214-2 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CWP No.10736 of 2018 (O&M)
Date of Decision: 27.08.2018

M/s Hometrail Estate Pvt. Ltd.

...... Petitioner

Versus

The State of Punjab and another

.... Respondents

CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL
HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Ashok Kumar Aggarwal, Senior Advocate with
Mr. Puneet Agrawal, Advocate and
Ms. Purvi Sinha, Advocate
for the petitioner.

Mr. Pankaj Gupta, Addl. A.G., Punjab.

RAJESH BINDAL J.

The petitioner has filed the present petition impugning the order dated 25.07.2017 (Annexure P-6) and assessment order dated 01.08.2016 (Annexure P-2) whereby the assessing authority has levied tax on the health care services provided by the petitioner to indoor patients in the hospital.

In support of the arguments, reliance has been placed upon a Division Bench judgment of this Court in *CWP Nos.1922 to 1924 of 2012* titled as '*M/s Fortis Health Care Limited and another vs. State of Punjab and others*' in which identical issue has been decided and this Court has opined that the medicines in the health care services provided to the indoor patients is not taxable as the amount charged cannot be bifurcated to cull out amount of sale of medicines, even if the amount is separately charged for pharmacy, laboratory services, implants services provided by the doctors as it is a composite medical service provided.

On the other hand, learned counsel for the State while not disputing the judgment referred to this Court in *M/s Fortis Health Care Limited's case (supra)* submitted that the State has preferred Special Leave Petition against the aforesaid before Hon'ble the Supreme Court which is still pending and there are contrary views taken by the Kerala High Court in '*Malankara Orthodox Syrian Church vs. Sales Tax Officer*' (2004) 135 STC 224 (Ker). However, he could not point out that there is any interim stay granted by Hon'ble the Supreme Court regarding the operation of the judgment delivered by this Court.

After hearing learned counsel for the parties and considering the contentions raised, in our view, the present petition deserves to be allowed while setting aside the order of assessment dated 01.08.2016 (Annexure P-2) as the same is squarely covered by the judgment of Division Bench of this Court passed in *M/s Fortis Health Care Limited's case (supra)*. While deciding *M/s Fortis Health Care Limited's case (supra)*, this Court had followed the judgment of Jharkhand High Court passed in '*Tata Main Hospital vs. The State of Jharkhand*', 2008 (2) JCR 174 (Jhr.), against which Special Leave Petition was dismissed. Relevant paras from judgment of this Court in *M/s Fortis Health Care Limited's case (supra)* are extracted below:-

> “We have considered the relevant statutory provisions of the Punjab and Haryana Statutes, the Bihar Finance Act, the Uttar Pradesh Act, the judgment of the Jharkhand and Allahabad High Courts, judgments of the Kerala High Court (cited by the respondents) are in respectful agreement with the

opinion recorded by the Jharkhand High Court and the Allahabad High Court and find no reason to record a contrary opinion or to hold that the supply of medicines, drugs, stents, implants etc. to a patient during a medical procedure inhers any element of sale, much less sets out the ingredients of a 'sale'. The power to impose sales tax/VAT flows from Entry 54 of List II of Schedile VII and Article 366(29-A) of the Constitution, the latter assigning the status of a deemed sale to transactions where one or the other element of sale is missing, but where the element of sale is altogether missing and the transaction does not fall within any of the clauses of Article 366(29-A) of the Constitution of India, a State shall not be empowered to levy of value added tax on such a transaction. For the purpose of attracting VAT, a transaction or a part thereof, which is essentially a service would have to qualify as a sale within the meaning of Sales of Goods Act, 1930 or the definition of sale. The fiction of a deemed sale applies only to such situations as would fall within the sub-clauses of Article 366(29-A) of the Constitution of India which permit severance of the service element from the sale element and empowers the State to tax the element of sale. A perusal of Article 366(29-A) of the Constitution of India does not enable us to record an opinion that it covers services provided by hospitals. Before such a transaction is put to tax, whether under the Haryana or Punjab VAT Act, it would have to satisfy the dominant nature test by reference to the substance of the contract. A contract for medical treatment necessarily involves medicines, supply of surgical items, stents, implants, valves, without which a medical procedure or medical treatment cannot be completed. The supply of these articles as held by the Allahabad and the Jharkhand High Courts are integral to and essential for the treatment offered to patients and even if one may categorize these as incidental to the actual medical procedure, one cannot but ignore that a medical procedure cannot be completed without supply of medicines, drugs, stents, implants, thereby leading to a singular conclusion that the State is not empowered under any provision of the Constitution much less the definition of goods, sale or dealer, to severe the contract and construe the supply of drugs, medicines, stents, implants etc. as a severable part of the contract and, therefore, exigible to VAT, as a sale. The situation would obviously be different if these articles are supplied from the pharmacy of a hospital.

A deeming fiction, must be rational and not farcical. The dominant purpose of a hospital is to provide medical treatment and if during a medical procedure it is required to provide medicines, stents, implants etc., it cannot by a deeming fiction be held to be a “sale”. A patient may have a choice as to the quality of implant/stent but even that choice is confined to the suitability of a stent etc. The fact that a hospital may charge money for individual stents etc., whether as part of a package or separately is entirely irrelevant. A contract of medical service cannot be said to be a contract for sale of a stent, or valve or of medicines to be used in a medical/surgical procedure. The essential element of such a contract is the procedure of knee replacement, hip replacement, angioplasty, which as an intrinsic and integral part involves placing an implant whether in the knee, hip or a heart etc. The only choice available to the patient is the nature of the implant, namely, its quality but such a procedure is admittedly, a medical procedure and a service that cannot be completed without an implant/drugs and medicines as an integral part of the procedure. A private hospital does not provide medical services for free. The fact that it charges money, for drugs, medicines etc. cannot raise an inference of intent to sell goods in the shape of medicines, stents, implants etc. We are, therefore, in complete agreement with the opinion recorded by the Jharkhand High Court in ***Tata Main Hospital***(supra) and the Allahabad High Court in ***M/s International Hospital Pvt. Ltd. v. State of U.P. And two others***.

An argument that the definition of "sale" under the Bihar and the Uttar Pradesh Acts, is entirely different, must also fail. A perusal of the definition of sale in the Bihar and the Uttar Pradesh Statutes reveals that this argument has apparently been raised by disregarding the definition of sale in these statutes which are essentially identical to the definition of sale of the present statute.

We therefore, have no hesitation in holding that medical procedures/services offered by the petitioners are a service. The supply of drugs, medicines, implant, stents, valves and other implants are integral to a medical services/procedures and cannot be severed to infer a sale as defined under the Punjab or the Haryana Act and therefore, are not exigible to value added tax."

The contentions raised by learned counsel for the State regarding judgment of Kerala High Court is totally misconceived for the reason that in *M/s Fortis Health Care Limited's case (supra),* Division Bench judgment of this Court had already been considered even the aforesaid judgment.

In the writ petition, number of other legal issues have also been raised. As the claim made by the petitioner is squarely covered by the judgment of this Court, we need not to go into the other issues. The same are left open to be considered in any appropriate case.

The writ petition stands allowed.

(RAJESH BINDAL)
JUDGE

(AMIT RAWAL)
JUDGE

27.08.2018
rittu

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No