

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.1425 OF 2016

Commissioner of Income Tax-TDS-2, Mumbai. ... Appellant

V/s.

Saifee Hospital Trust

... Respondent

Mr.Suresh Kumar for the Appellant.

Ms.Aasifa Khan for the Respondent.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.**

DATE : MARCH 6, 2019.

P.C.:-

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 16th September, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). This Appeal relates to Assessment Year 2011-12.

2. The Revenue urges the following questions of law for our consideration:

“(1) Whether, on the facts and in the

circumstances of the case and in law, the ITAT is correct in holding that the Payment made to M/s Monginis Hospitality Services Pvt. Ltd. Are payments for work contract covered u/s 194C and not fees for technical services u/s 194J, without appreciating that the services received by assessee are technical and managerial in nature?

(2) Whether, on the facts and in the circumstances of the case and in law, the ITAT was correct in accepting the claim of the assessee that tax was deductible under section 194J on payment made to full time Doctors and not under section 192 of the I.T.Act without appreciating the facts that the appointment letter created employer employee relationship and hence TDS should be deducted u/s 192 of the Act?

(3) Whether on the facts and in the circumstances of the case and in law, the ITAT was correct in accepting the claim of the assessee that tax was not deductible on 75% of actual payments made to the Doctors u/s 194J of the Act as only 25% of the total amount paid by the patient were routed through the Hospital and 75% of the actual payment were recovered directly from the patient by the Doctors?

(4) Whether on the facts and in the circumstances of the case and in law, the ITAT was correct in deleting the demand u/w 201(1A) of the Act without appreciating the fact that in the case of Hindustan Coca Cola Beverage Pvt. Ltd. It was clearly mentioned that “this will not alter the liability to charge interest under Section 201(1A) of the Act till the date of payment of taxes by the deductee-assessee?

(5) Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in rejecting the order of the Assessing Officer by holding that the assessee is not in default u/s 201(1) in respect of the amount of tax which has

not been deducted from the payments made under the required sections and that the assessee is not liable for levy of interest under section 201(1A)?”

3. Re.Question No.1 :-

(a) The impugned order of the Tribunal records the fact that the respondent was receiving services for cooking of food and supply of work force to serve the food from M/s Monginis Hospitality Services Private Limited (M/s Monginis). The respondent-assessee had deducted tax at source under Section 194C of the Act on the payments made to M/s Monginis for services of the catering rendered by it.

(b) The Assessing Officer held that services of catering rendered by M/s Monginis is technical service and therefore, deduction of tax at source by the respondent has to be under Section 194J of the Act. However, in appeal both the Commissioner of Income Tax (Appeals) (CIT(A)) as well as the Tribunal on facts have come to finding that the services rendered by M/s Monginis of cooking and serving food would fall within the definition of "work" provided under Section 194C of the Act. Thus, the tax has been properly deducted at source by the respondent.

(c) The concurrent finding of fact rendered by the CIT (A)

and the Tribunal that service of cooking does not include any technical service, is not shown to be perverse.

(d) In the above view, no fault can be found with the impugned order of the Tribunal. Therefore, this question of law as proposed does not give rise to any substantial question of law. Thus, not entertained.

4. Re.Question No.2 :-

(a) It is an agreed position between the parties that this issue stand covered in favour of the respondent-assessee by the decision of this Court in case of **Commissioner of Income Tax (TDS)-I Vs. Asian Heart Institute (ITXA No.1294/2016)**. In the above case, a similar issue raised by the Revenue came to be dismissed by a speaking order dated 5th March, 2019. No distinction in facts and/or law has been pointed to us in the present case from that existing in the above case of **Asian Heart Institute (supra)**, which would warrant our taking different view in this matter.

(b) Accordingly, this question as proposed does not give rise to any substantial question of law, as it stand concluded by the

decision of this Court. Hence, not entertained.

5. Re-Question No.3 :-

(a) The Assessing Officer held that the respondent is liable to deduct tax under Section 194J of the Act in respect of payments made directly by the patients to the consultant doctors working in the hospital.

(b) In appeal the CIT (Appeals) found that there is no record to show that hospital had credited any amount of the fees in the account of doctors or made payment to the doctors. Thus, the CIT (A) held that in absence of any tangible evidence and material to show that the respondent had either credited or paid the amount to the doctors, no requirement to deduct tax on the above fees under Section 194J of the Act arises. Therefore, it directed the Assessing Officer to delete the addition made on account of non-deduction of tax at source under Section 194J of the Act.

(c) On further appeal by the Revenue the Tribunal also independently found that there is no tangible evidence and material on record to show that any amount of fees was credited

in the doctors' account or paid to the doctor by the assessee. Thus, dismissed the revenue's appeal.

(d) We note that in the face of concurrent findings of fact that there is no evidence of crediting or making payments to the doctors by the respondent-assessee, no liability for deduction of tax under Section 194J of the Act at the hands of the respondent-assessee can arise. This in the absence of the finding of fact being shown to be perverse.

(e) In the above view, this question as proposed also does not give rise to any substantial question of law. Thus, not entertained.

7. Re.Question Nos.4 and 5:-

(a) These questions are consequential to question Nos. 1 to 3. However, as question Nos. 1 to 3 had been answered in favour of the respondent-assessee, these questions become academic in the present facts. Thus, not entertained.

8. In the result, income tax appeal is dismissed. No order as to costs.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)