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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9th DAY OF MARCH 2015

PRESENT

THE HON'BLE MR.JUSTICE VINEET SARAN

AND

THE HON'BLE MRS.JUSTICE S SUJATHA

ITA NO.747/2009 c/w ITA NO. 746/2009

BETWEEN:

1. THE COMMISSIONER OF INCOME TAX
NO.59, HMT BHAVAN
4TH FLOOR, BELLARY ROAD
GANGANAGAR
BANGALORE

2. THE DEPUTY COMMISSIONER
OF INCOME TAX (TDS)
CIRCLE-18(1)
NO.59, HMT BHAVAN
4TH FLOOR, BELLARY ROAD
GANGANAGAR
BANGALORE.

... COMMON APPELLANTS

(BY SRI. K V ARAVIND, ADV.)

AND:

M/S MANIPAL HEALTH SYSTEMS PVT. LTD.,
98, RUSTOM BAGH,
AIRPORT ROAD
BANGALORE

... COMMON RESPONDENT

(BY SRI. S PARTHASARATHI, ADV.)

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ITA.NO.747/2009 IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 03-07-2009 PASSED IN ITA NO.699/BNG/2008, FOR THE ASSESSMENT YEAR 2006-2007, PRAYING TO COURT I). FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, II. ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT BANGALORE IN ITA NO.699/BNG/2008, DATED 03-07-2009, CONFIRMING THE ORDER BY THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX, (TDS), CIRCLE-18(1), BANGALORE, IN THE INTEREST OF JUSTICE AND EQUITY.

ITA.NO.746/2009 IS FILED U/S.260-A OF I.T.ACT, 1961 ARISING OUT OF ORDER DATED 03-07-2009 PASSED IN ITA NO.700/BNG/2008, FOR THE ASSESSMENT YEAR 2007-2008, PRAYING TO COURT I). FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN, II. ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE ITAT BANGALORE IN ITA NO.700/BANG/2008, DATED 03-07-2009, CONFIRMING THE ORDER BY THE APPELLATE COMMISSIONER AND CONFIRM THE ORDER PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX, (TDS), CIRCLE-18(1), BANGALORE, IN THE INTEREST OF JUSTICE AND EQUITY.

THESE APPEALS HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 25TH FEBRUARY 2015, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, ***SUJATHA J.,*** DELIVERED THE FOLLOWING:

JUDGMENT

Revenue is in appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act' for short) challenging the order dated 3.7.2009 passed by the Income Tax Appellate Tribunal – "B" Bench, Bangalore pertaining to the assessment years 2006-2007 and 2007-08 on the following substantial questions of law:

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1. Whether the Appellate Authorities were correct in holding that the remuneration paid to consultant Doctors employed by the assessee hospital is not under an employer and employee relationship and therefore tax at source has to be deducted u/s. 192 of the Act and not u/s. 194J of the Act?

2. Whether the Appellate Authorities were correct in holding that the lease rent paid to Medical Relief Society of South Canara under the guise of repayment of loan taken by the lessor under a supplementary agreement would not attract section 194-I of the Act and tax at source need not be deducted when the said arrangement was external to deductions at source?

2. Facts in brief are:

- A survey under Section 133-A of the Act was conducted at the business premises of the assessee on 26.9.2007 by the competent authority in order to ascertain the TDS compliance with respect to Section 192 of the Act on two issues i.e.,

(i) Issue of consultant doctors

(ii) Issue of rent

3. The Assessing Officer(AO) found that there were three categories of doctors viz., A, B and C appointed by the assessee-Company and the assessee has made the TDS on the

sum paid to the doctors under Section 194(J) of the Act which deals with the TDS on payment of fee for professional or technical services. The AO held that there existed a relationship of employer and employee between the assessee Company and the doctors engaged by the Company, and applying the provisions of Section 192 of the Act computed the TDS liability under Section 201(1) and 201(A) of the Act. As far as the issue of the rent, the AO noticed that the assessee – company has entered into a memorandum of agreement with Medical Relief Society(MRS) of South Canara(registered). After examining the said memorandum of agreements, AO held that the assessee-company was required to deduct TDS on rent in cash of Rs.5 crores per annum and on the loan liability discharged.

4. Aggrieved by the said order, the assessee preferred appeals before the Commissioner of Income Tax –Appeals V, Bangalore (CIT) who allowed the appeals holding that consulting doctors working in the assessee's hospital cannot be construed as employees of the assessee-company and the professional fee paid to them attract TDS under Section 194(J)

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and not under Section 192 of the Act. As far as the issue of rent is concerned, it was held that the payments made by the assessee-company to MRS in pursuance to the amended agreement dated 26.4.2006 is not in the nature of rent. Accordingly, allowed the appeals filed by the assessee.

5. Aggrieved by the said order of CIT, revenue preferred appeals before the Income Tax Appellate Tribunal in ITA NOs.699 and 700/2008 (ITAT). ITAT vide common order dated 3.7.2009 dismissed the appeals against which these appeals are filed by the revenue.

6. The learned counsel appearing for the appellants Sri K.V.Aravind contended that the relationship of the assessee with all the categories of doctors appointed by the company is of an employer and employee and not that of consultant. In support of this proposition, he relied on the terms and conditions of the contracts executed between the assessee and the doctors. It was further contended that these doctors, though treated as 'consultants' of the assessee-company, were regularly employed by the assessee on a fixed remuneration,

and were bound by the service conditions of the assessee-Company thus, the provisions of Section 192 of the Act were applicable. The CIT and ITAT, without appreciating these aspects in a right perspective, have held that these doctors were 'consultants' and treated their income as professional income amenable to Section 194(J) of the Act.

7. On the issue of rent it was argued that Section 194(I) of the Act provides for TDS liability on rent if the same is paid in cash or by issue of a cheque or draft or by any other mode and further, drew our attention to the explanation thereof. It was contended that no certificate under Section 197 was furnished by the assessee in support of its claim that the recipient was exempted from payment of tax under Section 10(23)(c) of the Act.

8. Per contra, learned Counsel appearing for the respondent Sri Parthasarthy contended that Section 194(I) of the Act, contemplates TDS liability only in two circumstances i.e., (a) use of any machinery or plant or equipment (b) use of any land or building (including factory building) or land

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appurtenant to a building (including factory building) or furniture or fittings. The Memorandum of Agreement dated 01.04.2005 entered into between the assessee Company and the MRS specifically stipulates that MRS has granted the right to manage, administer and control the hospitals to the assessee Company on and from 1st April 2005, such management, administration and control of the hospital cannot be construed as use of any machinery or plant or equipment or use of any land or building as provided under Section 194(I) of the Act and thus, the provisions of Section 194(I) are not applicable to the present case. Further, it was argued that clause 2.1(b) of the said memorandum of agreement dated 01.04.2005 was amended by an agreement dated 29.05.2006 and as per the said amended agreement, loan liability discharged by the assessee-Company, is not governed by the provisions of Section 194(I) of the Act.

9. The learned Counsel further argued that the recipient MRS was enjoying the exemption benefit under Section 10(23)(c) of the Act, as per the approval accorded by the Chief Commissioner of Income Tax for the assessment years 2005-

06 to 2007-08 vide order dated 29.11.2004. The said order being in existence during the assessment years in question, Section 192 of the Act, had no application. The submission of the learned counsel for the assessee is that the repayment of loan instalment and interest paid thereon on behalf of MRS and the annual payment of Rs.5.00 crores made to MRS are not 'rent' to attract the provisions of Section 194(I) of the Act. Such payments are towards granting of right to manage, administer and control the hospital and thus, the orders passed by the CIT and ITAT do not warrant any interference by this Court.

10. After considering the arguments advanced by the learned counsel appearing for the parties, now we have to answer the two substantial questions of law raised in this appeal.

Regarding question no.1:

11. The main points considered by the Revenue on the relationship of employer and employee are:

(a) payment of remuneration

(b) employer's control and supervision

(c) service rules of the company binding on the doctors

(d) relationship of master and servant

(e) bar from private practice

12. We have examined the terms of the contract entered into between the assessee-Company and the Doctors and the reasons given by the assessee to treat the arrangement between the Doctors and the assessee-Company in the nature of consultancy.

> 1. The earnings available to the doctor are dependent on patients coming to hospitals to get the consultancy service.
>
> 2. If in a month the number of patients is zero they do not get any income. In this regard month on month earnings statement of all doctors for the financial years 2005-06 and 2006-07 were furnished.
>
> 3. All the doctors are not available in the hospital throughout the day. Their timings are fixed, based on patients coming to hospital.
>
> 4. The idea of putting conditions that 'doctor cannot have private practice or attend to another hospital" is to discourage them from transferring patients to another hospital.

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.

14. One such agreement referred to by the Tribunal i.e., para-7 of the agreement dated 12.09.2007 entered into between the Assessee Company and Dr.Isaac Mathew speaks in unequivocal terms that "This agreement is executed on a principal to principal basis notwithstanding the fact that the company may extend to the consultant certain benefits that are available to the employees. The consultant shall not be deemed to be an employee of the company".

15. 'Consultancy charges' in the ordinary sense means providing of expert knowledge to a third party for a fee. It is a service provided by a professional advisor. These consultant Doctors are rendering professional services as and when they are called upon to attend the patients. Profession implies any vocation carried by an individual or a group of individuals requiring predominantly intellectual skill, depending on individual characteristic of person(s) pursuing with the vocation, requiring specialized and advance education or expertise. Consultancy charges are paid to the Doctors towards rendering their professional skill and expertise which are purely in the nature of professional charges. Assesssee

Company has no control over the Doctors engaged by them with regard to treatment of patients.

16. Mere providing of non-competition clause in the agreement shall not invalidate the nature of profession. It is common that the doctors are rendering their professional services as visiting doctors in different hospitals. Imposing a condition of bar to private practice is to make use of the expertise, skill of a doctor exclusively to the assessee-company i.e., to get the attention and focus of the professional skill and expertise only to the patients of the assessee-company and to discourage doctors from transferring patients to their own clinics or any other hospital. This condition imposed by the assessee-company would not alter the nature of professional service rendered by the doctors. Tribunal also held that none of the doctors are entitled to gratuity, PF, LTA and other terminal benefits. Considering all these aspects at length a detailed, well reasoned order is passed by the Tribunal on this issue which we may not find fault with.

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17. It is also pertinent to note that the doctors have filed their return of income for the relevant assessment years showing the income received from the assessee-Company as professional income and the same is said to have been accepted by the department.

18. High Court of Gujarat, in the case of CIT (TDS) vs APOLLO HOSPITALS INTERNATIONAL LTD. reported in (2013 (359) ITR 78) (Gujarat) has taken a similar view that the consultant doctors were not getting salary, but the payment to them was in the nature of professional fees liable to deduction under Section 194G and Section 192 of the Act had no application.

19. We are in agreement with the findings of the Tribunal on this issue. Accordingly, we answer the first substantial question of law in favour of the assessee and against the revenue.

Regarding question no.2:

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The AO has relied on the memorandum of agreement dated 1.4.2005 entered into between the assessee-company and MRS. Clauses 1 and 2 of the said agreement reads thus:

> *"MRS hereby grants to MHS the right to manage, administer and control the Hospitals on and from 1 April, 2005. On and from that date the management administration, day-to-day operations and financial control of the Hospitals and of all the properties of the Hospitals (including of the assets as per list attached) shall vest with MHS. The same shall continue to vest with MHS together with such powers and authority as MRS is entitled to exercise over the Hospitals and their properties in connection with the operation, management and administration of the Hospitals, for the duration of this Agreement."*

CONSIDERATION

"In consideration of the covenants contained herein, as well as due fulfillment of the obligations of MRS hereunder, MHS hereby:

(a) Undertakes to pay an amount of Rs.5,00,00,000/- (Rupees Five Crore only) per annum to MRS. This amount shall be paid on an annual basis, within sixty (60) days from the date the annual general meeting of MHS adopts the, audited accounts of MHS; and

(b) Undertakes to pay the interest and principal in respect of the loan of Rs.3939.08 (approx) the 'Loan') presently due and outstanding from MRS to various banks/financial institutions (based on provisional financial statements as at March 31, 2005) as detailed below:

GE Capital Services (MHB) *Rs.1529.07 lacs*

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GE Capital Services (MRS)	*Rs.1666.67 lacs*
ICICI	*Rs. 400.00 lacs*
Wipro GE Medical Sys	*Rs. 86.94 lacs*
TATA Honey Well	*Rs. 196.20 lacs*
MAHE	*Rs. 62.20 lacs*
Total	***Rs.3939.08 lacs***

MHS shall, on and from I April, 2005 and until the date of termination of this Agreement, pay the interest and principal in respect of the loan directly to the lenders for and on behalf of MRS, on the terms contained in the Loan Agreement entered into between MRS and the lenders."

Clause 2.1 of the said agreement was amended by subsequent agreement dated 29.4.2006. Amended Clause 2.1(b) reads thus:

Clause 2.1 (b) of the Management Agreement shall be amended and be replaced in its entirely by the following Clause 2.1(b):

"2.1(b)Undertakes to pay interest and principal in respect of the loan of Rs.3939.08 lakhs (aprox.) (the "loan") presently due and outstanding from MRS to various banks financial institutions (Based on provisional financial statement as at March 31, 2005), as detailed below:

GE Capital Service	*Rs.1,529.07 lakhs*
ICICI	*Rs. 400.00 lakhs*
Wipro GE Medical systems	*Rs. 86.94 lakhs*
TATA Honeywell	*Rs. 194.20 lakhs*
MAHE	*Rs. 62.20 lakhs*
Total	***Rs.2,272.41 lakhs***

2.1(b)(i) The Loan along with interest thereon shall be re-paid by MHS for and on behalf of MRS. The said Loan shall be accounted as receivable from MRS by MHS in its

books of accounts and shall be accounted as payable to MHS by MRS in its books of account.

2.1(b)(ii) The loan of Rs.1,666.67 Lakhs taken by MRS for setting up Post Graduate Medical Education Programme shall be paid off by MRS from the revenues that accrue to MRS from the said Post Graduate Medical Education Programme"

20. As per the said covenant stipulated in the said agreements, the assessee-company undertook to pay an amount of Rs.5,00,00,000/- (Rupees Five crores only) per annum to MRS and further undertook to pay interest and principal in respect of the loan of Rs.3939.08 lakhs (the loan due as on the date of the agreement) outstanding from MRS to various creditors.

21. Section 194(I) reads thus:

> Section 194-I. Any person, not being an individual or a Hindu undivided family, who is responsible for paying to (a resident) any income by way of rent, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, (deduct income-tax thereon at the rate of-
>
> (a) two percent for the use of any machinery or plant or equipment; and
> (b) ten percent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings))

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Provided that no deduction shall be made under this section where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid to likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed (one hundred and eighty thousand rupees):

Provided further that an individual or a Hindu undivided family whole total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such income by way of rent is credited or paid, shall be liable to deduct income-tax under this section.)

Explanation for the purpose of this Section reads thus:

(i) "rent" means any payment, by whatevername called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together), any-

(a) land; or
(b) building (including factory building); or
(c) land appurtenant to a building (including factory building); or
(d) machinery; or
(e) plant; or
(f) equipment; or
(g) furniture; or
(h) fittings

22. A reading of these provisions with the covenants of the agreement referred to supra makes it clear that assessee-company, not being an individual or a HUF who is responsible for paying to a resident any income by way of rent, at the time of credit of such income to the account of the recipient, whether in cash or by issue of a cheque or draft or by **any other mode,** shall be liable to deduct income tax. Further, for the purposes of this Section, the word "rent" is defined under the explanation. This definition clarifies that, "rent" means any payment by whatever name called under any lease, sublease, tenancy or any other agreement or arrangement for the use of (a) to (h) provided in Explanation to Section 194-I of the Income Tax Act. The terms of agreement to make the payment towards 'consideration' for using the land, building with infrastructure squarely falls under Section 194(I) though styled as lease towards right to manage, administer and control the hospitals, which undoubtedly includes building and infrastructure, is not disputed by the assessee.

23. In the case of CIT vs PANBARI TEA COMPANY LTD. (1965(56) ITR (sh.N.)30.), the Apex Court held as follows:

> *The real test of a salami or premium is whether the amount paid, in a lump sum or in instalments, is the consideration paid by the tenant for being let into possession. When the interest of the lessor is parted with for a price, the price paid in premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital receipt and the latter are revenue receipts. There may be circumstances where the parties may camouflage the real nature of the transaction by using clever phraseology. In some cases, the so-called premium is in fact advance rent and in others rent is deferred price. It is not the form but the substance of the transaction that matters. The nomenclature used may not be decisive or conclusive but it helps the court, having regard to the other circumstances, to ascertain the intention of the parties.*

Thus, it is the real nature of the arrangement or transaction and not the nomenclature i.e. the substance of the agreement, is relevant and paramount. Since, the predominant or substantial part of the consideration is towards the land and building, with plant and machinery in the nature of infrastructure for hospital establishment, the phraseology used to circumvent the tax liability shall not alter the nature of the agreement.

24. The words "any other mode" and "whatever name called" occurring in Section 194(I) and the explanation of rent there of, if applied to the present case, the consideration paid

by the assessee as per the agreements dated 1.4.2005 and 29.4.2006 is in the nature of rent and the provisions of Section 194-I are squarely attracted. The CIT and the Tribunal proceeded on a misconception that by virtue of the amendment to clause 2.1(b) of the agreement dated 29.4.2006, the consideration amount paid cannot be construed as rent, ignoring the fact that the said amendment was only with respect to clause 2.1(b) and no to clause 2.1.

25. The agreement dated 1.4.2005 executed between the parties was amended by agreement dated 29.4.2006. By virtue of the amendment to Clause 2.1(b), the assessee-company is not entitled to discharge the TDS liability as far as the interest and principal paid in respect of the loan amount outstanding from MRS to various banks/financial institutions for the assessment year 2007-2008. However, the amount of Rs.5.00 crore paid per annum to MRS squarely falls under Section 194-I of the Act and the assessee-company is entitled to discharge the said TDS liability for both the assessment years 2006-07 and 2007-08.

26. The contention of the learned counsel appearing for the assessee that CIT had issued an order under Section 10(23-C)(via) of the Act, by virtue of which the assessee is not liable to deduct TDS under Section 194-I as the recipient itself is exempted from levy of tax, is not acceptable for the reasons that the said order was issued by the CIT, Panaji for the assessments year 2005-06 to 2007-08 subject to the compliance of conditions (i) to (vi) specified therein. The said conditional order shall not absolve the assessee from the deduction of TDS liability. The compliance/non-compliance of the exemption conditions by the recipient in advance cannot be foreseen in advance by the assessee-Company. Moreover, TDS liability under Section 194-I is not dependent on the tax liability/entitlement to exemption of the recipient. Irrespective of the tax exemption/tax liability of the recipient the assessee has to discharge the TDS liability under Section 194(1). No certificate under Section 197 of the Act is furnished by the assessee to establish that the recipient is exempted from the tax liability.

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27. For the foregoing reasons, we hold that the payment made towards consideration is in the nature of 'rent' as provided under Section 194(I) of the Act. Section 194(I) of the Act shall be applicable for the assessment years 2006-2007 and 2007-2008 for the payment of consideration of Rs.5,00,00,000/- (Rupees five crores only) and for the payment made towards loan liability for the assessment year 2006-2007.

28. Accordingly, the second substantial question of law is answered in favour of the revenue and against the assessee.

29. Appeals are partly allowed to the extent indicated above.

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