IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, BANGALORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

ITA Nos.572, 575 & 576/Bang/2014
(Assessment years: 2011-12, 2012-13 & 2013-14)

M/s.Hosmat Hospital Pvt. Ltd.,
No.45, Magrath Road,
Bangalore-560025. … Appellant
PA No.BLRD 01116D

Vs.

Asst. Commissioner of Income-tax (TDS),
Circle 18(1),
Bangalore. … Respondent

AND

ITA Nos.879, 880 & 881/Bang/2014
(Assessment years: 2011-12, 2012-13 & 2013-14)

Asst. Commissioner of Income-tax (TDS),
Circle 18(1),
Bangalore-. … Appellant

Vs.

M/s.Hosmat Hospital Pvt. Ltd.,
Bangalore. … Respondent

Assessee by : Shri S.Annamalai, Advocate.
Revenue by : Shri Sunil Kumar Agarwal, JCIT(DR)

Date of hearing : 13/07/2016
Date of pronouncement : 11/08/2016

O R D E R

Per BENCH :

These are cross appeals filed by the assessee-company as well as the revenue against the consolidated order of the

CIT(A)–V, Bangalore, dated 14/02/2014 for the assessment years 2011-12, 2012-13 and 2013-14 arising out of orders passed by the Asst. CIT(TDS), Circle 18(1), Bangalore [hereinafter referred to as 'TDS Officer'] u/s 201(1) and 201(1A) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short].

2. Briefly, facts of the case are as under: The assessee is a company engaged in the business of health-care. The TDS officer conducted survey operations on 25/02/2013 under the provisions of sec.133A of the Act with the intention of verifying TDS compliance by the assessee-company. During the course of such survey operations, it was found that the assessee-company is employing three categories of Doctors viz., salaried Doctors, In-house Consultants and Visiting Consultants. It was also found that the assessee-company has been deducting tax at source in respect of In-house Consultants and Visiting Consultants under the provisions of sec.194J of the Act. The TDS Officer also found agreements entered into by the assessee-company with the Consultant Doctors. The TDS officer, thereafter, noticing the following clauses in agreements had come to conclusion that TDS is required to be deducted u/s 192 of the Act:

i. Consultant doctors to act in the best interest of HOSMAT at all times and undertakes to observe all reasonable directions of HOSMAT diligently and faithfully.

ii. Consultant doctors have to make available such information as the MD may require in order that the he may evaluate and assess services.

iii. Material failure to meet the requirements of any specification set out in schedule 1 after having been given a reasonable opportunity to correct, will entitle HOSMAT to reject such part of the services and, at HOSMAT's discretion, to terminate this agreement

iv. Consultant doctor undertakes that she/he will not engage in any other work/business/service or carry out any other assignment or work in any other medical institution, hospital, nursing home or clinic while rendering professional services at HOSMAT without prior written consent / permission from HOSMAT.

v. A consultant doctor agrees to work for a minimum period of 5 years from the date of joining the organization. If Consultant doctors decide to leave the organization within 5 years, then the Consultant doctors will not work in Bangalore District for 2 years from the date of leaving.

vi. HOSMAT at its sole discretion is entitled to waive any term or envisaged in this agreement.

vii. Remuneration of Rs.60,000/-per month and incentives will be paid as per company policy(amount above is in case of consultant Dr. Somanna M S, and the amount various from doctor to doctor).

viii. **Consultant doctors will be governed by the rules and regulations of service, conduct rules, discipline and the standing order of HOSMAT** for its consultants which are in force now or as may be amended, altered, extended or established from time to time and Consultant's acceptance of this offer, carries with it consultant's agreement to obey all such rules, regulations and standing orders.

ix. Consultant doctors shoulders the responsibility of teaching as well. The appropriate details pertaining to teaching will be given on date of reporting.

x. In addition to above HOSMAT may ask to render appropriate administrative duties as well.

xi. Working hour for the Consultant doctors is from 7.30AM to 5.30PM

The TDS Officer also found that the agreements entered into with Salaried Doctors by the assessee-company, also contained similar terms and conditions which govern the employment of consultant doctors. Therefore, he concluded that consultant doctors are also salaried employees of the assessee-

company and thus held the assessee-company in default for not deducting tax at source u/s 192 of the Act. The TDS officer also charged interest under the provisions of section 201(1A) of the Act apart from tax liability u/s 201(1) of the Act. He, thus passed an order demanding the assessee-company to pay tax as under:

FY	AY	201	Interest 201(1A)	Total
2010-11	2011-12	92,13,596/-	36,86,101/-	1,28,99,697/-
2011-12	2012-13	65,36,668/-	22,54,711/-	87,91,379/-
2012-13	2013-14	1,82,15,782/-	14,57,263/-	1,96,73,045/-

3. Being aggrieved, an appeal was preferred before the CIT(A), who, after considering the following clause of the said agreement, concluded that consultant doctors are the employees of the assessee-company as under:

(a) The consultant agrees to provide the relevant services with reasonable skill and care to the satisfaction of HOSMAT, and as per terms of this agreement, to act in the best interest of Hosmat at all times and observe all directions diligently and faithfully, and to make available such information as the MD may require in order to evaluate and assess services.

(b) The consultant undertakes that he/she shall not engage in any other work/business/service or carry out any other assignment or work in any other medical institution, hospital, nursing home or Clinic, while rendering professional services at Hosmat, without prior written consent/permission from Hosmat.

(c) In consideration to the services provided to Hosmat by the consultant, Hosmat will pay the professional and technical fee as envisaged in Schedule 1.

(d) Nothing in this agreement shall be interpreted as meaning that the consultant is an employee of HOSMAT, and therefore not entitled to any pension, gratuity or other fringe benefits from Hosmat.

(d) The consultant has agreed to work for a minimum period of 5 years from the date of joining the organization.

4.3 **Schedule 1** forming part of the agreement states the **remuneration at Rs. 60,000/- per month**, and incentives as per company policy. Description of services are mentioned to be enclosed but has not been submitted. The special conditions mentioned in the schedule, also refers to the mandatory medical fitness for which the tests will be carried out by HOSMAT. The **appointment** will be subject to satisfactory verification of character, age, educational and professional credentials. Further, the consultant shall be governed by the Rules and regulation of service, conduct rules, discipline and standing order of the Hosmat. The consultant shall also shoulder responsibility of teaching for which details will be given by HOSMAT. The consultant may be asked to render appropriate administrative duties as well, in addition to the above duties, and will attend court as and when required to adduce evidence pertaining to Motor vehicle cases claims and other medico-legal cases. The working hours shall be 7.30 am to 5.30 pm. In emergencies, the consultant shall be available on call, as specified in the call duty register. Another letter dated 7.9.2012 issued to Dr. Somanna provides for incentives payable to her on elective surgeries before 5 pm/after 5 pm, emergency cases etc. as a percentage of surgeon's fees. *(emphasis supplied)*

However, in respect of visiting doctors, the CIT(A) held that professional fees paid to them is liable for deduction of tax at source only under the provisions of sec.194J of the Act by holding as under:

9. However, what is true for the 'in-house consultant doctors' in the case of appellant, may not be applicable for the 'visiting doctors' who may not have entered into an agreement with the appellant for a monthly remuneration for the 7.30 am to 5.30 pm hospital duty, and are not under the service rules and regulations of the appellant hospital. In the submission dated 17.1.2014, letter dated 17.8.2006 addressed to Dr. Shayeeb C.N., Consultant Orthopedic Surgeon has been filed which states that the appellant hospital offers visiting and operation facilities to him, and that the entire consultation fees will be paid 100% at the end of the month, after the amount is collected from the patient. Although no evidence has been filed with regard to the 20 doctors identified as Visiting doctors during FY 2011-12, in terms of agreement or arrangement, it is common knowledge that senior doctors and specialists are on the panel of visiting doctors of a hospital who are engaged for special procedures, such as neuro-surgeons or a plastic or reconstructive surgeon, on a case to case basis, on the

request of the patient or requirement of the treating hospitals. Due to the nature and specialization, or the experience and expertise, such doctors prefer to work as free-lancers, catering to the medical requirements of more than one hospital. They may not be required to do routine duty at a given hospital and are not on monthly remuneration, though may receive monthly retainer ship in some cases, however, their fees are related to the patient and treatment to the specific patients. They are certainly not bound by the service rules of any particular hospital, and are not under their control and supervision. Payments by the hospital to such visiting doctors could not be said to be in the nature of salary requiring deduction of tax u/s 192. The assessment orders do not bring out the differences or uniformity in terms of engagement of the visiting doctors and the basis of payments to them, as compared to the in-house doctors. The amounts paid to the visiting doctors have to be considered as 'professional fees' where the tax has rightly been deducted u/s 194J by the appellant, and the same could not be said to be in the nature of 'salary'. Assessing Officer is directed to work out the relief accordingly, in respect of payments to the 'visiting doctors'.

4. Being aggrieved by the decision of the CIT(A) that remuneration paid to visiting doctors is liable for deduction of tax at source only under sec.194J, the revenue is in appeal before us in ITA Nos.879, 880 & 881/Bang/2014.

5. Being aggrieved by the decision of the CIT(A) that consultant doctors are salaried employees, the assessee is in appeal in ITA Nos. 572, 575 & 576/Bang/2014. The assessee raised the following common grounds of appeals:

1. The orders of the authorities below in so far as they are against the appellant are opposed to law, equity, and weight of evidence, Probabilities, facts and circumstances of the case.

2. The appellant denies itself liable to assessed on any amount under section 201(1) of the Act in respect of in house consultants who are not employees of the appellant on the facts and circumstance of the case.

3. The learned CIT(A) erred in holding that in respect of In house consultants TDS under section 192 of the Act is applicable as against 194 J of the Act without appreciating the facts and evidence placed before him on the facts and circumstance of the case.

4. The authorities below were not justified in holding that the in house consultant doctors are covered under section 192 of the Act when they are Professionals and not employees and hence the appellant has correctly deducted TDS under section 194 J of the Act on the facts and circumstance of the case.

5. The authorities below were wrong in holding that there existed an employer and employee relationship between the appellant and in house consultant doctors.

6. The authorities below erred in the interpretation of the agreement to conclude that it contemplates a relationship of employer - employee on the facts and circumstance of the appellant case. They failed to appreciate that the manner in which they have interpreted the agreement is not in accordance with accepted cannons of interpretation of an agreement. They failed to appreciate that it is the understanding between the parties as understood by them that matter which according to the appellant is one of professional service and not salary on the facts and circumstance of the case.

7. The authorities below failed to appreciate that once the appellant has given details of the three conditions in proviso to section 201 (1) the appellant cannot be deemed to be an assessee in default and consequently nothing can be collected from the appellant on the facts and circumstance of the case.

8. The authorities below erred in law in not considering the tax liability already discharged by the deductee and the same is contrary to the provisions of section 201(1) proviso and to various decisions of the apex court and high courts in such regard. The learned CIT(A) failed to adjudicate this ground inspite of a specific ground before him.

9. The appellant submits and urges that there is no mechanism under section 201 (1) to collect any short deducted or non deducted amount from an assessee in default in the absence of similar provision like that of section 206C (6) and consequently the authorities below ought to have held that the nothing is liable to be paid by the appellant on the facts and circumstance of the case.

10. The assessing officer erred in law in passing an order under section 201(1) and 201(1A) of the Act and could not have treated as an assessee in default in terms of section 191 of the Act as the twin conditions have not been satisfied on the facts and circumstances of the case.

11. The assessing officer erred in law in passing a common order in respect of four quarterly statements filed u/s 200 during a financial year and failed to appreciate that there is no concept of assessment year or financial year under the scheme of TDS and hence the orders passed by him are bad in law on the facts and circumstances of the case.

12. The authorities below failed to appreciate that the liability in respect of TDS is only an alternative liability and the primary liability continues on the person receiving the income and consequently when the matter has been accepted for several years the authorities ought not to have disturbed the said finding without any basis on the facts and circumstance of the case.

13. The authorities below cannot treat the payments by the appellant as salary for the purpose of TDS when most of the returns filed by the Doctors have all been accepted wherein they have declared professional income on the facts and circumstance of the case.

14. The appellant denies itself liable to pay any interest under section 201(1A) of the Act. The same ought not to have been levied on the facts of the case. The authorities below erred in law in charging interest u/s. 201(1A) of the Act.

15. The appellant craves leave to add, alter, amend, substitute or delete any of the grounds as urged above at the time of hearing of appeal.

16. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and justice rendered.

6. The issue to be adjudicated in the appeals of the assessee-company is whether there is a relationship of an employer and employee on construction of the terms of agreement entered by the assessee-company with consultant doctors.

7. To decide the relationship of employer and employee, it is to be examined whether the contract entered into between the parties is 'contract for service' or 'contract of service'. The Hon'ble jurisdictional High Court in the case of CIT vs. *Manipal Health System (P) Ltd.* (375 ITR 509) vide para.13 of the judgment held as follows:

> *"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 if both parties have mutual agreement. In the instant case, the terms of contract ipso facto proves that the contract between the assessee-Company and the doctors is*

of 'contract for service' not a 'contract of service'. The remuneration paid to the doctors depends on the treatment to the patients. If the number of patients is more, remuneration would be on a higher side or if no patients, no remuneration. The income of the doctors varies, depending on the patients and their treatment. All these factors establish that there is no relationship of employer and employee between the assessee-Company and the doctors. "

Applying the above law to the facts of the present case from the terms of contract entered by the assessee with consultant doctors it is clear that remuneration is fixed irrespective of number of patients attended by the consultant doctors. The timings are fixed. Clause 7 of the said agreement also stipulates that consultant doctors are working with hospital for a minimum period of 5 years from the date of joining the organization. Further, it is submitted that in case consultant doctor leaves hospital within a period of 2 years and such doctor is barred from working in Bangalore District for a period of 2 years from the date of leaving. It is further submitted that in case consultant doctor shall not undertake any professional work or assignment in any other hospital without prior consent of the assessee-company. All these conditions go to prove that it is a case of contract of service. It is also clear from clauses of the agreement placed at page 26 of the paper book that there is no independence to the consultant doctors, their working hours and service conditions are under the direct control and superintendence of the assessee. All these circumstances go to prove that the assessee is only making an attempt to camouflage real nature of the transaction by using

clever phraseology. It is not the form but the substance of the transaction that matters. The nomenclature used may not be decisive or conclusive to determine the nature of transaction. The intention of the parties is to be ascertained with reference to terms of conditions contained in the agreement. As cited supra, from the terms of contract, it is very clear that the intention between parties is only a contract of service. Furthermore, Hon'ble jurisdictional High Court in the case of *Manipal Health System (P) Ltd.* (supra) held that the contract of service are not in the nature of employer and employee relationship as the remuneration drawn is dependent upon the patients attended by the consultant doctor. Similarly, Hon'ble Bombay High Court, in the case of *CIT vs. Grant Medical Foundation (Ruby Hall Clinic)* (375 ITR 49), held that in a case where doctors are paid fixed remuneration and tenure the amount paid to such doctors constitutes salaries. Thus, having regard to the ratio laid down by the Hon'ble jurisdictional High Court in the case of *Manipal Health System (P) Ltd.* (supra) as well as the Hon'ble Bombay High Court in the case of *Grant Medical Foundation (Ruby Hall Clinic)* (supra) in the instant case also since consultant doctors were paid fixed remuneration and the working conditions are under supervision and control of the hospital authorities, in our considered opinion, services are rendered in the nature of employee. Hence, payments are subject to tax deduction at source u/s 192 of the Act. The assessee has failed to controvert

the findings of the TDS officer that the terms and conditions of consultant doctors are same as that of salaried doctors. The fact that consultant doctors have declared their income under the head 'professional charges', has no bearing on the issue on hand. Accordingly, the assessee's appeals are dismissed.

8. As regards the revenue's appeals, the revenue is in appeal before us being aggrieved by the direction of the finding of the CIT(A) that remuneration paid to visiting doctors are subject to deduction only under the provisions of sec.194J of the Act. The revenue raised the following common grounds of appeal:

1. The CIT (A) has erred in holding that the amounts paid to the visiting doctors is not in the nature of "salary" and liable for deduction of tax at source u/s 194J as "professional fees".
2. The CIT (A) has erred in not appreciating the facts that the terms and conditions of the assessee company with that of salaries doctors and the consultant doctors was the same.
3. The CIT (A) has erred in not appreciating the fact that an employer-employee relation existed between the assessee company and the consultants/
4. The CIT (A) has erred in not appreciating the fact that assessee hospital engaged some doctors as visiting consultants and as per the agreement these consultants would be governed by the rules and regulations of service conduct rules, discipline etc., which proves that there existed an employee-employer relation.

For these and other grounds that may be raised during the course of appeal.

9. The findings of the CIT(A) are based on the fact that remuneration paid to visiting doctors is variable with number of patients attended by him is in consonance with law laid down by

the Hon'ble jurisdictional High Court in the case of *Manipal Health System (P) Ltd.* (supra) and the Hon'ble Bombay High Court decision in the case of *Grant Medical Foundation (Ruby Hall Clinic)* (supra). Thus, we do not find any reason to interfere with the order of the CIT(A).

10. In the result, the appeals filed by the revenue are also dismissed.

Order pronounced in the open court on this 11th August, 2016

sd/-	sd/-
(VIJAY PAL RAO)	**(INTURI RAMA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Place : Bangalore
D a t e d : 11/08/2016

srinivasulu, sps

Copy to :

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

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore