IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND SHRI SANJAY GARG, JUDICIAL MEMBER

ITA No. 7051/MUM/2012
(Assessment Year : 2008-09)
ITA NO.7052/MUM/2012
(Assessment Year : 2009-10)
ITA No.7053/Mum/2012
(Assessment Year : 2010-11)
ITA No.7054/Mum/2012
(Assessment Year : 2011-12)

DCIT (TDS)-1(1),
8th Floor, KG Mittal Ayurvedic –
Hospital Building,Charni Road,
Mumbai – 400002 ... Appellant

Vs.
Asian Heart Institute & Research
Centre Pvt. Ltd.
GN Block, Bandra Kurla Complex,
Bandra (E), Mumbai 400051 .... Respondent

ITA No. 7177/MUM/2012
(Assessment Year : 2008-09)
ITA NO.7178/MUM/2012
(Assessment Year : 2009-10)
ITA No.7179/Mum/2012
(Assessment Year : 2010-11)
ITA No.7180/Mum/2012
(Assessment Year : 2011-12)

Asian Heart Institute & Research
Centre Pvt. Ltd.
GN Block, Bandra Kurla Complex,
Bandra (E), Mumbai 400051 .... Appellant

Vs.

DCIT (TDS)-1(1),
8th Floor, KG Mittal Ayurvedic –
Hospital Building,Charni Road,
Mumbai – 400002 ... Respondent

Revenue by	:	Ms. Lakshmi Hande Puri
Assessee by	:	Shri Vimal Punmiya
Date of hearing	:	06/08/2015
Date of pronouncement	:	30/09/2015

ORDER

PER G.S. PANNU,AM:

The captioned are a group of eight appeals, four each by the assessee and the Revenue relating to assessment years 2008-09 to 2011-12. Since the appeals relate to the same assessee and involve common issues, they have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

2. All the appeals are directed against a common order passed by the CIT(A) dated 29/08/2012 for assessment years 2008-09 to 2011-12, which in turn has arisen from the respective orders passed by the Assessing Officer under section 201(1)/201(1A) of the Income Tax Act, 1961(in short 'the Act') dated 22/3/2011 holding the assessee as an assessee in default for short deduction of tax at source on certain payments. Since the issues are common in all the four assessment years, the cross appeals of the assessee and the Revenue for

assessment year 2008-09, being ITANo. 7177/Mum/2012 & 7051/Mum/2012 respectively are taken up as the lead appeals.

3. First, we may take up the appeal of the assessee, wherein the primary dispute relates to the tax liable to be deducted at source on payment made to the Doctors, who are described as Full Time Consultants (hereafter referred to as "FTCs"). The assessee before us is a company incorporated under the provisions of Companies Act, 1956 and is engaged in running a Super Specialty Cardiac hospital at Bandra Kurla Complex, Bandra (E), Mumbai. In the course of running its hospital, the assessee employs two types of Doctors, viz. FTCs and Panel Doctors. FTCs were paid professional fee, on which assessee deducted tax at source in terms of the provisions of section 194J of the Act. The Assessing Officer analyzed terms of employment of the FTCs and observed that assessee company exercised such control over these consultants that they did not enjoy any independent status of a Consultant, but they act as an employee of the assessee company. The Assessing Officer concluded that in respect of the remuneration paid to the FTCs, there was an employer-employee relationship and thus, assessee was required to deduct tax at source in terms of the provisions of section 192 of the Act. In other words, as per the Assessing Officer the payments made by the assessee company to such FTCs were in the nature of 'salary' and hence tax was required to be deducted under section 192 of the Act. As a consequence of the aforesaid, the Assessing Officer held that assessee had short deducted the tax at source on payment of remuneration to FTCs and accordingly, he held the assessee in default within the meaning of section 201(1) of the Act

and such shortfall was determined at Rs.4,61,25,376/- and the related interest chargeable under section 201(1A) of the Act was determined at Rs.2,21,40,180/- in relation to the assessment year 2008-09.

3.1 In appeal before CIT(A) assessee contended that there was no employer-employee relationship between FTCs Doctors and the assessee and the distinction between the two was sought to be canvassed on the basis of the following points. That the professional fee was paid to FTCs Doctors on case to case basis as per the policy of the hospital; that the fee collected from the patients was also subject to deduction as the share of the hospital; that the collection of fee depended directly on the patients attended to by the concerned Doctor and as a result the income of the Doctor was not fixed but it varied from month to month; that FTCs Doctors were not entitled for any retirement benefits or other benefits like Provident fund, Gratuity, bonus etc.; that FTCs Doctors were not entitled for any type of leave such as personal leave or casual leave or compensation in lieu of such leave; that appointment of FTCs Doctors was for one year only and the contract was subject to renewal every year; that FTCs Doctors have a right to admit patients and recovery of the hospital bills were also their responsibility; that even in cases where FTCs Doctors are retained on a minimum guarantee amount plus amount payable on case to case basis, it would show that the income of such Doctors was not consistent but varied from month to month; and, that the FTCs Doctors had a right to admit patients under them directly to the hospital; and that they were bound by certain administrative rules, which was for the purpose of discipline, regularity and accountability to the patients through an

agreement entered into and there was no employer-employee relationship was established between the assessee company and the Doctors. Similarly, it was pointed out that it was only for the purpose of discipline and adherence to the timings that the Doctors were required to report for certain number of hours at the hospital. The CIT(A) however was not convinced with the submissions put-forth by the assessee. The CIT(A) noticed that the features of appointment of FTCs Doctors brought out by the Assessing Officer established that it was a case where employer employee relationship existed between the assessee company and FTCs Doctors. In para 6.6 of the impugned order, the CIT(A) specifically noted that the FTCs Doctors were supposed to supervise the work of the staff; that they were not supposed to be engaged in competing or conflicting profession or business; attachment to any other hospital was prohibited; that the recording of attendance was mandatory; that there was restrictions regarding use of information/results of clinical research outside assessee's hospital; and, that a notice of three months was required to terminate the arrangement between the assessee and the Doctors. As per the CIT(A), in the appointment letter of FTCs Doctors there was a standard clause which stated that the Doctor was to be governed by the bye-laws and the general rules and regulations of the appellant hospital. In this manner, the CIT(A) concluded that the relationship between the assessee and the FTCs Doctors was purely that of an employer and employee and the remuneration paid to them as a result of said relationship was in the nature of 'salary', which would attract the provisions of section 192 of the Act. In this manner the CIT(A) has

affirmed the action of the Assessing Officer against which assessee is in appeal before us.

3.2 Against the aforesaid stand of the lower authorities the Ld. Representative for the assessee vehemently pointed out that the remuneration paid by the assessee to the FTCs Doctors was not in the nature of salary to be considered under section 192 of the Act and, rather it was in the nature of professional fee on which tax was liable to be deducted under section 194J of the Act. Firstly, the Ld. Representative for the assessee contended that the tenure of appointment of all FTCs Doctors was for a period of one year, which was renewable on an yearly basis depending on his performance which was subject to the Medical Advisory Council of the appellant hospital. It was contended that in a case of an employee to whom salary is being paid, the appointment is not for a fixed period. Secondly, it was pointed out that none of the FTCs Doctors are eligible for any benefits such as encashment of leave, gratuity, contribution to provident fund, superannuation, etc., whereas the employees are given such benefits. Thirdly, all the FTCs Doctors are required to maintain indemnity insurance at their own cost during the period of contract with the assessee hospital, whereas in the case of employees such insurance is the responsibility of the assessee. Fourthly, it is pointed out that responsibility of collection of fee is on the Consultant and if the amount is not received, the Consultants do not get their payments. Such a clause is completely missing in a case where assessee has employed full time employees. Fifthly, the employees of the assessee are eligible for specific number of leaves during their tenure, for

example privilege leaves, casual leave, sick leave, etc., whereas no such benefits are available for the FTCs Doctors. Sixthly, it is pointed out that remuneration paid to FTCs Doctors varies from month to month and depends on the patients attended to by the Doctors, which is not so in the case for full time employees. Seventhly, it is pointed out that the appointment letters of the FTCs Doctors clearly point out that it is a 'contract for service' and not a 'contract of service' so as to suggest any employee-employer relationship. Next, it is pointed out that the employees are paid their salaries or wages on or before 7th of the month, whereas the FTCs Doctors are paid their remuneration only after the realization of fees from the patients. Next, it is pointed out that the restriction referred to by the CIT(A) in the appointment letter of FTCs Doctors are stated only to ensure discipline and control and for smooth functioning of the hospital and to ensure minimum inconvenience to the patients. Apart from the aforesaid factual assertions, the Ld. Representative for the assessee relied upon the following judgments to support his plea that the payments to the FTCS was in the nature of professional fee on which tax is liable to be deducted in terms of section 194J of the Act:-

1. CIT vs. Grant Medical Foundation , 375 ITR 049
2. CIT (TDS) v. Apollo Hospitals International Ltd., ,359 ITR 78 (Guj)
3. CIT vs. Manipal Health System Limited, 375 ITR 509(Kar).
4. CIT(TDS) vs. Yashoda Super Speciality Hospital , 365 ITR 356(AP)

4. On the other hand, Ld. Departmental Representative has referred to the reasoning advanced by the lower authorities in their respective orders, which we have already adverted to in the earlier part of this order and is not being repeated for the sake of brevity.

5. We have carefully considered the rival submissions. The crux of the controversy is as to whether as per the terms of agreement with the FTCs Doctors, the tax was liable to be deducted as per section 194J of the Act or as per section 192 of the Act. The case set up by the Revenue is that the terms of appointment of the FTCs Doctors reflects that there is a relationship of employer-employee between assessee and the Doctors and, therefore, tax is liable to be deducted under section 192 of the Act. On the other hand, the case set up by the assessee is that the terms of agreement with FTCs Doctors show that it is a case of payment of professional fee for procuring independent services and, thus, liable for deduction of tax at source under section 194J of the Act. The aforesaid discussion would show that the entire controversy hinges on the appreciation of the various terms and conditions of the appointment of the impugned FTCs Doctors.

6. In the context of the present controversy, it is quite evident that the Doctors have been employed by the assessee in terms of their respective contracts. It is also quite evident that the remuneration payable to FTCs Doctors vary from month to month, which is directly linked to the number of patients attended to by the concerned Doctor. No doubt in the case of some of the Doctors there is an element of remuneration which is fixed per month but alongwith such amount there is also a clause which envisages sharing of fees with the hospital.

Apart from the fixed amount, the Doctors are also paid on a case to case basis. It is also quite evident that once the fees are collected from the patients attended by a particular Consultant, the assessee hospital deducts its share and only thereafter the amount is paid to the Consultants. Ostensibly, there are restrictions placed on the FTCs Doctors, whereby they are not entitled to render services to a competing hospital. The aforesaid has been emphasized by the Revenue to say that there is an employer-employee relationship. In our considered opinion, the presence of such a clause itself shows that the FTCs Doctors have been considered as independent Consultants. The aforesaid clause seeks to only ensure that the business of the assessee is protected from competition. Furthermore, it has been emphasized by the Revenue that if the FTCs Doctor is to go on leave or to remain absent he has to pre-inform the assessee hospital. Before the lower authorities, assessee explained that this restriction was put so that alternate arrangement could be made in the absence of the doctor because the assessee hospital is liable to maintain the timings and regularity in attending patients.

7. Be that as it may, in our view, the contract agreements with FTCs Doctors have to be read as a whole and in the background of the purpose for which it has been entered into. Primarily, the agreements envisage engagement of the expertise and skill of the Doctors which would be utilized by the assessee hospital in rendering services to its patients. Factually speaking, the terms of agreement do not show that such Doctors were treated by the assessee as regular employees because the employee-benefits like provident fund, superannuation

benefits, leave encashment, etc. were not extended to them. At this stage we may also refer to a somewhat similar situation considered by the Hon'ble Bombay High Court in the case of Grant Medical Foundation (supra). In the said case also, the assessee hospital had engaged Doctors for a tenure on a variable remuneration. The Assessing Officer interpreted the conditions of engagement as to mean that there was an employer- employee relationship, whereas assessee had contended that it was a case of payment of professional fee. The following discussion in the order of the Hon'ble High Court is worth of notice:-

> *"37. In relation to other category of doctors there was a dispute. The Assessing Officer and the Commissioner of Income tax (Appeals) concluded that though these categories of doctors had a fixed remuneration and variable pay but their terms and conditions of employment or service would be crucial and material. In relation to two doctors, namely, Dr. Zirpe and Dr. Phadke, the contracts were taken as sample and scrutinised minutely. Upon such a scrutiny, the Tribunal noted that it cannot be said that these doctors were employees. If the first part of the Commissioner of Income- tax (Appeals) order indicates as to how these persons or doctors were not treated by the assessee as regular employees for want of benefits like provident fund, retiremental benefit, etc., then merely because they are required to spend certain fixed time at the hospital, treating fixed number of patients at the hospital, attend them as out patients and indoor patients does not mean that a employer-employee relationship can be culled out or inferred. We do not see how Mr. Gupta can fault such conclusions by relying upon the decisions, which have been rendered in the cases of doctors having a fixed pay and tenure. In that case, before us, there is no dispute. Even the assessee accepts the position that they are the employees of the assessee-trust.*
>
> *38. However, in cases of other doctors the contract would have to be read as a whole. It would have to be read in the backdrop of the relationship and which was of engagement purpose and time. The skill of the doctors and their expertise were the foundation on which an invitation was extended to*

them to become part of the assessee which is a public charitable trust and rendering medical service. If well known doctors and in specified fields are invited to join such hospitals for a fee or honorarium and there are certain terms drawn so as to understand the relationship, then in every case such terms and the attendant circumstances would have to be seen and in their entirety before arriving at a conclusion that there exists a employer-employee relationship. The Tribunal found that the Commissioner of Income tax (Appeals) was in error. We also agree with the Tribunal because in the Commissioner of Income tax (Appeals) order in relation to these two doctors the findings are little curious. The Commissioner of Income tax (Appeals) referred to the tests in paragraph 9 of the order at running page 62 and at internal page 14 in paragraph 10 the Commissioner of Income tax (Appeals) concluded that the doctors drawing fixed remuneration are full time employees. However, in relation to the second category of doctors drawing fixed plus variable pay with written contracts, the terms and conditions of Dr. Zirpe and Dr. Phadke have been referred and the Tribunal concluded that neither of the doctors was entitled to provident fund or any terminal benefits. Both were free to carry on their private practice at their own clinic or outside hospitals but beyond the hospital timings. Both doctors treated their private patients from the hospital premises. All of which could be seen as indicators that they were not employees but independent professionals (see paragraph 14). However, they were found to be sharing a overwhelming number of attributes of employees. In relation to that the contract seems to have been bifurcated or split up or read in bits and pieces by the Commissioner of Income-tax (Appeals). The Leave Rules were held to be applicable in the case of Dr. Phadke and there were fixed timing and fixed remuneration. Now, it is inconceivable that merely because for a certain period of time or required number of hours the doctors have to be at Ruby Hall Clinic means they will not be entitled to visit any other hospital or attend patients at it necessarily. The anxiety appears is not to inconvenience the patients visiting and seeking treatment at the Ruby Hall Clinic. If specialised team of doctors, experts and experienced in the field are part of the assessee's clinic, then their availability at the clinic has to be ensured. Now, the trend is to provide all facilities under one roof so that patients are not compelled to go to several clinics or hospitals. Hence, a diagnostic centre with laboratories and clinics, consultation rooms, rooms with beds for indoor treatment, critical care, treatment for kidney, lever, heart, brain, stomach ailments are facilities available at clinics and hospitals. The management, therefore, insists that such facilities, which are very costly and expensive are utilised to the optimum and the investment of time, money and infrastructure is not wasted. Hence, fixed timings and required number of

hours and such stipulations are incorporated in contracts so that they are of binding nature. The doctor or expert medical practitioner is then obliged to denote his time and energy to the clinic whole heartedly. If handsome remuneration, fee is prescribed in return of readymade facilities even for professionals, then such insistence is not necessarily to treat highly qualified professionals as servants. It is a relationship of mutual trust and confidence for the larger interest of the patient being served efficiently. From this contract or any clause therein no such conclusion could have been arrived at. We do not see how there was any express bar from working at any other hospital and if the contracts would have been properly and carefully scrutinised. Merely because their income from the hospital is substantial does not mean that ten out of the fourteen criteria evolved by the Commissioner of Income-tax (Appeals) have been satisfied. The Assessing Officer and the Commissioner of Income-tax (Appeals), therefore, were in complete error. We have also perused these contracts and copies of which are annexed to the paper book being part of the order of the Assessing Officer. We find that the communications which have been relied upon, namely, November 25, 2008, and May 14, 2009, do not contain any admission by the assessee. All that the assessee admitted is the existence of a written contract and with the above terms. Those terms have also been perused by us minutely and carefully. We do not find that any stipulations regarding working hours, academic leave or attachments would reveal that these doctors are employees of the assessee. In fact, Dr. Zirpe was appointed as a junior consultant on three years of contract. He was paid emoluments at fixed rates for the patients seen by him in the OPD. That he would not be permitted to engage himself in any hospital or nursing home on pay or emoluments cannot be seen as an isolated term or stipulation. In the case of Dr. Uday Phadke, we do not find any such stipulation. In these circumstances, the only agreement between the parties being that certain private patients or fixed or specified number seen by the consultant could be admitted to the assessee-hospital. That would not denote a binding relationship or a master-servant arrangement. A attractive or better term to attract talented young professionals and too in a competitive world would not mean tying down the person or restricting his potential to one set up only. The arrangement must be looked in its entirety and on the touch stone of settled principles. The Tribunal was right in reversing the findings of the Assessing Officer and the Commissioner of Income-tax (Appeals). There was a clear perversity and contradiction in the findings, particularly pointed out by us hereinabove.

39. In relation to other doctors where the remuneration was variable and there was a written contract or no written contract the Commissioner of Income-tax (Appeals) and the Tribunal did not commit any error at all. Both have referred extensively to the materials on record. We are not in agreement with Mr. Gupta that the Tribunal's order is in any way incomplete or sketchy or cryptic. The settled principles and rendered in co-ordinate Bench decisions have been referred only to emphasise the tests, which have been evolved from time to time. It is only in the light of such tests and their applicability to individual cases that matters of this nature must bedecided. This approach of the Tribunal did not require it to render elaborate or lengthy findings and when it agreed with the Commissioner of Income-tax (Appeals). We do not find even in the case of Dr. Sumit Basu the Commissioner of Income-tax (Appeals) or the Tribunal committed any error. Merely because of his stature he was ensured and guaranteed a fixed monthly payment. That would not make him an employee of the hospital. This cannot be seen as a stand alone term. There are other terms and conditions based on which the entire relationship of a consultant or professional and visiting the assessee's hospital had been determined. Once again, no general rule can be laid down. Nowadays, private medical care has become imperative. Public hospitals cannot cater to the increasing population. Hence, private hospitals are established and continue to be formed and set up day-by-day. The quality of care, service, attention, on account of the financial capacity therein has forced people of ordinary means also to visit them. Since specialists are in demand because of the life style diseases that consultants and doctors prefer these hospitals. Sometimes they hop from one medical centre or clinic to another throughout the day. Retaining them for fixed days and specified hours requires offering them friendly terms and conditions. In such circumstances, we do not think that the Tribunal committed any error of law apparent on the face of the record in confirming the findings rendered by the first appellate authority. The findings of fact from paragraph 16 onwards in the Commissioner of Income-tax (Appeals) order on ground No. 2 and from paragraph 20 onwards on ground No. 3 do not suffer from any serious legal infirmity. The appreciation and appraisal of the factual materials is not such as would enable us to interfere in our limited jurisdiction. Our further appellate jurisdiction is limited.

40. As a result of the above discussion, we need not advert to the entire case law in the field. Suffice it to note that the Revenue relied on the judgments which were rendered in cases where the terms and conditions denoting employee and employer relationship included a fixed pay or monthly remuneration only. For all these reasons we are of the opinion

that the questions of law termed as substantial and framed as above would have to be answered against the Revenue and in favour of the assessee. "

8. Similarly, the Hon'ble Karnataka High Court in the case of Manipal Health System Limited(supra) has held as under:-

"*13. To decide the relationship of employer and employee we have to examine whether the contract entered into between the parties is a "contract for service" or a "contract of service". There are multi-factor tests to decide this question. Independence test, control test, intention test are some of the tests normally adopted to distinguish between "contract for service" and "contract of service". Finally, it depends on the provisions of the contract. Intention also plays a role in deciding the factor of contract. The intention of the parties can also determine or alter a contract from its original shape and status both parties have mutual agreement."*

9. The aforesaid judgments reinforce the proposition that the issue is liable to be decided on proper appreciation of the terms of agreement between the assessee and the FTCs Doctors. We have perused the terms and conditions of the agreement and note that the FTCs Doctors are entitled to admit, investigate and provide treatment to patients and that the Doctors would be responsible for their clinical care. The Doctor is responsible for supervising the subordinate staff, whereas the facilities of the hospital staff, paramedical and nursing staff is provided by the hospital alongwith the necessary equipment to render the services to the patients. It is further provided that 15% of the fee collected by the FTCs Doctors is deducted by the hospital as its share and the balance 85% is paid to the Doctor after deduction of tax at source. It is specifically provided that in the event of non-payment of fee by the patients, it shall be the responsibility of the concerned

Doctors. Quite clearly, the arrangement between the assessee hospital and the FTCs Doctors show that the earnings of the Doctors are dependent on the patients coming to the hospital. The more patients are attended to by the Doctor, more the revenue in the hands of the Doctor. In such a situation, in our view, the FTCs Doctors cannot be construed as employees of the assessee hospital but are independent Consultants, who undertake risk and reward of their medical profession. Mere presence of a clause prohibiting rendering of service to competing hospital would not alter the nature of professional services rendered by the FTCs Doctors. Even other conditions pointed out by the Revenue, namely reporting of absence and observation of ethical conduct, etc. do not show that the rendering of independent services by such Consultants are compromised. Quite clearly, such restrictions are placed by the assessee hospital for facilitating timely and proper services to the clients. There are no employee benefits extended to the Consultants, namely gratuity, provident fund, leave encashment, etc.

10. At the time of hearing the Ld. Representative for the assessee also made a statement at Bar that the recipient FTCs Doctors have filed their individual returns of income showing the income received from the assessee as professional income, and the same has been accepted by the Department. There is no contravention by the Revenue to the aforesaid.

11. Considering the entirety of facts and circumstances emerging from the material on record, we hold that the payments made to the FTCs Doctors are in the nature of professional fees liable for deduction

of tax at source in terms of section 194J of the Act and that there does not exist any employer-employee relationship so as to invoke the provisions of section 192 of the Act. Consequently, on this aspect assessee has to succeed.

12. Before parting, we may refer to the decision of the Hon'ble Delhi High Court in the case of St.Stephens Hospital vs. DCIT, 6 SOT 60 (Del), which has been relied upon by the Revenue before us. We have perused the said decision and find that the same is inapplicable to the facts before us. In the case of St. Stephens Hospital (supra) the payments made to the Doctors were termed as 'salary' and in terms of the fact-situation therein, the payments were held liable for tax deduction of at source under section 192 of the Act. Factually speaking, in the present case on the basis of the reading of the terms of agreement with FTCs Doctors and in the light of the judgment of the Hon'ble Bombay High Court in the case of Grant Medical Foundation (supra), it has to be held that no employer-employee relationship subsist between assessee hospital and the FTCs Doctors.

13. In the result, we therefore, hold that lower authorities have erred in treating the assessee as an assessee in default within the meaning of section 201(1) of the Act qua the payment of professional fee to FTCs Doctors. As a consequence, we therefore, set aside the order of the CIT(A) and direct the Assessing Officer to cancel the levy of demand under section 201(1) of the Act and also the corresponding interest charged under section 201(1A) of the Act for assessment year 2008-09. Thus, on this aspect assessee succeeds.

14. The only other ground raised by the assessee in its appeal for A.Y 2008-09 is non-granting of full relief under section 201(1) of the Act following the ratio of the Hon'ble Supreme Court in the case of Hindustan Coco-Cola Beverage (P) Ltd. vs. CIT, 293 ITR 226(SC). The aforesaid Ground of appeal is only an alternate ground and since we have already held that the payment made to FTCs Doctors is liable for deduction of tax at source under section 194J of the Act and not under section 192 of the Act, the said ground of appeal is rendered fructuous. The same is accordingly dismissed.

15. In the result, the appeal of the assessee for Assessment Year 2008-09 is allowed, as above.

16. Now we may take up the cross appeal of the Revenue vide ITA No.7051/Mum/2012 for assessment year 2008-09, wherein the first issue relates to the payment made by the assessee towards annual maintenance of the machineries. The assessee company had deducted tax on such payments in terms of section 194C of the Act on the ground that payments were made to contractors for carrying on work. However, the Assessing Officer was of the view that tax was liable to be deducted on such payments under section 194J of the Act as the payments were for rendering technical services. As a consequence, the Assessing Officer held the assessee as an assessee in default within the meaning of section 201(1) of the Act and such shortfall was determined at Rs.3,25,569/- and the related interest chargeable under section 201(1A) of the Act was determined at Rs. 1,56,273/-

16. On this aspect, CIT(A) has accepted the stand of the assessee that payments in terms of the contract for annual maintenance of the machines was liable to be subject to deduction of tax at source under section 194C of the Act. Accordingly, Revenue is in appeal before us.

17. Another aspect raised in the appeal of the Revenue is with regard to the tax deductible at source on payments made for pest control expenses. The assessee deducted tax at source on such payments by invoking section 194C of the Act, whereas the Assessing Officer held that the tax was liable to be deducted under section 194J of the Act. The assessee was held as an assessee in default under section 201(1) of the Act on this aspect and the interest chargeable under section 201(1A) was determined at Rs.52,377/- and Rs.25,141/- respectively. On this aspect also the CIT(A) concurred with the assessee and accordingly the Revenue is in appeal before us.

18. With respect to the payments made towards annual maintenance contract, we find that the CIT(A) upheld the stand of the assessee following the CBDT Circular No.715 dated 8/8/1995 as also the decision of the Ahmedabad Bench of the Tribunal in the case of Nuclear Power Corporation Ltd., ITA NO.3059 to 3061/Ahd/2009 dated 30/9/2011. The following discussion in the order of CIT(A) is worthy of notice:-

> *"4.4 I have considered the above submissions of the appellant as well as the facts of the case. I have also considered the observations of the AO as per the impugned order passed by him. The details of expenses under this head show that they are towards Annual Maintenance Contracts (AMC) of medical equipments machines etc. The AMCs are contracts for periodical inspection and routine maintenance work along-with supply of spare parts and in my view do not constitute 'fees for technical services'. Also, in my view, the repairs of other gadgets such ACs etc are also in the nature of normal repairs*

as mentioned in Q.29 of Circular NO.715 dated 8.8.1995 issued by CBDT which is as under:

"Question 29: Whether a maintenance contract including supply of spares would be covered under Section 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."

4.5 The appellant's claim is also supported by the decision of IT AT, Ahmedabad in the case of Gujarat State Electricity Corporation Ltd. vs. ITO, 3 SOT 468 (Ahd) wherein it was held that "the payments made by the assessee company to Gujarat Electricity Board for entire operation and maintenance of power plant under a comprehensive contract could not be treated as payment of fees for professional services as contemplated in section 194J but were covered by section 194C of the Act. Further, in the recent decision dated 30.09.2011 in ITA Nos. 3059 to 3061 & 3081/Ahd. 2009 of Ahmedabad Tribunal in the case of Nuclear Power Corporation Ltd., it has been held that repairs and annual maintenance of computers do not involve services of technical nature so as to be assessable as "fees for technical services" u/s 9(1)(vii) of the Act and hence the assessee was required to deduct TDS under Section 194C of the Act and not under Section 194J of the Act. The Hon'b1e ITAT has in this regard followed the decision of Hon'b1e Madras High Court in the case of Skycell Communications Ltd, 251 ITR 53 (where it was held that the installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee). The decision in the case of Ultra Entertainment Solutions Ltd. (supra) cited by the AO is not applicable to the issue at hand because in that case, the question was regarding the nature of payments made by the assessee to another person 'P' who was engaged by the assessee is to carry out all operations connected with the selling of online lottery tickets on behalf of the assessee.

4.6 In view of above discussion therefore and respectfully following the above two decisions of Hon'ble Ahmedabad Tribunal, I hold that the expenditure on account of Annual Maintenance Contracts (AMC) of medical-equipments machines etc. is not in the nature of professional or technical services as construed under the provisions of Section 194J of the Act and hence, provisions of Section 194J of the Act are not applicable. The appellant has correctly deducted TDS under section 194C of the Act in respect of

payments on Annual Maintenance Contracts (AMC) of medical equipments machines etc. Accordingly, the demands of tax under section 201(1) and of interest under section 201(1A) raised by the AO in respect of the assessment years under consideration are hereby deleted."

19. We do not find any infirmity in the order of CIT (A) and therefore we hold that tax has been rightly deducted by assessee on the annual maintenance charges u/s 194C of the Act. Consequently, it is held that the assessee cannot be deemed to be an "assessee in default" within the meaning of section 201(1) of the Act. Consequently, no interest under section 201(1A) of the I.T. Act is leviable. Accordingly, the order of CIT(A) is affirmed on this point.

20. In respect of payment made towards pest control charges, the CIT(A) agreed with the assessee that such payments are covered under section 194C of the Act and not under section 194J of the Act. The following discussion in this regard in the order of CIT(A) is relevant

"5.4 I have considered the above submission of the appellant and agree with same. I do agree that the major part of the cost of the maintenance contract is towards the costly pesticides that are applied and for the purpose off such application, any high technical skill or professional qualification is not required. The work of pets control process is repetitive in nature and the persons who carry out the same are semi-skilled persons not having and high degree of professional qualification. Hence, the payments in respect of the pest control contracts cannot be said to be covered under the provisions of section 194J of the act. The appellant has rightly deducted the tax at source under section 194C of the act. Therefore the demands of tax under section 201(1) and of interest u/s 201(1A) raised by AO in respect of the assessment years under consideration are hereby deleted."

21. In our view, the CIT(A) has correctly held that the payment of Pest control charges do not involve rendering of any technical services

by the recipient and accordingly the assessee was right in deducting tax at source u/s.194C of the Act. The order of the CIT(A) on this aspect is also affirmed. Thus, in so far as the appeal of the Revenue for Assessment Year 2008-09 is concerned the same is dismissed.

22. It was a common point between the parties that the issues involved, and facts and circumstances in the cross-appeals for the other captioned Assessment Years are similar to those considered by us in the cross-appeals for Assessment Year 2008-09 in the earlier paras. Therefore, our decision in the appeals for A.Y 2008-09 shall apply *mutatis mutandis* in other years also.

22. Resultantly, whereas the appeals of the assessee are allowed, those of the Revenue are dismissed.

Order pronounced in the open court on 30/09/2015.

Sd/-	Sd/-
(SANJAY GARG)	(G.S. PANNU)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai,Dated ..... /09/2015

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai