the present case. Hence, we are not dealing with the same.

8.2 We have carefully considered the submissions and perused the records. During the year under consideration, the assessee entered into an agreement M/s UG Hospitals Pvt. Ltd. who are the owners of Metro chain of hospitals as a Hospital Management Consultant for a period of five years w.e.f. 1st January, 2006 for a total emolument of ₹ 1,15,00,000/- plus TDS ₹ 6,83,494/-, thereby working out the total taxable emoluments at ₹ 1,21,83,494/-. The duration of the agreement was for five years and the assessee was committed to render the services to the UG Hospitals for five years, hence for the year under consideration the assessee declared the professional income from UG Hospitals in proportion to the period for which the assessee had rendered the services during the year under appeal. Rest of the emoluments was spread over and declared in subsequent years in proportion to the period of services rendered in those years. Assessing Officer was of the opinion that the entire amount has to be taxed in the year of its receipt and accordingly, he treated the entire amount of ₹ 1,21,83,994/- as income of the year under appeal. Ld. Commissioner of Income Tax (Appeals) confirmed this action of the Assessing Officer. Now it is the submission of the ld. counsel of the assessee that the assessee was committed as per agreement to serve for 5 years for the UG Hospitals. Under the circumstances, the

only income from UG Hospitals in proportion to the period for which the assessee had rendered the services during the concerned year should be recognised. This proposition draw support from the decision of the Hon'ble Apex Court in the case of E.D. Sasoon & Co. Ltd. vs. C.I.T. 26 ITR 27. In this case at pages 51-52, the Hon'ble Supreme Court has observed as under:-

> "*If income has accrued to the assessee it is certainly earned by him in the sense that he has contributed to its production or the parenthood of the income can be traced to him. But in order that the income can be said to have accrued to or earned by the assessee it is not only necessary that the assessee must have contributed to its accruing or arising by rendering services or otherwise but he must have created a debt in his favour. A debt must have come into existence and he must have acquired a right to receive the payment. Unless and until his contribution or parenthood is effective in bringing into existence a debt or a right to receive the payment or in other words a debitum in prasenti, solvendum in futuro it cannot be said that any income has accrued to him.".*

8.3 Now we examine the present case on the touch-stone of the aforesaid decision. Admittedly, assessee has not served for the

period of five years. Assessee has not rendered enough services to warrant emoluments of ₹ 1,21,84,494/-. It is assessee's submission that during the year under consideration he has not created a debt or a right to receive the payment equivalent to ₹ 1,21,84,494/-. Hence, it cannot be said that the income equivalent to total emolument ₹ 1,21,84,494/- has accrued to the assessee.

8.4 In this regard, assessee's reliance of AS-9 issued by the ICAI is also relevant. AS-9 deals with the system of recognition of revenue in the rendering of services. In para 7.1 it states that revenue from service transactions is usually recognized as the service is performed, either by proportionate completion method or by the completed service contract method. It further specifies that in proportionate completion method, the revenue is recognized proportionately by reference to the performance of each Act and when services are provided by an indeterminate number of acts over a specific period of time, revenue is recognized on a straight line basis over the specific period. In other words, AS-9 also prescribes that in case of service contracts which is spread over to various years, the revenue is recognized on proportionate basis.

8.5 We further find that the decision of Hon'ble Jurisdictional High Court in the case of C.I.T. vs. Dinesh Kumar Goel in 331 ITR 10 (Del) also supports the case of the assessee. In this case assessee was running an institute of coaching students and had received the total fee of the entire course having the duration of two years. The fee was non-refundable. The said assessee claimed that the fee should be spread over to the years for which the coaching was to be made, whereas the Revenue was of the view that because the money was

non-refundable and as per the agreement the students have to pay the entire fee in advance at the time of admission, therefore, it is assessable in the year of receipt. The Jurisdictional High Court negative the contention of the Revenue and held, after following the judgment of E.D. Sasoon & Co. (Supra) that because the services had to be rendered in two years, therefore the entire fee had to be spread over in two years and had to be assessed proportionately.

8.6 Furthermore, in the case of Career Launchers (India) Ltd. vs. ACIT in 131 ITD 414, the Coordinate Delhi Bench of the ITAT has also held that even if the amount is non-refundable, it has to be assessed on proportionate basis on the basis of duration of services rendered.

8.7 The Chennai Special Bench of the Tribunal in the case of ACIT vs. Mahendra Holidays & Resorts (India) Ltd. in 131 TTJ 1 has also held that where the services are required to be rendered in various years, the receipts have to be spread over the years for which the services are required to be rendered. The Special Bench of the ITAT further observed that recognizing entire receipt in the year of receipt can lead to a distorted picture. We further find that the other case laws relied by the ld. counsel of the assessee also support the assessee's case.

8.8 From the above discussion and precedents, it is amply clear that in service contract the income has to be recognized in proportion to the services rendered in a particular year. In the present case, admittedly the assessee has not rendered services for the period of 5 years. Hence, there is no question of recognizing the entire amount as income of the assessee in the year of receipt. It cannot be said that assessee has created such a debt or right against the M/s UG Hospital that the income for the entire 5 years had accrued to the assessee. In

our considered opinion, in the background of the aforesaid discussion and precedent, we find that the assessee has correctly declared professional fee from the UG Hospital in proportion to the period of services rendered during the year. Under the circumstances, we set aside the orders of the authorities below and decide the issue in favour of the assessee.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 04/5/2012.

Sd/- Sd/-

[R.P. TOLANI] [SHAMIM YAHYA]
JUDICIAL MEMBER ACCOUNTANT MEMBER

Date 04/5/2012

"SRBHATNAGAR"
Copy forwarded to: -

1. Appellant 2. Respondent 3. CIT 4. CIT (A)
5. DR, ITAT

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By Order,

Assistant Registrar,
ITAT, Delhi Benches