

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

16.

+

ITA 653/2012

COMMISSIONER OF INCOME TAX-IX Appellant
Through: Mr. Zoheb Hossain, Senior Standing
Counsel with Mr. Deepak Anand, Advocate.

versus

AMAN KHERA Respondent
Through: Mr. M. P. Rastogi with Mr. K. N. Ahuja,
Advocates.

WITH

17.

+

ITA 476/2014

COMMISSIONER OF INCOME TAX-IX Appellant
Through: Mr. Rahul Chaudhary, Senior Standing
Counsel with Mr. Raghvendra Singh, Advocates.

versus

RAMAN KHERA Respondent
Through: Mr. M. P. Rastogi with Mr. K. N. Ahuja,
Advocates.

WITH

18.

+

ITA 19/2015

COMMISSIONER OF INCOME TAX-14 Appellant
Through: Mr. Rahul Chaudhary, Senior Standing
Counsel with Mr. Raghvendra Singh, Advocates.

versus

JYOTI KHERA Respondent
Through: Mr. M. P. Rastogi with Mr. K. N. Ahuja,
Advocates.

WITH

19.
+

ITA 21/2015

COMMISSIONER OF INCOME TAX-14 Appellant
Through: Mr. Rahul Chaudhary, Senior Standing
Counsel with Mr. Raghvendra Singh, Advocates.

versus

AMAN KHERA Respondent
Through: Mr. M. P. Rastogi with Mr. K. N. Ahuja,
Advocates.

AND

20.
+

ITA 326/2015

COMMISSIONER OF INCOME TAX-IX Appellant
Through: Mr. Ashok K. Manchanda, Senior
Standing Counsel.

versus

RAMAN KHERA Respondent
Through: Mr. M. P. Rastogi with Mr. K. N. Ahuja,
Advocates.

**CORAM:
JUSTICE S. MURALIDHAR
JUSTICE NAJMI WAZIRI**

%

ORDER
03.08.2016

Dr. S. Muralidhar, J.:

1. These are five appeals by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act'). Three of them i.e. ITA Nos. 653 of 2012, 19 of 2015 and 326 of 2015 pertain to quantum proceedings and two of them i.e. ITA Nos. 476 of 2014 and 21 of 2015 pertain to penalty proceedings.

Background facts

2. The background facts are that an agreement was entered into on 31st October 2005 between Dr. B.L. Khara Charitable Trust (hereafter 'the Trust'), a society incorporated under the Societies Registration Act, 1860 and Heart Institute, Noida represented by Dr. Purshotam Lal, the Director of Metro Hospital and Heart Institute.

3. The agreement noted that the Trust was the owner of a hospital situated on a plot of approximately 1.5 acres in Pandav Nagar, Naraina Road, New Delhi with a building consisting of a basement, ground floor and four floors known as Khara Hospital. The agreement noted that the Khara Hospital had not been functioning except for an Out-Patient Department and that too on a small scale. The hospital was stated to be ill-equipped and facing financial problems.

4. The agreement noted that the Trust had approached the management of Metro Hospital, Noida to run and manage the Khara Hospital and that the Metro Hospital had agreed to the proposal. The clauses of the agreement relevant for the present purposes read as under:

ITA Nos. 653 of 2012, 476 of 2014, 19 of 2015, 21 of 2015 & 326 of 2015

Page 3 of 28

“1. Khera society will allow Metro Hospital to make necessary changes, alterations or additions and/or demolitions, renovations accordingly in Khera Hospital building and other places.

2. Khera Society shall facilitate and empower Metro Hospital in sorting out the legal and other disputes relating to Khera Hospital.

3. Khera Hospital shall make available all records, deeds, writings, files and documents to Metro hospital to facilitate proper day to day working in Khera Hospital within seven days of signing of this agreement.

4. Metro Hospital shall pay a monthly lump sum amount as mutually decided to Khera Society and all receipts of monthly in cash or by cheque shall belong to Metro Hospital.

5. Metro Hospital shall have full freedom in fixing rates for various medical procedures, consultation and treatment procuring medicines, consumables equipments, recruiting staff, maintenance of buildings, equipments etc.

6. Metro Hospital has to manage Khera Hospital to the best of its ability and capability.

7. Metro Hospital shall be entitled to use all the assets existing and to be procured in future for Khera Hospital to run and manage the Hospital for all purposes, intents and externs exclusively.

8. This managing agency agreement shall remain valid for twenty five years;

This agreement may be terminated by giving 12 months notice in writing to the other party provided consideration, if any, in any form and interest accruing thereon from the day it was taken from Metro Hospital or its nominees is cleared and

discharged by Khera Hospital at the time of serving of notice. No notice of termination will be valid if the financial involvement is not discharged.”

5. The agreement could be terminated by either party by giving 12 months’ notice to the either party. Interestingly, the agreement provided that in the event of such termination, the consideration taken from Metro Hospital and interest accruing thereon should be discharged by Khera Hospital at the time of serving of notice. It was stipulated that no notice of termination will be valid if "the financial involvement is not discharged".

6. The agreement was signed on behalf of the Trust by its Trustees Dr. Krishan Khera, Dr. Raman Khera (the Respondent Assessee in ITA Nos. 476/2014 and 326/2015) and Ms. Jyoti Khera (the Respondent Assessee in ITA No. 19 of 2015).

7. The case of the Assesseees/Respondents is that on 12th December 2005, UG Hospitals Pvt. Ltd. (‘UGHPL’) which was running Metro Hospital and the Heart Institute issued a letter to Dr. Aman Khera in the following terms:

“We are glad to appoint you as a management consultant for the chain of hospitals run and managed by us for a period of 5 years. The tenure of your appointment shall start w.e.f. 1st January 2006. You have been paid a consolidated amount of Rs.1,21,83,494/- in advance for the above mentioned appointment. An amount of Rs.6,83,494/- has been deducted as TDS from the above-mentioned amount. A detailed MOU with all terms and conditions shall be executed at a later date.”

8. A similar letter was issued to both Dr. Raman Khera and Ms. Jyoti Khera as well. All the three were each paid a lump sum consolidated amounts of Rs 121,83,494 after deduction of TDS of Rs 6,83,494 in each case.

9. The three Assesseees i.e. Dr. Aman Khera (Respondent in ITA No. 653/2012), Dr. Raman Khera (Respondent in ITA No. 326/2015) and Ms. Jyoti Khera (Respondent in ITA No. 19/2015) filed their respective returns of income for the AY 2006-07. While Dr. Aman Khera declared an income of Rs.5,46,616 on 31st October 2006, Dr. Raman Khera filed a return on 31st October 2006 declaring an income of Rs. 3,82,155 and Ms. Jyoti Khera filed a return on 31st March, 2007 declaring an income of Rs 33,950. None of them disclosed the entire amount received from UGHPL in their respective returns.

Assessment orders

10. The returns of income were picked up for scrutiny and assessment orders under Section 143(3) of the Act were passed on 22nd December 2008 in the cases of Dr. Aman Khera and Dr. Raman Khera, and on 26th December 2008 in the case of Ms. Jyoti Khera for AY 2006-07. Each of them claimed that the amount received from UGHPL was on account of professional/management consultancy. Significantly, the AO noted in each of the assessment orders that none of the Assesseees were able to produce their regular books of accounts or receipts to show the source of the salary income or the income from business.

11. As regards the receipt from UGHPL, the AO noticed that TDS had been deducted on the entire payment made in lump sum by UGHPL. The claim of the Assesseees that the amount was received as advance on account of appointment as hospital/management consultant for five years and, therefore, the amount should be spread over for a period of five years, was

not accepted by the AO. He observed that it was unbelievable that a hospital would all of a sudden need so many Hospital Consultants from a single family all closely related to each other by blood and pay all of them in advance for five years a hefty sum amounting to crores for their services as claimed. He also noted that Dr. K.L. Khara, the father of three Assesseees, who was the senior most among the recipients had been paid only Rs.58,26,888 for the same period of five years whereas his children with much less experience had received sums of over Rs.1 crore.

12. The AO further noticed that from the period mentioned on the TDS certificates it was clear that the Assessee's claim of advance receipt for five years was not correct. Importantly, the AO noticed that there was no reason why a business entity like UGHPL would advance such a huge sum to doctors of a particular family for such a long period without any formal written agreement or contract. The AO noted that "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 and accordingly it is presumed that there is no written agreement or contract between the payer & the payees of so called advance for hospital consultancy."

13. The AO also noted that neither the Assesseees nor their father appeared in response to the summons issued under Section 131 of the Act. However, in response to a further letter asking them why the entire receipt from UGHPL should not be added to the income, a written submission was filed on 11th December 2008. The AO noticed that there was no further acceptable evidence to spread over the lump sum amount over five years as claimed by

the Assesseees. It was noticed that “there is no regular books of accounts maintained by the Assesseees in any system cash or mercantile.” Accordingly, the entire receipt from UGHPL by each of the Assesseees was treated as their respective income for the AY in question.

14. The AO then proceeded to deal with the claim of expenditure which might have been incurred by the Assesseees. Considering it not to be in the interest of justice to disallow expenses, the AO permitted “roughly 35% of the total receipt” on an estimated basis as expenses and took the balance amount as income of the Assessee which was added to the return income. Penalty proceedings under Section 271(1)(c) of the Act were also directed to be initiated.

Proceedings before the CIT (A)

15. The Assesseees appealed to the Commissioner of Income Tax (Appeals) [‘CIT (A)’]. By separate orders dated 24th November 2010, the CIT (A) partly allowed each of the appeals. Significantly, before the CIT (A) for the first time, the Assesseees placed on record the letters issued by UGHPL to each of them at the time of their appointment as Hospital Consultants; copy of the accounts of UGHPL in the books of the Assesseees; confirmation receipt from UGHPL about the treatment of the payment in their books; income tax returns for each of the Assesseees for AY 2007-08 and 2008-09 which showed that the proportionate fees in those respective AYs were shown in the income and offered to tax by the Assesseees.

16. An alternative submission was made before the CIT (A) by each of the

Assessee as under:

“if your Honour is of the view that the receipt for the period 01.01.2006 to 31.12.2010 is to be taxed in this year itself, it is prayed that the Id. Assessing Officer be directed to modify the assessment for the assessment years 2007-2008 to 2011-12 to that extent after allowing expenses incurred in those years, because in law the same income cannot be taxed twice.”

17. The CIT (A) appears to have raised specific questions which were answered as under:

“1. Whether there is any agreement between the appellant and UG Hospital. How UG Hospitals will recover the advance received in case of failure of appellant to provide services/consultancy to the Hospital.

Answer: There is no agreement between me and UG Hospitals. There is only a letter of appointment dated 12.12.2005 which is already on record. Confirmation of UG Hospitals was also received in assessment proceedings in response to summons under Section 133(6) of the Income Tax Act, 1961. Another confirmation is being attached which has been recently taken from UG Hospitals reconfirming the same facts. Already four years of this appointment are over and the possibility of failing to provide hospital management consultancy services to the UG Hospital is unlikely. Also, I would like to mention that we are already negotiating to extend this appointment for another 5 years once the term is completed. The details however have not yet been worked out.

2. Evidence for service rendered; name of patients attended, time period of consultancy, fees received from patient.

Answer: We are not doctors there. We are management consultants who are involved in corporate management of the hospitals run by UG Group of hospitals. We do not have to go to the hospital everyday. We meet at the head office as and

when required.

The nature of our services are advisors in corporate affairs like decisions as to which new hospital to acquire, feasibility study of new projects, planning of new projects, procurement and decision as to which equipments to buy, doing market study as to which specialty of medical service to promote etc.

Please note that we are not working in the capacity of administrators or looking after day to day working of the hospitals, but working as advisors at the corporate level.

3. With whom of Metro Group/UG Hospitals negotiation has taken place?

Answer: With Dr. Purshottam Lal.

4. How the sum had been working out at an odd figure - basis of receipt by the appellant.

The sum demanded by me was Rs. 3 lacs per month. Then it was negotiated to Rs. 2 lacs a month if all was paid in advance. This was Rs. 1 crore and 20 lacs. This was finally settled at Rs. 1 crore and Rs. 15 lacs. Then came the issue of TDS. Since I wanted Rs 1 crore and 15 lacs in hand, the whole amount was re-calculated so that the TDS was paid and I got Rs. 1 crore and 15 lacs.

6. Khera Hospitals, Pandav Nagar - whether it has been transferred or not. Who is running the hospital?

Khera Hospital is owned by Dr. R.L.Khera Charitable Trust. It is now being run and managed by UG Hospitals under a management agreement. I have been appointed as a consultant to all the hospitals under the UG Group of Hospitals to assist them in the capacity of hospital management consultant including Khera Hospital. Copy of agreement attached.”

The balance documentation/information required is furnished below:

1. Trust deed of R.L. Khera Charitable Hospital: attached
2. Is there any Agreement between R.L.Khera Charitable Hospital and UG Hospital if so copy of that Agreement: already filed under cover of our letter dated 17.09.09
3. Service rendered by the assessee to R.L. Khera Charitable Hospital. Are they getting any salary/reimbursement or any in kind for these services: None.
4. What actual expenses incurred for giving consultancy to UG Hospital: as per income and expenditure account attached to return: produce bill/vouchers: produced herewith.”

18. The Assessee produced before the CIT (A) for the first time an agreement dated 15th June 2010 entered into between Metro Institute of Medical Sciences Private Limited formerly UGHPL and each of the Assessee. Interestingly, in the Preamble to this agreement there is no reference to the letters dated 12th December 2005 issued by the UGHPL to each of them. However the contract period shown to be five years “commencing with the effective date from which the Consultant joins the Metro Institute whether the originally stipulated date, suspended date or extended date.” Clause 2.2 stated the term of the agreement and read as under:

“2.2 The term of this Agreement shall begin as on 1st January 2006 and shall continue in full course and effect for a period of five years from the effective date unless it is terminated earlier in accordance with the terms and conditions stated herein or on account of Force Majeure or any unforeseen circumstance rendering the present Agreement unenforceable.”

19. Further clause 2.6 reads as under:

“2.6 The Metro Institutes has agreed to pay unto the consultant an amount of Rs.1,21,83,494/- (Rupees One Crore Twenty One Lacs Eighty Three Thousand Four Hundred and Ninety Four Only) the date of the execution of this Agreement being the fixed consultancy fees for the entire term of five years of consultancy. The Metro institute shall, however, deduct any or all applicable taxes as are statutorily required.”

20. Article 4 which spelt out the representations and warranties did not require the Consultant to return any amount in case he failed to perform any part of the contract. Interestingly, Article 9.2 stated as under:

“9.2 In the event, that Metro Institute for any reason disclosed or otherwise chooses to seek premature termination of the Services of the consultant prior to the expiry of the fixed period of 5(five) years, the consultant shall not be liable under any circumstance to refund any amount of the consultancy fees and the same shall deemed to have been forfeited and no claim in respect thereof shall be entertainable.”

Order of the CIT (A)

21. An issue was raised before the CIT (A) on whether this additional evidence in the form of the above agreement which was obviously entered into nearly four years after the so-called engagement of the Assessee as Hospital Consultant could be taken on record by the CIT (A) under Rule 46A of the Income Tax Rules, 1962 ('Rules'). The CIT (A) concluded that “these evidences only enable the undersigned to pass an order on this issue one way or other.” The CIT (A) held that “the nature of evidence is such that these do not give rise to any new principle or lead to any new facts requiring fresh investigation and by filing the additional evidence the assessee is not

seeking to make any fresh line of enquiry.”

22. On the merits of the appeal, the CIT (A) came to the following conclusions:

(i) The evidence brought on record showed that UGHPL instead of making payment to the Trust on monthly basis as per agreement made payments of Rs. 4 crores excluding income tax to the Trustees of the Trust. The lump sum tax free payment was made in the following manner namely Rs.1.15 crores each to Dr. Aman Khera, Dr. Raman Khera and Ms. Jyoti Khera and Rs.55 lakhs to Dr. R.L. Khera.

(ii) It is not understood how UGHPL was utilising the expertise of the three Assesseees. One of them Ms. Jyoti Khera was not a doctor and was also not having a degree in hospital management.

(iii) The payments appear to have been made not for their expertise but otherwise. The payments to the Assesseees were made irrevocable because they were not related to the specific services. There was no obligation on the Assesseees to refund or repay the fees received.

23. Consequently, the CIT (A) upheld the conclusions of the AO that receipts from UGHPL was chargeable in this year.

24. The CIT (A) then turned to the question of allowing expenses at 35%. The CIT (A) held that since the entire receipt from the UGHPL was chargeable the allowance of expenses over and above the claimed expenses

was unjustified. The claimed expenses as against the business income had already been allowed by the AO. Consequently, the CIT (A) added back the expenses allowed by the AO at 35%.

Impugned order of the ITAT

25. Aggrieved by the order of the CIT (A) the three Assesseees went in appeal before the ITAT which by the impugned order allowed the appeals after coming to the following conclusion:

(i) When examined in the light of the decision in ***E.D. Sasoon & Co. Ltd. v. Commissioner of Income Tax (1954) 26 ITR 27(SC)***, it is seen that the Assesseees had not served the entire period of five years and had, therefore, not awarded emoluments in the sums paid to each of them. In other words, the entire income could not be said to have accrued to the Assessee as the Assessee had not created a debt or a right to receive the payment.

(ii) Accounting Standard 9 ('AS 9') issued by the Institute of Chartered Accountants of India ('ICAI') which talks of recognition of revenue in the rendering of services was relevant. It specifies that in the proportionate completion method, the revenue is recognised proportionately by reference to the performance of each act. In case of service contracts the revenues are recognised on proportionate basis.

(iii) Relying on the decision in ***Commissioner of Income Tax v. Dinesh Kumar Goel (2011) 331 ITR 10 (Del)***, it was held that the amount received by each of the Assessee has to be proportionately

spread over five years.

26. The orders of the AO and the CIT (A) were accordingly set aside and the appeals were allowed.

Question of law

27. While admitting these appeals on 23rd January 2014, this Court framed the following question of law in each of the appeals:

“ Did the Tribunal fall into error in accepting the assessee's contention that the sum of Rs. 1,21,83, 494/- received by him and offered in AY 2006-07 as income to be spread over a period of five years on the basis of an agreement entered into with M/s. UG Hospital Private Limited?

28. A similar question as above framed in the other two quantum appeals on 9th January 2015 (Jyoti Khera) and 25th May 2015 (Raman Khera).

29. In the penalty appeal in the case of Mr Aman Mehra, i.e. ITA 21/2015, while admitting the appeal on 9th January 2015, this Court framed the following question of law:

"Did the ITA T fall into error in deleting the penalty in the case of the assessee in the circumstances of the case?"

30. However, in the penalty appeal in the case of Mr Raman Mehra i.e. ITA Nos. 476 of 2014, no question as such was framed and the matter was simply kept for hearing along with the quantum appeals.

31. However, it should be noted that as far as the penalty proceedings were

concerned, the CIT (A) allowed the appeals of the Appellants by separate orders dated 22nd May 2013 on the ground that in the quantum proceedings the ITAT had deleted the additions made in the AY 2006-07. As a result the appeals were allowed and the penalty orders passed by the AO on 13th March 2012 and 30th March 2012 under Section 271(1)(c) of the Act was set aside.

Submissions of counsel for the Revenue

32. This Court has heard the submissions of Mr. Zoheb Hossain, Mr. Ashok K. Manchanda and Mr. Raghvendra Singh, learned counsel appearing on behalf of the Revenue and Mr. M.P. Rastogi, learned counsel for the Assessee.

33. The submissions on behalf of the Revenue could be summarised as under:

(i) There was no agreement entered into between the Assesseees and UGHPL at the time of making of the payment on 12th December 2005. Further although the letter dated 12th December 2005 to Dr. Aman Khara by UGHPL termed the amount as being “in advance for the abovementioned appointment” it was clear that what was paid was ‘consolidated amount’ from which Rs.6,83,494 was deducted as TDS.

(ii) The payment had in fact to be made by UGHPL to the Trust under the agreement dated 31st October 2005. The payment made to the Assesseees was, therefore, not related to any specific service. There was no live link between the payment made by UGHPL and the

services rendered by the Assessees.

(iii) The Assessees did not maintain any books of accounts. If indeed the Assessees had maintained the accounts on cash basis, the question of accrual of income or the right to receive income or the creation of a debt justifying the income received did not arise. The question of spreading over said income over five years also did not arise.

(iv) The decision in *Commissioner of Income Tax v. Dinesh Kumar Goel (supra)* was distinguishable on facts. The decision in *E.D. Sasoon & Co. Ltd. v. Commissioner of Income Tax (supra)* was relevant for companies and not individual Assessees. The matching principle or AS-9 could not be pressed into service when the assessment was of individuals.

(v) The Assessees failed to produce vouchers or any books of accounts and, therefore, the AO is justified in treating the entire income received by the Assessees to be taxable in the relevant AY. In the absence of books of accounts, the presumption was that the Assessees were following the cash system of accounting. The receipts were liable to be taxed in the year in which they were actually received.

(vi) The CIT (A) ought not to have permitted additional evidence to be produced at the stage of appeal since none of the conditions under Rule 46A was satisfied. Reliance was placed on the decision in

Commissioner of Income Tax v. Manish Buildwell (2012) 204 Taxman 106 (Delhi).

Submissions of counsel for the Assessees

34. On behalf of the Assessees it was submitted by Mr. M.P. Rastogi, learned counsel, as under:

(i) Under Section 4 of the Act, tax was chargeable on the total income which in terms of Section 5 included income derived from three sources (a) income received or deemed to be received in India (b) income that accrues or arises or deemed to accrue or arise in India (c) income that accrues or arise outside India.

(ii) The liability of tax was attracted at the stage of accrual of income and at the stage of receiving income. To begin with there was an oral agreement that the Assessees would render services to UGHPL for five years. Therefore for the AY in question, the Assessees declared professional income from UGHPL in proportion to the period i.e. January to March 2006 for which each of them rendered services. The emoluments were spread over and declared in the subsequent years in proportion to the period of services rendered in those very years. This has been acknowledged in the orders of the CIT (A) as well as the ITAT.

(iii) With the Revenue having processed the returns filed by the Assessees for the AYs subsequent to the AY in question i.e. 2006-07 in which the proportionate amount received from the UGHPL was

offered to tax, which has been accepted by the Revenue, an exception cannot be made for the AY in question by treating the entire amount received to tax. Reliance is placed on the decision in *Parimisethi Seetharamamma v. CIT (1965) 57 ITR 532 (SC)* in support of the proposition that all incomes are receipts but all receipts are not income. It is only receipts which bear the characteristic of income that can be taxed.

(iv) Relying on the decision in *E.D. Sasoan & Co. Ltd. v. Commissioner of Income Tax (supra)* it was submitted that in the AY in question in relation to bringing the entire amount received from UGHPL to tax it would have to be shown that the Assessee must have either rendered all the services or created a debt in his favour in the AY in question. In other words, unless it was shown that he has brought into existence a debt or a right to receive the payment, it cannot be said that the income was accrued to him.

(v) AS-9 issued by the ICAI recognised that revenue from service transactions should be proportionate to the period during which the services were rendered and computed either by the proportionate completion method or by the completed service account method. Under the proportionate completion method, revenue is recognised proportionate to the performance of each act and when services are provided by an indeterminate number of acts over a specific period of time. In such an event, the revenue is recognised on a straight line basis over the specific period. Reliance is placed on *Commissioner of*

Income Tax v. Dinesh Kumar Goel (supra) where on facts it was held that since the services of a coaching institute had to be rendered in two years, the entire fee received had to be spread over in two years and assessed proportionately. Reliance is also placed on the decision of this Court in *Commissioner of Income Tax, Delhi v. Om Prakash Khaitan 62 taxmann.com 324 (Del)* where the monies received by lawyers from clients were treated as income in the hands of lawyers in the year in which the money is received since some portion of the monies were to meet out-of-pocket payment in the conduct of the case.

(vi) In any event, the Assessees having offered the proportionate income in subsequent AYs, there was no justification to bring the entire amount received from UGHPL in this year i.e. AY 2006-07. Reliance is placed on the decision in *Commissioner of Income-Tax v. D.C. Gandhi Associates (1994) 210 ITR 929 (Guj)* where it was held that even in a cash system of accounting, income accrues upon rendering of service. Reference was also made to the decision in *Commissioner of Income-tax v. Winner Business Link (P). Ltd. [2015] 55 taxmann.com 468 (Guj)* where the Gujarat High Court following the decision in *Commissioner of Income Tax v. Dinesh Kumar Goel (supra)* held that the entire receipt of the membership fees in the business of discount cards was required to be spread over the period of membership and income had to be recognised proportionately.

(vii) Whether it is a mercantile or cash basis of accounting, income would be said to have accrued only with the rendering of service. Income could be, therefore, sought to have accrued in the proportion to the services rendered to the Assesseees over a period of five years. It is submitted that the payment made by UGHPL to the Trust under the agreement dated 31st October 2005 was an independent transaction not connected with the Assesseees. It is asserted that UGHPL engaged the services of the Assesseees on account of their qualification.

(viii) The alternative plea before the CIT (A) was that if the entire income is to be taxed in this year then the tax already paid on the proportionate amount in the subsequent years should be accounted for and in that event the expenditure claimed in the subsequent years should be allowed in full. Emphasis was placed on the matching principle and the decision in *Calcutta Co. Ltd. v. Commissioner of Income Tax (1959) 37 ITR 1 (SC)*.

35. In response to the above plea, it was submitted by Mr. Raghvendra Singh, learned counsel appearing for the Revenue, that the matching principle will not apply in the case of individuals. It is relevant only in the limited context as explained by the Supreme Court in *Taparia Tools v. Joint Commissioner of Income Tax (2015) 372 ITR 605 (SC)*. He further submitted that expenses of later years cannot be allowed in this year. Since there was admittedly only a cash system of accounting the concept of accrual of income did not arise in the facts and circumstance of the case.

Analysis and reasons

36. The ITAT appears to have proceeded on the basis that since the services were to be performed by each of the Assessees for over a period of five years, the amount received from UGHPL had to be spread over a period of five years in proportion and for this purpose the ITAT referred to the decision in ***E.D. Sasoon & Co. Ltd. v. Commissioner of Income Tax*** (*supra*).

37. The Court finds that the decision in ***E.D. Sasoon & Co. Ltd. v. Commissioner of Income Tax*** (*supra*) was on an entirely different set of facts. There the Assessee company was a managing agent of other companies i.e. E.D. Sassoon United Mills Ltd., Elphinstone Spinning & Weaving Mills Company Ltd. The Assessee company agreed to transfer the managing agency of the said companies to M/s. Agarwal & Co., Chidambaram Mulraj & Co. Ltd. and Rajputana Textile (Agencies) Ltd. by separate letters. The shareholders of the respective companies also agreed for the transfer. Formal deeds of assignment and transfer were duly executed. It is in the above context that it was held that the remuneration or commission was given by the transferee company to the managing agents only on completion of a definite period of service. It was held that such remuneration constituted a debt only at the end of period of service and no remuneration or commission was payable to the managing agents for broken periods.

38. The above decision is of no assistance to the Assessees. In the first place

the entities involved in the above decision i.e. the managing agencies had been transferred from one company to another. The question of any right accruing only at the completion of a definite period which existed in the decision in *E.D. Sasoon & Co. Ltd. v. Commissioner of Income Tax* (*supra*) does not find place here. There is nothing to show that the Assessees would have to return the monies if they did not perform the services. In fact the agreement between the Trust and the UGHPL indicated that it is the Trust which is saddled with the responsibility of making good the losses.

39. The mere terming of the money received as 'advance' will not per se render the payment as such when in fact it admittedly was paid upfront as a lump sum amount on which TDS was been deducted as such for the period 1st January to 31st March 2006. The decision in *Commissioner of Income Tax v. Dinesh Kumar Goel* (*supra*) is distinguishable on facts. There the issue was about collecting fees from students for coaching classes, payable for two years at one point in time. There the Court noted that the amount had to be treated as refundable even though there was no clause as such since complaints could be filed in the consumer forum by the students. The spread over of the receipt over two years was specific to the facts of the case which involved a coaching institute offering courses for two years. There could be no comparison of those facts with the case on hand. Here the payments were irrevocable and non-refundable.

40. There is merit in the contention of the learned counsel for the Revenue that since admittedly no books of accounts were maintained by any of the three Assessees it had to be presumed that they followed the cash system of

accounting. In that view of the matter, the question of income accruing or the right to earn income accruing only upon the performance of a service at the end of a period would not arise.

41. As rightly pointed out by learned counsel for the Revenue, the matching principle or the application of AS-9 issued by the ICAI which deals with the principle of revenue recognition appear to apply only to companies and not individuals. Once it is clear that it is the cash system of accounting that is followed, the further question whether the sum received in one year could be spread over several years, and that too in the absence of any agreement at the time of such payment would not arise. The ITAT could not have overlooked the fact that the agreements produced before the CIT (A) regarding engaging the Assessee as hospital consultant was more than four years after the amount had been paid. Such agreements were not reliable pieces of evidence.

42. Mr. Rastogi repeatedly stressed that the proportionate income disclosed by each of the Assesseees in the years subsequent to the AY in question was in fact offered to tax and therefore, there cannot be a double taxation of the same amount.

43. While it may be true that the Assesseees had offered to tax in the later AYs the sum proportionate to the period of service, the fact remains that the entire sum was received upfront in the year in question and TDS was also deducted on that basis. The agreements purportedly entered into between each of the Assesseees and UGHPL was a document drawn up four years

after they received the entire remuneration upfront in December 2005. Consequently, the Court is of the view that the ITAT erred in concluding that the sum received in each of the AYs in question could be spread over five years on the basis of the subsequent agreements dated 15th June 2010 between the UGHPL and the Assesseees.

44. Significantly, what the Trust was being paid was only a monthly payment whereas over a sum of Rs.4 crores as lump sum payment was made to the Assesseees. The questions raised by the CIT (A) do not appear to have been satisfactorily answered by the Assesseees. In the facts and circumstances, the Court is of the view that the CIT (A) was right in affirming the order of the AO to the extent of bringing the entire amount received by the Assesseees to tax in the year in question.

45. For the aforementioned reasons the question framed is answered in the affirmative i.e. in favour of the Revenue and against the Assesseees.

Consequential directions

46. Mr. Rastogi then made an earnest plea for directions to be issued to the AO to take into account, while giving the appeal effect to this order, the fact that each of the Assesseees having paid tax on the proportionate income over the subsequent AYs.

47. From the side of the Revenue, a reference is made to Section 240 of the Act which reads as under:

“240. Refund on Appeal, etc. – Where, as a result of any order

passed in appeal or other proceeding under this Act, refund of any amount becomes due to the Assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the Assessee without his having to make any claim in that behalf:

Provided that where, by the order aforesaid,—

(a) an assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment;

(b) the assessment is annulled, the refund shall become due only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee.”

48. The Court would like to observe that although the Assessee may have offered the proportionate sum to tax in the subsequent AYs, it will not change the correct legal position that where accounts are maintained on cash basis and there is nothing to show that there was any agreement about spreading the income over several years, the entire amount received should be brought to tax in the year of the receipt. As regards the expenditure of the subsequent years, where it has actually been incurred, it should be allowed in that year. The question of allowing the expenditure of later years in the year under consideration does not arise. There is no question of any matching principle or application of AS-9 in this instance.

49. Section 240 of the Act does envisage a situation where an AO has to, while giving an appeal effect to the order of a Court, account for tax that may have been paid in the subsequent years. Nevertheless, the Court does not find any reason to interfere with the order of the CIT (A) to the extent

that he has disallowed expenditure at an estimated 35% beyond what has already been allowed in relation to the business income in the returns of the Assessees. There is indeed no basis for any estimation of expenditure with the Assessees not maintaining accounts and being unable to produce any vouchers or bills as proof of any expenditure.

50. Accordingly, the questions framed in the case of quantum appeals, i.e. ITA Nos. 653 of 2012, 19 of 2015 and 326 of 2015, are answered in the affirmative, i.e., against the Assessee and in favour of the Revenue. The ITAT's order is accordingly set aside and the order of the CIT(A) is sustained.

Penalty appeals

51. As far as the penalty appeals are concerned, since the CIT (A) set aside the penalties imposed by the AO only on the ground that the ITAT had deleted the addition, it is necessary for the Court as a result of setting aside the order of the ITAT to remand the appeals concerning the penalty issue to the file of the CIT (A).

52. Accordingly, the orders dated 22nd May, 2013 of the CIT (A) and later affirmed by the ITAT in the penalty proceedings, which are challenged in ITA Nos. 476/2014 and 21/2015 are hereby set aside and the penalty appeals are restored to the files of the respective CIT (A) for a fresh decision in accordance with law.

53. The appeals are disposed of in the above terms but in the facts and

circumstances with no order as to costs.

CM No. 8784/2015 in ITA 326/2015 (for condonation of delay of 574 days in re-filing the appeal)

54. Although the delay in re-filing the appeal is extraordinary, considering that this and the two connected appeals arise from a common impugned order of the Income Tax Appellate Tribunal ('ITAT'), the delay is condoned.

55. The application is allowed.

S.MURALIDHAR, J

NAJMI WAZIRI, J

AUGUST 03, 2016

dn

