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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL No.105 of 2016.
WITH
INCOME TAX APPEAL No.116 of 2016.
WITH
INCOME TAX APPEAL No. 112 of 2016.
WITH
INCOME TAX APPEAL No. 115 of 2016.
WITH
INCOME TAX APPEAL No. 121 of 2016.
WITH
INCOME TAX APPEAL No. 128 of 2016.

Pr. Commissioner of Income-tax (TDS)2,
Smt. K.G.Mittal Ayurvedic Hospital Bldg.
Charni Road, Mumbai 400 002.

..APPELLANT.

Vs

National Health & Education Society
(P.D.Hinduja Hospital & Medical
Research Centre), Veer Savarkar Marg
Mahim, Mumbai 400 016
PAN AAATN 0093 Q

..RESPONDENT.

Mr. Suresh Kumar for the Appellant in all the Appeals.
Mr. S.C. Tiwari a/with Ms. Rutuja Pawar for Respondent in all
Appeals.

**CORAM : S.C.DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

RESERVED ON :-26th September, 2018.
PRONOUNCED ON :- 22nd February, 2019

JUDGMENT : [PER B. P. COLABAWALLA, J.]

1. All these Income Tax Appeals have been filed under Section 260A of the Income-tax Act, 1961 (for short **“I.T. Act”**) challenging the orders dated 6th February, 2015 and 10th February, 2015 passed by the Income Tax Appellate Tribunal, Mumbai (for short **“the ITAT”**). By the impugned orders, the Tribunal dismissed the appeals filed by the revenue and partly allowed the appeals filed by the assessee. It is being aggrieved by these decisions of the ITAT that the revenue is in appeal before us.

2. Mr. Suresh Kumar, the learned Advocate appearing on behalf of the revenue, submitted that in ITXA No.105 of 2016, ITXA No. 128 of 2016 and ITXA No.115 of 2016 four questions of law arise for our consideration which read as under :-

- (a) “Whether on the facts and in the circumstances of the case and in law, the ITAT was correct in not treating the Hospital Based Consultants (HBCs) as employees and therefore provisions of Section 192 is not applicable?
- (b) Whether on the facts and in the circumstances of the case and in law, the ITAT was correct in holding that payment made to Hinduja TMT/Hinduja Global Solutions Ltd., TDS is required to be deducted under Section 194C and not under Section 194J of the Act?
- (c) Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in holding that drug handling charges paid by the assessee are covered under Section 194C for the purpose of TDS without appreciating that these charges are commission liable for TDS under section 194H?
- (d) Whether on the facts and in the circumstances of the case and in law, the ITAT was correct in holding that the payment made to the employees of Hinduja Foundation who had worked with the assessee for rendering various services is to be treated as reimbursement and not as payment towards professional fee instead of ITAT treating it as a reimbursement of expenditure and TDS was required to be deducted under Section 194J?

3. As far as ITXA No.116 of 2016 and ITXA No.121 of 2016 are concerned, Mr. Suresh Kumar submitted that over and above, the above mentioned four questions, an additional question arises for our consideration and which reads thus :-

- (e) Whether on the facts and in the circumstances of the case and in law, the ITAT was correct in holding that the

orders passed by the Assessing Officer under Section 201 (1) for the Financial Year commencing on 1st April, 2007 and earlier years are time-barred without appreciating that as per the proviso to sub-section 3 of the Section 201 and as per CBDT's Circular No.5/2010 dated 3/6/2010, the time limit for passing such orders is 31/3/2011?

4. As far as ITXA No.112 of 2016 is concerned, Mr. Suresh Kumar submitted that the questions that arise for our consideration in this appeal are Questions (a), (c), (d) and (e) respectively. Since it is agreed that common questions of fact and law arise in all these appeals, they are being disposed of by this common judgement. For the sake of convenience, we shall refer to the facts in ITXA No.105 of 2016.

5. It is the case of the revenue that in this case a survey under Section 133A of the I. T. Act was conducted on 4th October, 2010 for verification of proper TDS compliance by the assessee - deductor. During the survey, the statement of Shri Deepak Samant, Director (Finance) was recorded on oath under Section 131 of the I. T. Act. As a result of the aforesaid survey and after it was carried out, proceedings under Section 201(1) of the I. T. Act were initiated and the assessee was required to show cause as to why it should not be treated as an assessee in default in respect of certain payments.

In reply to the aforesaid show cause notice, the assessee furnished its reply and various details as required by the Assessing Officer. After considering all the material, the Assessing Officer passed his order dated 24th March, 2011 under Section 201 (1A) of the I.T. Act holding the assessee to be in default on certain counts and accordingly raised a demand for tax against the assessee.

6. The Assessing Officer inter alia held that the Hospital Based Consultants (HBCs) were employees of the assessee and therefore tax was required to be deducted under Section 192 of the IT Act. The Assessing Officer further held that payments made to Hinduja TMT/Hinduja Global Solution Ltd. required deduction of TDS under Section 194J and not under Section 194C of the Act. Since the assessee had deducted tax under Section 194C, the Assessing Officer brought the difference to tax. Thereafter, the Assessing Officer further held that the drug handling charges paid to M/s Saxsons Biotech, the assessee ought to have deducted TDS under Section 194H. The Assessing Officer came to this conclusion because he was of the opinion that M/s Saxsons Biotech had acted as an agent of the assessee and was paid a commission for that purpose. It is on all these counts, the Assessing Officer passed the assessment

order dated 24th March, 2011 under Section 201(1) and the order dated 28th September, 2011 under Section 201 (1A).

7. Being aggrieved by these actions of the Assessing Officer, the assessee filed an appeal before the Commissioner of Income-tax (Appeals) [for short **“CIT (Appeals)”**]. The learned CIT (Appeals), vide his order dated 30th March, 2013, partly allowed the appeal of the assessee for statistical purposes.

8. Being aggrieved by the order of the CIT (Appeals), the revenue as well as the assessee, filed cross appeals before the ITAT. After hearing the parties, the ITAT by its order dated 6th February, 2015 dismissed the appeal of the revenue and partly allowed the appeal of the assessee. It is in these circumstances that the revenue has filed the present appeals before this Court under Section 260-A of the I.T. Act, challenging legality and validity of the impugned orders and raising the questions of law as reproduced by us earlier.

9. In this factual backdrop, Mr. Suresh Kumar, the learned Advocate appearing on behalf of the revenue, submitted that the ITAT had completely gone wrong in not treating the Hospital Based

Consultants (HBCs) as employees of the assessee. He submitted that the Assessing Officer as well as the CIT (Appeals) had taken note of the salient features of the terms of the employment of these Consultants and after taking these features as well as the other terms of the employment into consideration, came to the conclusion that such HBCs would fall in the category of employees of the assessee, though it can be said that they are in the category of fixed period / part time contract employees of the assessee. This being the case, Mr. Suresh Kumar submitted that it was clear that the relationship between the HBCs and the assessee was purely that of an employer and an employee and that remuneration paid to them as a result of the said relationship was in the nature of “salary” which would attract the provisions of Section 192 of the Act.

10. Similarly, Mr. Suresh Kumar submitted that the ITAT had completely gone wrong in holding that the payments made to Hinduja TMT/Global Solution Ltd, TDS was required to be deducted under Section 194C and not under Section 194J of the Act. Mr. Suresh Kumar submitted that the payments were made to these two entities Hinduja TMT/Global Solution Ltd., towards call centre expenses, etc. and would therefore clearly be fees for professional or

technical services and therefore deduction of TDS had to be done under Section 194J and not under Section 194C of the I.T. Act. In support of this proposition, Mr. Suresh Kumar relied upon the observations of the Assessing Officer.

11. Thereafter, Mr. Suresh Kumar further submitted that the ITAT had also erred in holding that for the drug handling charges paid by the assessee, TDS was correctly deducted under Section 194C of the I.T. Act. He submitted that the ITAT failed to appreciate that the charges paid to Saxson Biotech were charges in the nature of a commission and therefore TDS was liable to be deducted under Section 194H and not under Section 194C of the I.T. Act.

12. Similarly, Mr. Suresh Kumar submitted that the payments made by the assessee to the Hinduja Foundation was in the nature of payment made for professional fees and therefore required deduction of TDS under Section 194J. He submitted that the CIT(A) and the ITAT had completely gone wrong in coming to the conclusion that these payments were in the nature of reimbursements. For all the aforesaid reasons, Mr. Suresh Kumar submitted that substantial questions of law arise for our

consideration (and as reproduced above) and therefore the appeals be allowed and the impugned orders passed in all the above appeals be set aside.

13. On the other hand, Mr. Tiwari, the learned Advocate appearing on behalf of the assessee took us through the impugned orders and submitted that the ITAT correctly analysed all the provisions and thereafter came to the conclusions that it did. He submitted that as far as Question (a) is concerned, the same is fully covered by a decision of this Court in the case of the **Commissioner of Income-tax (TDS), Pune vs. Grant Medical Foundation (Ruby Hall Clinic) [ITXA No.140 of 2013 decided on 22nd January, 2015]**. As far as Questions (b), (c) and (d) are concerned, he submitted that no substantial question of law arises since the findings in relation thereto were purely factual in nature. The ITAT is the last fact finding authority and unless it is shown that these findings (based on the facts) of the ITAT are completely perverse, there is no occasion for any substantial question of law arising therefrom. In this regard, Mr. Tiwari took us through the findings given by the ITAT and urged that all these findings are based purely on facts which required no interference and certainly did not suffer

from any perversity which in turn would give rise to any substantial question of law. As far as Question (e) is concerned, Mr. Tiwari submitted that considering the findings given by the ITAT, this question has become purely academic which need not be considered by us in this case and could be kept open to be considered in an appropriate case where the issue would be alive and would have a direct bearing on the outcome of the case. For all the aforesaid reasons, Mr. Tiwari submitted that all the above appeals therefore do not give rise to any substantial question of law and consequently, all the appeals be dismissed.

14. We have heard the learned Counsel for the parties at length and we have perused the papers and proceedings in these appeals as well as the impugned orders. We shall discuss each question separately.

Re: Question (a) :-

15. As far as Question (a) is concerned, we find considerable force in the argument canvassed by Mr. Tiwari that the same is squarely covered by a Division Bench decision of this Court. We find

that a Division Bench of this Court in the case of **Commissioner of Income-tax (TDS Pune) (ITXA No.140 of 2013) (supra)** and to which one of us was a party (S. C. Dharmadhikari, J), was considering whether the Tribunal was correct in holding that there exists no relationship of employer and employee between the assessee - Grant Medical Foundation (Ruby Hall Clinic) and the Consultant doctors employed in the hospital. After perusing the law on the subject, this Court answered the aforesaid question in favour of the assessee and against the revenue. We find that as far as Question (a) is concerned, the same has been answered against the revenue and in favour of the assessee as per the judgment delivered by this Court in the case of **Commissioner of Income-tax (TDS Pune) (ITXA No.140 of 2013) (supra)**. In fact, when this judgment was brought to the notice of Mr. Suresh Kumar, he fairly conceded that Question (a) would be covered by this decision. This being the case, in our opinion, Question (a) does not give rise to any substantial question of law.

Re: Question (b):-

16. As far as Question (b) is concerned, we find that the CIT

(Appeals) examined the payments made to Hinduja TMT/Global Solution Ltd. towards call centre expenses. The CIT (Appeals) noted that the work done by these two entities includes primarily providing the customer information pertaining to the hospital and fixing appointments. The appointment list contains the names of various Departments/Consultants. The call centre gives appointments and also gives instructions to callers, if any. HTMT Global Solutions also gives information about the clinics, labs, blood bank, report availability, home services, ambulance services, admission and billing, hospitality and general enquiry etc. For all this, Hinduja TMT/Global Solution Ltd., raise an invoice on a monthly basis as per the terms of the contract. While examining all this material, the CIT (Appeals) came to the conclusion that from all these activities it was evident that the services involved were not of a technical or professional nature. He therefore took the view that these services were in the nature of a 'works contract' and accordingly deleted the demand of tax raised by the Assessing Officer under Section 201 (1) on merits. In other words, the CIT (Appeals) held that for the payments made by the assessee to Hinduja TMT/ Hinduja Global Solution Ltd., TDS was correctly deducted by the assessee under Section 194C of the I.T. Act.

17. In paragraph 12.1 of the impugned order dated 6th February, 2015, the ITAT noted the findings given by the CIT (Appeals). Thereafter, in paragraph 13.1, the ITAT gave its opinion that the activities carried out by both the aforesaid entities, namely, Hinduja TMT/Hinduja Global Solutions Ltd., do not fall under the head 'technical or professional services'. In these circumstances, the ITAT held that the CIT (Appeals) was fully justified in holding that TDS was correctly deducted under Section 194C of the Act. The ITAT held that it did not find any legal infirmity in the order passed by the CIT (Appeals) and therefore upheld his order on this count.

18. On going through the findings given by the CIT (Appeals) as well as ITAT, we find considerable force in the argument canvassed by Mr. Tiwari that these findings are purely factual in nature. It is after examining the record that the CIT (Appeals) as well as ITAT came to the conclusion that the services that were rendered by these two entities were not of a technical or professional nature that would require deduction of TDS under Section 194J. The CIT (Appeals) specifically came to the conclusion that the contract between the assessee and these two entities was in the

nature of a 'works contract' and therefore the deduction of TDS under Section 194C was correctly done by the assessee. In these circumstances, we do not find that these factual findings suffer from any perversity that would give rise to any substantial question of law. In these circumstances, we find that Question (b) also does not give rise to any substantial question of law requiring for our consideration.

Re: Question (c):-

19. Question (c) is regarding Drug Handling Charges paid by the assessee to M/s Saxsons Biotech. On this issue the CIT (A) noted the relevant material. The CIT (Appeals) noted that M/s Saxsons Biotech arranges a particular drug, which is not ordinarily available in the market. It is a radioactive material required in nuclear medicine treatment. It is supplied to the assessee at a particular price. The charges invoiced by the supplier includes the cost of material, freight charges, customs duty, the clearing & forwarding charges, delivery charges etc. The invoice raised by M/s Saxsons Biotech consist of two parts, one is of actual cost of the material supplied and the other is for the service charges on which tax is

deducted under Section 194C. After noting all these facts, the CIT (Appeals) held that the assessee had correctly deducted TDS under Section 194C. These findings are confirmed by the ITAT.

20. On going through the findings given by the CIT(A) as well as the ITAT on this issue, we are fully satisfied that in the facts of the present case, the assessee correctly deducted TDS under section 194C. We find that in the present case there was no question of payment of any commission to Saxsons Biotech which supplied the radioactive drug used by the assessee in Nuclear Medicine Treatment. The facts and as recorded by the authorities below would clearly show that the drug supplied by Saxsons Biotech to the assessee was invoiced by Saxsons Biotech in the manner set out earlier. This being the case, there was no question of such a payment being in the nature of commission that would require deduction of TDS under Section 194H of the I.T. Act. We are therefore clearly of the view that Question (c) also does not give rise to any substantial question of law requiring our consideration.

Re: Question (d) :-

21. Question (d) basically relates to payments made to Hinduja Foundation for its employees who had rendered services to the assessee in key managerial positions. It was the case of the assessee that these payments are to be treated as a reimbursement and not as payment towards professional fees which would require TDS to be deducted under Section 194J of the I.T. Act. The CIT (Appeals) noted that the Hinduja Foundation charges the salaries (and other allowances) to the assessee on actual basis and there is no further markup (either as a percentage of such charges or otherwise) paid by the assessee to the Hinduja Foundation. The personnel deputed by the Hinduja Foundation to the assessee are all highly qualified persons who are deputed to man senior management positions of the assessee - hospital. These highly qualified persons are paid by the Hinduja Foundation and it is to reimburse the Foundation that payment is made by the assessee - hospital. The fact that the Hinduja Foundation charges only the actuals from the assessee can be appreciated because Hinduja Foundation is also a trust. Looking to these facts, the CIT (Appeals) came to the conclusion that the payments made by the assessee to the Hinduja Foundation in respect of the persons deputed by it to the assessee - hospital, are not in the nature of 'fees for professional

services' but was in the nature of pure reimbursement. On this issue, the ITAT also agreed with the findings given by the CIT (Appeals). The ITAT noted that the CIT (Appeals) after considering the order passed by the Assessing Officer, the submissions of the assessee and the nature of services carried out by the service providers, held that payments made to the Hinduja Foundation was towards reimbursing the salaries of Senior Management Personnel deputed by Hinduja Foundation to the assessee - hospital. All these personnel were on the pay-roll of the Hinduja Foundation and they got all the benefits from the Foundation. In turn, the Foundation raised a debit note towards actual cost of employment and accordingly the assessee made the payments to the said Foundation and which was therefore clearly in the nature of reimbursement. It was in these circumstances, and after hearing the parties and perusing the material on record, the ITAT concurred with the findings of the CIT (Appeals). In these circumstances, the ITAT opined that the payments made by the assessee to the Foundation were not in the nature of fees for technical services and therefore confirmed the order passed by the CIT (Appeals).

22. On going through the findings given by the CIT (Appeals)

as well as the ITAT on this issue, we find that both the authorities below have given their findings on the basis of facts presented before them. We find that the authorities below are fully justified in coming to the conclusions that they did, namely, that the payments made by the assessee to the Foundation was in the nature of reimbursement and not in the nature of any technical or professional services which required deduction of TDS under Section 194J of the I.T. Act. This being the case, Question (d) also does not give rise to any substantial question of law that would require our consideration.

Re Question (e):-

23. Question (e) is regarding whether the ITAT was correct in holding that the orders passed by the Assessing Officer under section 201 (1) for the Financial Year commencing from 1st April, 2007 and earlier years are time- barred without appreciating that as per the said provisions and as per the Circular of CBDT dated 5/2010, the time-limit for passing such orders was 31st March, 2011. Considering the answers that we have already given to Questions (a) to (d) above, and considering that TDS was deducted under the correct provisions of the I.T. Act, this question really becomes

academic in the facts of the present case. We, therefore, do not propose to give any finding on this question and leave it open to be considered in an appropriate case.

24. In view of the aforesaid discussion, all the appeals are dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B . P. COLABAWALLA, J)

(S. C. DHARMADHIKARI, J)